

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Oct 17 2013 10:31 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

JOSEPH HENDERSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 62629

Appeal from an Order Denying
Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County
The Honorable Abbi Silver, District Judge
District Court No. C-05-212968-1

APPELLANT'S APPENDIX VOL. 2

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Transcript: Sentencing	1	15-41	08/28/2008

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2013, I served the foregoing document via the Nevada Supreme Court's eFlex system to the following:

Name

Address

Steven B. Wolfson, Esq.
Steven S. Owens, Esq.
Clark County District Attorney's Office

200 Lewis Ave.
Las Vegas, NV 89155

Catherine Cortez Masto
Nevada Attorney General's Office

100 N. Carson St.
Carson City, NV 89701

/s/ Julian Gregory

JULIAN GREGORY, ESQ.
Nevada Bar No. 11978

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(702) 868-8866

Attorneys for Joseph Henderson

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

/s/ Julian Gregory
Julian Gregory, Esq.

10-16-13
Date

Case No. C212968

Dept. No. 15

FILED

JAN 11 2011

John L. Blum
CLERK OF COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

05C212968

PWHC

Petition for Writ of Habeas Corpus
1163643



JOSEPH A. HENDERSON
Petitioner,

v.

STATE OF NEVADA
Respondent.

**PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)**

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

RECEIVED

JAN 11 2011

CLERK OF THE COURT

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: ELY STATE PRISON WHITEPINE NEVADA

2. Name and location of court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT

3. Date of judgment of conviction: SEPTEMBER 24th 2008

4. Case number: C212968

5. (a) Length of sentence: 10 LIFE SENTENCES PLUS 40 years to 90 years

(b) If sentence is death, state any date upon which execution is scheduled: _____

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes _____ No X

If "yes", list crime, case number and sentence being served at this time: _____

7. Nature of offense involved in conviction being challenged: ROBBERY, KIDNAP, ASSAULT
SEXUAL ASSAULT, BURGLARY, CONSPIRACY:

8. What was your plea? (check one):

(a) Not guilty X (b) Guilty _____ (c) Nolo contendere _____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details: _____

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury X (b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No X

12. Did you appeal from the judgment of conviction? Yes X No _____

13. If you did appeal, answer the following:

(a) Name of Court: EIGHTH JUDICIAL DISTRICT COURT #16

(b) Case number or citation: C212968

(c) Result: FOUND GUILTY BY JURY

(d) Date of result: JUNE 26th 2008

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: _____

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?

Yes X No _____

16. If your answer to No. 15 was "yes", give the following information:

(a)(1) Name of court: EIGHTH JUDICIAL DISTRICT COURT #16

(2) Nature of proceeding: MOTION TO DISMISS COUNSEL; MOTION FOR DISCOVERY;

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes _____ No X

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes _____ No _____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such a result: _____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes _____ No _____

Citation or date of decision: _____

(2) Second petition, application or motion? Yes _____ No _____

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes _____ No _____

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) _____

(a) Which of the grounds is the same: _____ NA

(b) The proceedings in which these grounds were raised:	NA
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NA

NA

NA

If yes, state what court and case number:

VALERIE RADOSTA: NORMAN REED: SEDRICK BASSETTE

If yes, specify where and when it is to be served, if you know:

4

(a) Ground One: The State deprived Petitioner of his right to be confronted with the evidence and witnesses against him in violation of the 6th and 14th Amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(b) Ground Two: The State elicited perjured testimony from its expert witness Guenther and failed to correct the known perjury in violation of Petitioner's 6th and 14th Amendment rights to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(c) Ground Three: The State failed to meet its burden of proving Petitioner guilty of each element of each offense beyond a reasonable doubt in violation of Petitioner's rights under the 6th and 14th Amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(d) Ground Four: Petitioner suffered ineffective assistance of counsel at trial in violation of the 6th and 14th Amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(a) Ground Five: Petitioner was deprived of his right to Confrontation and Compulsory process in violation of his 6th and 14th Amendment rights under the U.S. Constitution

Supporting FACTS (Tell your story briefly without citing cases or law.):

(b) Ground Six: The trial Court's failure to dismiss the charges against Petitioner and failure to preclude evidence against Petitioner violated Petitioner's 6th and 14th Amendment rights to due process and a fair trial under U.S. Const.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(c) Ground Seven: The trial Court erred when it denied Petitioner's Motion in limine to preclude the State from presenting evidence or arguing Petitioner's ID was assumed as a result of DNA testing in violation of the 6th and 14th Amendments to U.S. Const.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(d) Ground Eight: Petitioner's right to due process was violated when the Court denied defense motion for a mistrial after the testimony of Kim Murga in violation of the 6th and 14th Amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

Background

On September 03, 2004, approximately thirty minutes past midnight, Eric Bernweig and his girlfriend Julie Kim were victims of a home invasion robbery. Three men, one white and two black, gained entry into the home ostensibly in search of money. During the course of the robbery one of the black males subjected Ms. Kim to multiple acts of sexual assault in various areas throughout the home. At some point Ms. Kim was taken upstairs and while tied up she was raped a second time. In her bedroom, on her bed, she was subjected to further restraints as her assailant then tied her legs.

While Ms. Kim was being raped, the other two men were beating Mr. Bernweig up and ransacking the home in search of a safe and more money. Mr. Bernweig gave the men approximately one thousand dollars in hundred dollar bills and asserted it was all he had. Mr. Bernweig was also restrained but managed to slip his restraints and was pistol whipped about the head and face when he was discovered.

Shortly thereafter, the assailants fled. Ms. Kim managed to free herself and went to the aid of her boyfriend who was lying in a pool of blood. The Couple called 911 and police arrived but the assailants were gone. Mr. Bernweig drove to Summerlin for hospital attention from a Colleague while Ms. Kim was transported to UMC where she is seen by Linda Ebbert, RN and Sexual Assault Nurse Examiner (SANE). Ebbert completes a rape kit, having interviewed, photographed and swabbed Julie Kim. Ms. Kim informed Ebbert that her assailant licked her nipples at one point. As a result of that information, swabs were taken of the nipples of Ms. Kim. In addition to blood being drawn and taking oral, vaginal, rectal and buccal swabs, Ebbert took swabs of blood from Ms. Kim's left forearm, left hand, and left knee. It was noted that there was also blood on the bridge of her nose. Ms. Kim asserted the blood was not her own but that of her boyfriend.

Nurse Ebbert conducted a pelvic examination with the use of toluidine blue dye and

reported that there was no adherence made with the blue dye and stated "Light Staining microscope was negative for any Sperm on slides prepared by this nurse."

The rape kit was eventually turned over to LVMPD. Detective Michael Jeffries was assigned to the case which was assigned Event number 040903-0152. Jeffries requested the rape kit be examined by the LVMPD's DNA Lab. The examination was conducted by Criminalist David F. Welch of the LVMPD. Welch concluded his exam and findings on November 16, 2004. Welch reported that DNA was detected on the breast swabs of victim Julie Kim, DNA from an unknown male. The DNA profile from the unknown male was searched against the local DNA Index System. No matches were found. Petitioner's DNA was on file in both Nevada and California and the profile did not come back as a match to him. Further, Welch reported that Semen was detected on the

Vaginal Swabs of the Victim, "however, no spermatozoa were observed. Therefore, no significant DNA-STR typing results were obtained."

Once detective Jeffries learns that no suspect can be identified from the analysis, he submits the profile to Kathy M. Guenther, another Criminalist with the LMPD, who submitted the profile to her contacts in the California Department of Justice on January 7, 2005 requesting that they "Please start the match confirmation procedure." According to Guenther's preliminary testimony, officials in California "...went ahead and pulled their sample [DNA] and tested it again..." (prelim. Transcr. of 6/9/05 at p. 118 ln. 19-23). This was the "CODIS" hit purportedly by federal authorities (4/28/05 prelim. Tr. at pp. 138-139).

So, the profile generated from the breast swabs of Ms. Kim ~~was~~ sent to a Comparison lab in California in hopes of discovering a match. On February 13, 2005, Guenther is allegedly notified by CDJ that the profile submitted matched their known DNA for Petitioner, Joseph Henderson.

(Note: Skipped 5e)

Guenther informed Jeffries of this information and with it, Detective Jeffries obtains a Search Warrant to take buccal Swabs of Petitioner's mouth. The Swabs were given to Guenther for analysis and she generate a profile that was a match for Petitioner's DNA from the obtained buccal Swabs and the DNA obtained from the breast Swabs of the victim, Ms. Kim.

Petitioner at this point was effectively locked in as the prime suspect of the charged crimes.

THE STATE DEPRIVED PETITIONER
OF HIS RIGHT TO BE CONFRONTED WITH
THE EVIDENCE AND WITNESSES AGAINST HIM

This violation occurred when the State failed to provide Petitioner the evidence Guenther submitted to the comparison lab. Petitioner required that evidence for testing to insure that it was not unfairly and unreliably manufactured. It is apparent that

the DNA "profiles" are indeed manufactured as evinced by Guenther's trial testimony stating "The DNA goes through a lot of steps. I won't go through all the boring steps of the DNA process, but at the end we end up with a numeric profile generated from our genetic analyzer." (Trial Tr. of 6/27/08 at p. 111).

Petitioner was not afforded any discovery concerning this "genetic analyzer." Does this machine ingest biological specimens? Is it sterilized before and after each use? By whom? Who can verify that? Does it merely do math and scan markers? What software does it use? What hardware? How reliable is this soft or hardware?

Petitioner was never given opportunity to confront his actual accuser, the genetic analyzer.

Further, if the profile Guenther sent to federal authorities in California was indeed flawed, how reliable is the Codis match? What steps did CDOJ

Take to match Petitioner to the profile
Gwenther provided them? She asked them
to make a match and "confirm" it and they
did. But, did they do so fairly? Was
Petitioner's Profile in California merely
Similar, Strikingly Similar, or Spot-on-Exact?
Did the federal authorities alter their
Calibrations to bring about the match or
increase the probability of a match? Could
their Conclusions be a matter of interpretation?
These are all questions Petitioner should have
been able to explore but he was deprive
of that right. Petitioner could not Confront
his accusers, Cross-examine them and Compel
Expert Testimony to Contradict them. This
was a Violation of Petitioner's 6th & 14th
Amendment rights to the U.S. Constitution

THE STATE ELICITED PERJURED TESTIMONY
FROM ITS EXPERT WITNESS - GUENTHER AND
FAILED TO CORRECT WHAT THEY KNEW TO BE
FALSE.

Guenther testified as follows:

A. ... I detected the presence of Semen on
two stains on ^{the} top bed sheet. I tested
those and obtained DNA profiles from those.

Q. From two independent stains?

A. Yes.

Q. Sufficient Spermatozoa for you to get a
profile?

A. Yes, certainly.

Q. Did you document those findings as well?

A. Yes, I did.

Q. And again this was in July of 2005 when
you were looking at two more loci; is that
correct?

A. That's correct.

Q. Prior to the -- to Dave Welch's initial Crime Scene Screening and your initial Comparison of the Known DNA of Joseph Henderson?

A. That's correct.

Here, the jury hears testimony from this expert that she detected semen, tested stains, obtained DNA profiles from them because there was sufficient spermatozoa to get a profile and she had all of this from the very outset, having obtained it prior to Dave Welch's initial Crime Scene Screening and her initial Comparison of the Known DNA of Petitioner. It's a regular "gotcha" moment. The jury could reasonably infer that the State had Petitioner's sperm from the beginning and obtain a profile with it first.

We know this is completely untrue as Welch conducted his analysis in November of 2004. The perjury went uncorrected and

prejudiced Petitioner so that his conviction was wrongfully obtained with this perjured testimony.

THE STATE FAILED TO MEET ITS BURDEN OF PROVING PETITIONER GUILTY OF EACH ELEMENT OF EACH OFFENSE BEYOND A REASONABLE DOUBT.

Petitioner is alleged to have committed the crimes in this case with two co-conspirators, however there was no evidence presented by way of testimony of a co-conspirator or perpetrator that Petitioner was in any way party to these crimes. There was no testimony from the victims that Petitioner was one of their assailants; no eye witness identification testimony presented; no fingerprints nor confession that puts Petitioner at the scene of these crimes.

In this case, the State was in a position where they merely had to prove the crimes took place in general. Then, the

State asserts that Petitioner's DNA was found at the scene and it is automatically presumed in the minds of the jury that the State has proven its case and the defendant is guilty. This is because of the almost mythic infallibility jurors routinely afford confident scientific experts as they attempt to explain their cutting-edge technology. Because the average person can hardly understand the scientific mumbo-jumbo, we bow to the assertion that it's correct and concede that we are not qualified to question it.

For this reason, it is imperative that the State not abuse its authority when using this science. When the State points its finger and asserts that it is the defendant's DNA that is found in a case such as this, that defendant will surely be convicted. Consequently, the process to get to that point,

must be pristine, virtually error free, before it can be presumed that the information is correct and the State has met its burden of proof. Otherwise the process would be fundamentally unfair. In this case, the victim, Ms. Kim knelt in a pool of her husband's blood (DNA) at the scene of the crime. When she arrived at UMC and was seen by SANE Nurse Ebbert, Ebbert noted that there was blood on Ms. Kim's face, hand, arm and knee. There can be no question that blood splatter, contaminate DNA, has come into contact with the victim before any swabs were taken. Ms. Kim went to check on her boyfriend and concerned for him she

5n

pressed her body to his and picked up foreign DNA all over her person, from head to knee. The State of the evidence is that at that point, Ms. Kim was nearly nude, without panties or brassiere. It could reasonably be assumed that the contaminate DNA came into contact with Ms. Kim's breast and pelvis either directly or through contact soaked through her night gown. In any case, if Ms. Kim's person was contaminated by Eric Bernweig's DNA, how reliable is the profile generated from the swabs taken subsequent to the contamination? Not very!

In the instant case, Criminalists Welch and Guenther assert that the analysis they performed on the DNA was through PCR amplification. PCR is an acronym for "Polymerase Chain reaction." PCR tests are

Extremely sensitive to Contaminating DNA at the Crime Scene and within the Test Laboratory. During PCR, Contaminants may be amplified up to a billion times their original Concentration. Contamination can influence PCR results, Particularly in the absence of Proper handling techniques and Proper Controls for Contamination. Sensitivity is the main advantage of PCR tests. However, the increased Sensitivity also makes PCR tests more vulnerable to trace Contaminants, i.e., DNA from unexpected sources.

The State was careful to avoid presenting evidence of Julie Kim's Contamination as their case hinged upon the interpretation of these tests. The evidence of the Contamination is irrefutable, see Exhibit "A" attached hereto. In light of this evidence, the profile generated from the swabs of Julie Kim were presumptively unreliable and the State failed to meet its burden of proof.

PETITIONER SUFFERED THE
INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In this case, the State sought to prove Petitioner's guilt by showing his DNA was left on the person of the victim, Ms. Kim.

The only plausible defense available to Petitioner was to challenge the reliability of the experts findings. There was no "strategic" reasoning that could remotely justify abandoning this course of action.

Petitioner contends that Counsel was ineffective when:

A. Counsel failed to call into question and have tested the evidence of California authorities lab work matching Petitioner to Nevada's profile.

B. Counsel failed to move for the suppression of the State's profiles generated with or

"possibly" generated with Contaminated DNA.

C. Counsel failed to make the jury aware that the State failed to maintain the integrity of its evidence, conducting analysis with potentially contaminated DNA.

D. Counsel failed to make the jury aware that Julie Kim's actions in pressing herself to Eric Bernweig's bloody body and kneeling in a pool of his blood may have effectively contaminated herself so as to make all subsequent testing presumptively unreliable thus giving rise to reasonable doubt.

E. Counsel failed to impeach the credibility of Expert Guenther who claimed to have located sufficient spermatozoa to obtain a genetic profile when Expert Welch and SANE Nurse Ekbert asserted there was virtually no spermatozoa at all.

F. Counsel failed to make the jury aware that witness Linda Ebbert performed a blue dye test that revealed no spermatazoa.

G. Counsel failed to make the jury aware that Expert Witness Guenther committed perjury.

PETITIONER WAS DEPRIVED OF HIS
RIGHT TO CONFRONTATION AND COMPULSORY
PROCESS

State's Witness, Criminalist Welch consumed all of the evidence of the breast swabs of Julie Kim. Consequently, Petitioner was deprived the opportunity to test the swabs himself and compel expert testimony to refute the State's experts on the outcome of the breast swabs. Petitioner could not confront this evidence against him.

THE TRIAL COURT'S FAILURE TO
DISMISS THE CASE FOR FAILURE TO
PRESERVE EVIDENCE VIOLATED PETITIONER'S
RIGHT TO DUE PROCESS AND A FAIR
TRIAL

Trial Counsel filed a motion to dismiss due to Welch's failure to preserve some portion of the breast swab so the defense could test it. The Trial Court refused to dismiss and refused to provide an instruction that the mishandled DNA evidence prejudiced Petitioner. This action was violative of the 6th & 14th Amendments to the U.S. Constitution.

THE TRIAL COURT REFUSED TO
PRECLUDE THE STATE FROM ARGUING AND
PRESENTING EVIDENCE THAT PETITIONER'S
IDENTITY IS ASSUMED AS A RESULT OF
THE DNA TESTING

Petitioner's motion in limine challenged the nature and extent by which the State's experts could testify and the prosecutor could argue regarding conclusions of the DNA testing. The motion in limine asked the Court not to allow inaccurate and unreliable testimony concerning DNA evidence. The government should not have been able to present nor argue statistical evidence to suggest that the DNA evidence indicates the likelihood of the defendant's guilt rather than the odds of the evidence having him found in a randomly selective sample. The prosecution could elicit that the DNA match is one in whatever number of people randomly selected from the population would also match the DNA found. That is random match probability. However, giving a percentage that the DNA was found to be Petitioner was impermissible. That was/is Source Probability.

Additionally, an expert should be precluded from stating, and the prosecutor precluded from arguing identity is assumed.

In trial, the prosecutor asked its expert, Guenther, the following:

Q. To a reasonable degree of scientific certainty, what is your conclusion regarding the vaginal swab vis-a-vis the known profile of Joseph Henderson re-profiled in July 2005?

A. That the sperm DNA profile from the vaginal swab, male portion, matches the DNA profile from Joseph Henderson and Joseph Henderson is the source of that DNA. (6/26/08 TTr. at pg. 131)

This was impermissible source probability testimony asserting invariably (100%) that it was Petitioner. This violated Petitioner's right to a fair trial under the 6th Amendment, U.S. Constitution.

The violation occurred again when the State asked:

Q. May, in your professional opinion,

to a reasonable degree of Scientific Certainty, who was the Contributor?

A. The male Contributor is Joseph Henderson.

(6/27/08 TTr. at pg. 21).

Again, this was not random match probability testimony but rather Source probability and leaves the impression that it is 100% invariable.

The State elicited this same prejudicial testimony from its witness, Kim Murga, who also was presented as an Expert.

A. The individual who left the DNA on the breast Swab of -- on the breast sample of Julie Kim is Joseph Henderson. (6/27/08 TTr. at p. 34).

A. The individual who contributed to the DNA mixture, the male profile in the vaginal Swab is Joseph Henderson. (6/27/08 TTr. at pg. 34).

These actions violated Petitioner's 6th and 14th Amendment rights under the U.S. Constitution to a fair trial.

PETITIONER'S RIGHT TO DUE PROCESS
WAS VIOLATED WHEN THE COURT DENIED
DEFENSE MOTION FOR MISTRIAL AFTER
THE TESTIMONY OF KIM MURGA

The State's key witness or expert witness, Kim Murga, was used to bolster the State's case as she testified to the veracity of and credibility of witnesses Welch and Guenther. Using this expert to vouch for the credibility of the State's other experts was improper. Murga's testimony was cumulative and highly prejudicial. Additionally, she referenced material evidence not timely disclosed to the defense. These actions

were violative of Petitioner's 6th and 14th
amendment rights under the U.S. Constitution.

Conclusion

For the reasons set forth in this
petition, Petitioner prays this Court
will REVERSE his conviction and remand
this matter back to the prosecutor's
office for further disposition.

Respectfully,

Joseph Henderson
Joseph A. Henderson

DATED: This 2nd day of January, 2011.

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 2nd day of the month of January, of the year 2011.

Joseph Henderson
Signature of petitioner

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

none
Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Joseph Henderson
Petitioner

none
Attorney for petitioner

UNIVERSITY MEDICAL CENTER
1800 West Charleston Boulevard
Las Vegas, Nevada 89102

Las Vegas Metro Event Number - 040903-0158

MODE OF ARRIVAL: Las Vegas Metro Police Department

TIME OF SERVICE: 3:28 on 09/03/2004

CHIEF COMPLAINT: Sexual assault.

- HISTORY OF PRESENT ILLNESS: The patient states that there was a knock at her door at about 11:30 last evening and that there was an Hispanic male who came to the door and he said that someone had thrown his keys into the backyard. The patient states that her boyfriend went into the garage to find a flashlight to assist him and then suddenly there were 2 black males that came into the home. The patient states she and her boyfriend were both tied with plastic bands and that she was sexually assaulted on the couch, pn missionary position by a black male and then she was sexually assaulted on the bed with her in missionary position. She states that the male who sexually assaulted her also tied her ankles. She states that after the assailants were gone, she was able to get loose from the restrains and that is when law enforcement became involved with the case. The patient does state that there was penetration of the vagina with the penis of the assailant 2 times. There was also finger penetration. She denies any anal or oral penetration. The patient does state the suspect did masturbate her, she is unsure if he did ejaculate. She does say that he sucked on her nipples, areas of the nipples are swabbed and placed in the sexual assault kit for saliva. She states there was a black gun used and that she has not had consensual intercourse in the last 5 days. The patient is very upset and nervous but cooperative and very straight forward with her answers during her examination.

PHYSICAL EXAMINATION:

GENERAL: This is an alert, oriented 29-year-old Oriental female who is here for a sexual assault examination.

HEENT: There is blood noted over the bridge of the nose. The patient states this is from her boyfriend, who had a cut to his head and injury to his mouth. She had no complaints of injury in this area.

HEART: Regular rate and rhythm.

LUNGS: Respirations are even and unlabored.

ABDOMEN: Soft and nontender.

EXTREMITIES: The patient is able to move all extremities without difficulty. She does have blood on her left forearm, on her left hand and on her left knee. These areas are also swabbed. She does state that this is from her boyfriend, however.

PELVIC: Pelvic examination is done with the use of toluidine blue dye. There is a increased redness at the introitus of the patient's vagina. Please see anatomical drawing sheet for this. No adherence was made with the toluidine blue dye. The increased redness is at 6 o'clock on the introitus. Light staining microscope was negative for any sperm on slides prepared by this nurse. The slide is enclosed in the sexual assault kit for further review by the Las Vegas Metro Crime Lab.

Sexual assault panel is done on the patient. Pregnancy test is reported as negative. Urine toxicology screen is negative. ETOH is less than 10. Zithromax 1 gram is given p.o. prophylactically, Tequin 400 mg, p.o., Ovral 2 tablets during her visit and 2 to take in 12-hours. The patient is also given Flagyl 2 grams p.o. She is given crackers to eat at this time and is encouraged to have breakfast as soon as she leaves. The patient is given instructions on sexually transmitted diseases, sexual assault instructions and sitz baths. She is to follow with the Rape Crisis Center. In 7 days

PATIENT: KIM, JULIE S

ACCOUNT#: 00075882522

MR#: 000-625-003

JOB #: 327018

ADM. DATE: 09/03/2004

Dictated by: Linda Ebbert, RN

Attending:

EMERGENCY ROOM NOTE

EXHIBIT-A

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Petition

For Writ of Habeas Corpus (Past-Conviction)
(Title of Document)

filed in District Court Case No. C212968

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-OR-

B. For the administration of a public program or
for an application for a federal or state grant.

Joseph Henderson
(Signature)

1/2/11
(Date)

Certificate of Service by Mail

I, Joseph A. Henderson, hereby certify that
on this 2ND day of January, 2011, I
mailed a true and correct copy of the
foregoing Petition For Writ OF HABEAS CORPUS,
addressed to:

Eldon K. McDaniel
Warden, ESP
P.O. Box 1989
Ely, NV. 89301

David Roger
Clark County District Attorney
200 Lewis Avenue, 3rd Floor
Las Vegas, NV. 89155

Catherine Cortez Masto
Attorney General
100 North Carson Street
Carson City, NV. 89701-4717

Mr Joseph Henderson

MR JOSEPH A HENDERSON 07224
PO BOX 1989
ELY NV. 89301

REGISTER OF ACTIONS

CASE NO. 05C212968

The State of Nevada vs Joseph A Henderson

§
§
§
§
§
§
§
§
§

Case Type: **Felony/Gross Misdemeanor**
Date Filed: **06/29/2005**
Location: **Department 15**
Cross-Reference Case Number: **C212968**
Defendant's Scope ID #: **1502730**
Lower Court Case Number: **05F05146**
Supreme Court No.: **62629**

RELATED CASE INFORMATION

Related Cases

05F05146X (Bind Over Related Case)

PARTY INFORMATION

Defendant Henderson, Joseph A

Lead Attorneys
Julian Gregory
Retained
702-471-1436(W)

Plaintiff State of Nevada

Steven B Wolfson
702-671-2700(W)

CHARGE INFORMATION

Charges: Henderson, Joseph A	Statute	Level	Date
1. CONSPIRACY TO COMMIT A CRIME	199.480	Gross Misdemeanor	01/01/1900
1. BURGLARY.	205.060	Gross Misdemeanor	01/01/1900
2. BURGLARY.	205.060	Felony	01/01/1900
3. CONSPIRACY TO COMMIT A CRIME	199.480	Felony	01/01/1900
3. KIDNAPPING IN FIRST DEGREE	200.320	Felony	01/01/1900
3. KIDNAP WITH USE OF A DEADLY WEAPON	200.310	Felony	01/01/1900
4. KIDNAPPING IN FIRST DEGREE	200.320	Felony	01/01/1900
4. KIDNAP WITH USE OF A DEADLY WEAPON	200.310	Felony	01/01/1900
4. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
5. KIDNAPPING IN FIRST DEGREE	200.320	Felony	01/01/1900
5. KIDNAP WITH USE OF A DEADLY WEAPON	200.310	Felony	01/01/1900
5. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
6. CONSPIRACY TO COMMIT A CRIME	199.480	Felony	01/01/1900
6. SEXUAL ASSAULT	200.366	Felony	01/01/1900
6. SEXUAL ASSUALT	200.364	Felony	01/01/1900
7. SEXUAL ASSAULT	200.366	Felony	01/01/1900
7. SEXUAL ASSUALT	200.364	Felony	01/01/1900
7. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
8. SEXUAL ASSAULT	200.366	Felony	01/01/1900
8. SEXUAL ASSUALT	200.364	Felony	01/01/1900
8. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
9. SEXUAL ASSAULT	200.366	Felony	01/01/1900
9. SEXUAL ASSUALT	200.364	Felony	01/01/1900
9. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
10. CONSPIRACY TO COMMIT A CRIME	199.480	Felony	01/01/1900
10. ROBBERY	200.380	Felony	01/01/1900
11. ROBBERY	200.380	Felony	01/01/1900
11. USE OF A DEADLY WEAPON OR TEAR GAS IN	193.165	Felony	01/01/1900

COMMISSION OF A CRIME.			
12.ROBBERY	200.380	Felony	01/01/1900
12.USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
13.OPEN OR GROSS LEWDNESS	201.210	Gross Misdemeanor	01/01/1900
14.BATTERY WITH THE USE OF A DEADLY WEAPON AND SUBSTANTIAL BODILY HARM	200.481-2E2	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

03/17/2011 **Confirmation of Counsel** (9:00 AM) (Judicial Officer Silver, Abbi)

Request of Evidentiary Hearing

Minutes

03/17/2011 9:00 AM

- Ms. Kice confirmed as counsel for Deft. COURT SO ORDERED;
Public Defender's office to forward case file to Ms. Kice.
COURT FURTHER ORDERED, matter SET for status check on
trial setting. NDC 3/31/11 9:00 AM STATUS CHECK: TRIAL
SETTING / REQUEST FOR EVIDENTIARY HEARING...DEFT'S PRO
PER PETITION FOR WRIT OF HABEAS CORPUS (POST
CONVICTION)

[Parties Present](#)

[Return to Register of Actions](#)


CLERK OF THE COURT

1 **WRIT**
2 STEPHANIE B. KICE
3 Nevada Bar No. 10105
4 **THE KICE LAW GROUP, LLC.**
5 4532 W. Charleston Blvd.
6 Las Vegas, NV 89102
7 (702) 401-9115 [phone]
8 (702) 973-9450 [fax]
9 Attorney for Petitioner
10 *Joseph Henderson*

8 **EIGHTH JUDICIAL DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 JOSEPH HENDERSON,

11 Petitioner,

12 v.

13 RENEE BAKER, Warden
14 Ely State Prison, et al.,

15 Respondent.

Case No. C212968
Dept. No. XV

Date of Hearing: December 1, 2011
Time of Hearing: 9:00 a.m.

(Not a Death Penalty Case)

17 **PETITION FOR WRIT OF HABEAS CORPUS**
18 **(POST-CONVICTION)**

19 1. Name of institution and county in which you are presently imprisoned or where and
20 how you are presently restrained of your liberty: **Ely State Prison, P.O. Box 1989, Ely, NV 89301**

21 2. Name and location of court which entered the judgment of conviction under attack:
22 **Eighth Judicial District, Las Vegas, Nevada, Clark County**

23 3. Date of judgment of conviction: **September 24, 2008**

24 4. Case Number: **C212968**

25 5. (a) Length of sentence: **Life with Possibility of Parole**

26 6. Are you presently serving a sentence for a conviction other than the conviction under
27 attack in this motion? Yes X No

28 If "yes", list crime, case number and sentence being served at this time: **Possession of a**

1 Controlled Substance Case No.: C213960 Maximum term of 36 months.

2 7. Nature of offense involved in conviction being challenged: Count 1 (Conspiracy to
3 Commit Burglary) -12 months in CCDC; Count 2 (Burglary While in Possession of a
4 Firearm)-a maximum of 156 months minimum parole eligibility af 62 months in NDOC to run
5 concurrent with Count 1; Count 3 (Conspiracy to Commit First Degree Kidnapping)-a
6 maximum of 60 months with a minimum parole eligibility of 24 months in NDOC to run
7 consecutive with Count 2; Count 4 (First Degree Kidnapping with Use of a Deadly Weapon)-to
8 LIFE with a minimum parole eligibility after 60 months plus and equal and consecutive term
9 of LIFE with a minimum parole eligibility after 60 months to run consecutive to Count 3;
10 Count 5 (First Degree Kidnapping with Use of a Deadly Wcapon)-to LIFE with a minimum
11 parole eligibility after 60 months plus and equal and consecutive term of Life with a minimum
12 parole eligibility after 60 months plus and equal and consecutive term of LIFE with a
13 minimum parole eligibility after 60 months for the use of a deadly wcapon, to run consecutive
14 to Count 4; Count 6 (conspiracy to Commit Sexual Assault)-a maximum of 60 months with
15 a minimum parole eligibility of 24 months in NDOC to run consecutive with Count 5; Count
16 7 (Sexual Assault with Use of a Deadly Weapon)-to LIFE with a minimum parole eligibility
17 after 120 months plus and equal and consecutive term of LIFE with a minimum parole
18 eligibility after 120 months for the use of a deadly weapon, to run concurrent to Count 6;
19 Count 8 (Sexual Assault with Use of a Deadly Weapon) -to LIFE with a minimum parole
20 eligibility after 120 months plus and equal and consecutive term of LIFE with a minimum
21 parole eligibility after 120 months for the use of a deadly wcapon, to run consecutive to Count
22 7; Count 9 (Sexual Assault with Use of a Deadly Weapon)-to LIFE with a minimum parole
23 eligibility after 120 months plus and equal and consecutive term of LIFE with a minimum
24 parole eligibility after 120 months for the use of a deadly weapon, to run consecutive to Count
25 8; Count 10 (Conspiracy to Commit Robbery)-a maximum of 60 months with a minimum
26 parole eligibility of 24 months in NDOC, to run consecutive with Count 9; Count 11 (Robbery
27 with use of a Deadly Weapon)-a maximum of 180 months with a minimum of parole eligibility
28 of 72 months in the NDOC plus and equal and consecutive term of 180 months with a

minimum parole eligibility after 72 months in the NDOC for the use of a deadly weapon to run concurrent to Count 10; Count 12 (Robbery with Use of a Deadly Weapon)- a maximum of 180 months with a minimum parole eligibility of 72 months in the NDOC plus and equal and consecutive term of 180 months with a minimum parole eligibility after 72 months for the use of a deadly weapon to run consecutive to Count 11; Count 13 (Open and Gross Lewdness)-12 months in CCDC to run concurrent to Count 12; Count 14 (Battery with use of a Deadly Weapon Resulting in Substantial Bodily Harm)-a maximum of 156 months with a minimum parole eligibility of 62 months in NDOC to run consecutive with Count 13.

8. What was your plea? (check one)

(a) Not guilty X (c) Guilty but mentally ill ____

(b) Guilty ____ (d) Nolo contendere ____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury X

(b) Judge without a jury ____

11. Did you testify at the trial? Yes ____ No ____

12. Did you appeal from the judgment of conviction?

Yes X No ____

13. If you did appeal, answer the following:

(a) Name of court: Nevada Supreme Court

(b) Case number or citation: 52573

(c) Result: Denied Without Argument

(d) Date of result: March 11, 2010 (Remittitur Issued)

14. If you did not appeal, explain briefly why you did not:

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court,

1 state or federal? Yes___ No __X__

2 16. If your answer to No. 15 was "yes," give the following information:

3 (a) As to any first petition, application or motion, give the same information:

4 (1) Name of court:

5 (2) Nature of proceeding:

6 (3) Grounds raised:

7 (4) Did you receive an evidentiary hearing on your petition,
8 application or motion? Yes ___ No ___

9 (5) Result:

10 (6) Date of result:

11 (7) If known, citations of any written opinion or date of orders entered
pursuant to such result:

12 (b) As to any second petition, application or motion, give the same
13 information:

14 (1) Name of court:

15 (2) Nature of proceeding:

16 (3) Grounds raised:

17 (4) Did you receive an evidentiary hearing on your petition,
application or motion? Yes ___ No ___

18 (5) Result:

19 (6) Date of result:

20 (7) If known, citations of any written opinion or date of orders entered
21 pursuant to such result:

22 (c) As to any third or subsequent additional applications or motions, give the
23 same information as above, list them on a separate sheet and attach. N/A

24 (d) Did you appeal to the highest state or federal court having jurisdiction, the
25 result or action taken on any petition, application or motion? No.

26 (1) First petition, application or motion?

27 Yes ___ No ___

28 (2) Second petition, application or motion?

1 Yes ___ No ___

2 (3) Third or subsequent petitions, applications or motions?

3 Yes___ No ___

4 Citation or date of decision.

5 (c) If you did not appeal from the adverse action on any petition, application
6 or motion, explain briefly why you did not. (You must relate specific facts in response to this
7 question. Your response may be included on paper which is 8 ½ by 11 inches attached to the
8 petition. Your response may not exceed five handwritten or typewritten pages in length) N/A

9 _____
10 _____
11 17. Has any ground being raised in this petition been previously presented to this or
12 any other court by way of petition for habeas corpus, motion, application or any other post-
13 conviction proceeding? If so, identify: N/A

14 (a) Which of the grounds is the same:

15 (b) The proceedings in which these grounds were raised:

16 (c) Briefly explain why you are again raising these grounds. (You must relate
17 specific facts in response to this question. Your response may be included on paper which is 8 ½
18 by 11 inches attached to the petition. Your response may not exceed five handwritten or
19 typewritten pages in length.)

20 18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any
21 additional pages you have attached, were not previously presented in any other court, state or
22 federal, list briefly what grounds were not so presented, and give your reasons for not presenting
23 them. (You must relate specific facts in response to this question. Your response may be
24 included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not
25 exceed five handwritten or typewritten pages in length.) N/A

26 19. Are you filing this petition more than 1 year following the filing of the judgment
27 of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the
28 delay. (You must relate specific facts in response to this question. Your response may be

1 included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not
2 exceed five handwritten or typewritten pages in length.)

3 20. Do you have any petition or appeal now pending in any court, either state or
4 federal, as to the judgment under attack? Yes___ No X

5 If yes, state what court and the case number:

6 21. Give the name of each attorney who represented you in the proceeding resulting in
7 your conviction and on direct appeal:

8 James Ruggeroli
Nevada Bar No.: 7891

9 Lynn Avants
Nevada Bar No.: 6208

10 Violet Radosta
Nevada Bar No.: 5747

11 Norm Reed
Nevada Bar No.: 3795

12 Kedric Bassett
Nevada Bar No.: 4214

13 Howard Brooks
Nevada Bar No.: 3374

14 Clark County Public Defender's Office
15 309 S. Third St., Suite 226
16 Las Vegas, NV 89155

17 22. Do you have any future sentences to serve after you complete the sentence
18 imposed by the judgment under attack:

19 Yes___ No X

20 23. State concisely every ground on which you claim that you are being held
21 unlawfully. Summarize briefly the facts supporting each ground. Each claim is presented below.

22 **INTRODUCTION:**

23 Eric Bernweig and his fiancée, Julie Kim, were in bed in the early morning hours of
24 September 3, 2004 when their doorbell rang. Mr. Bernweig went downstairs to answer the door. The
25 man at the door—who the victims described as both "Hispanic" or "Middle Eastern" at varying
26 times—told Mr. Bernweig that his child had thrown his keys into Mr. Bernweig's backyard. This was
27 a ruse to get access to the residence. Both victims described assailants entering the residents with
28 guns equipped with laser sights. Upon entry, the men made repeated demands to get into the safe.

1 Two of the assailants took Mr. Bernweig upstairs and the third man, who had on a mask, tied up Ms.
2 Kim. This man began touching Ms. Kim's breast(s) and buttocks.

3 This masked assailant digitally penetrated Ms. Kim and eventually placed his penis in her
4 vagina without her consent. A noise startled the assailant and the sexual assault momentarily ceased.
5 The assailant then took Ms. Kim upstairs where he again sexually assaulted her. After all of the
6 assailants left, Ms. Kim freed herself and Mr. Bernweig and they called 9-1-1.

7 Ms. Kim went to University Medical Center (UMC) where a SANE nurse conducted a sexual
8 assault exam. DNA samples of an unknown person were collected from Ms. Kim's vagina, breast,
9 and bed sheet. This DNA was uploaded into the National DNA Index system (CODIS) for
10 comparison. A CODIS hit came back from California and the DNA was linked to Joseph Henderson.
11 Based upon this "hit" authorities secured a warrant to obtain a buccal swab from Mr. Henderson. The
12 METRO crime lab analyzed the sample and based upon those findings, they charged Mr. Henderson
13 with fourteen (14) criminal counts. A jury found Mr. Henderson guilty and he is currently serving
14 multiple life sentences.

15 GROUND ONE

16 **MR. HENDERSON'S CONVICTION AND SENTENCE ARE INVALID UNDER THE 1st,
17 6th, AND 14th FEDERAL CONSTITUTIONAL AMENDMENT GUARANTEES OF DUE
18 PROCESS AND EQUAL PROTECTION UNDER THE LAW AND ARTICLE 1 OF THE
19 NEVADA CONSTITUTION BECAUSE COUNSEL'S PERFORMANCE FELL BELOW AN
OBJECTIVE STANDARD OF REASONABLENESS AS IS MANDATED BY Strickland v.**

20 Legal Authority Relevant to All Claims of Ineffective Assistance of Counsel

21 The Sixth Amendment of the United States Constitution guarantees that an accused person
22 shall "have the Assistance of Counsel for his defense." The United States Supreme Court has clearly
23 defined when the assistance of counsel becomes ineffective and an accused person is denied this
24 right. In Strickland v. Washington, 466 U.S. 668 (1984), the Court established a two-prong test for
25 determining ineffective assistance of counsel at trial. See also Porter v. McCollum, 130 S. Ct. 447,
26 175 L. Ed. 2d 398 (2009). To prevail under Strickland, a defendant must demonstrate both that his
27 "counsel's performance was deficient" and "that the deficient performance prejudiced the defense."
28 Id. at 687. To satisfy the second prong of Strickland, a defendant must show that his trial counsel's

1 performance prejudiced his defense such that he suffered actual prejudice and that "there is a
2 reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
3 would have been different. A reasonable probability is a probability sufficient to undermine
4 confidence in the outcome." Strickland, 466 U.S. at 694. This test has also been adopted in Nevada.
5 See Ilurd v. State, 114 Nev. 182, 953 P.2d 270 (1998). Further, trial counsel's actions must be based
6 on reasonable strategic decisions. Strickland, 466 U.S. at 691.

7 In this case, Mr. Henderson's appointed counsel made a series of errors that so undermined
8 the proper functioning of the adversarial process that the outcome of Mr. Henderson's proceedings
9 cannot be relied upon as have produced a just result.

10 **A. Prior Counsel Failed to Hire a Forensic DNA Expert to Either Re-Test or Make and**
11 **Independent Evaluation of the DNA Report Generated by METRO.**

12 There are a number of reasons why there can be false-positives in DNA testing. Some of
13 these include: the quantity of DNA tested; how the samples are smeared; how often the lab
14 implements quality assurance measures and when and if the lab is accredited; mislabeling and
15 mishandling the DNA; carry over or contamination issues; lab errors, issues of kinship, and
16 coincidence, and the failure to isolate certain subgroups in a population. Again, without a thorough
17 examination of the State's evidence, grave concerns exist about the DNA collection, testing, and
18 results.¹

19 Even though the court declared Mr. Henderson indigent and was represented by the public
20 defender's office, he was still entitled to the assistance of experts. Ake v. Oklahoma, 470 U.S. 68
21 (1985). Because counsel failed to secure expert assistance, Mr. Henderson was significantly
22 prejudiced and effectively deprived of counsel in a critical stage of the proceeding in violation of his
23 Constitutional rights and due process of law. U.S. v. Cronie, 466 U.S. 648 (1984).

24 The trial in this case was continued a number of times. As such, ample time existed for Mr.
25

26 ¹ Mr. Henderson asks this Court to take judicial notice of the recent news regarding
27 problems at the METRO lab that led to the firing of one chemist and the "retirement" of another.
28 Mr. Henderson believes and therefore alleges that it was METRO's errors or errors by the lab in
California that led to him even being connected to this case at all.

1 Henderson's prior counsel to either send the remaining samples out in order to re-test the DNA or
2 to hire a forensic DNA specialist to review the METRO report and generate an independent review
3 of the methods used.²

4 These actions were critical in this case. Neither victim can identify Mr. Henderson. In fact,
5 Ms. Kim's descriptions of her assailant **do not match** the physical description of Mr. Henderson.
6 During the preliminary hearing Ms. Kim testified that the person who raped her was "approximately
7 five-eight, middle built (sic)". (PH 4/28/05 page 15 line 9). According to the Nevada Department
8 of Corrections web-page, Mr. Henderson is 6'0" tall and weighs 230 pounds and he is listed as
9 having a large build. The only thing that "links" Mr. Henderson to the crime is the DNA.

10 Counsel had no tactical or strategic justification within the range of reasonable competence
11 for their failure to hire expert witnesses in this case. Counsel's failure to gather the necessary expert
12 opinions prevented a jury from hearing any potential problems with the DNA collection and/or
13 processing in both California and Nevada. But for counsel's failure to perform at a reasonable level
14 of competence, the jury relied upon evidence that was not fully explored. The decision to proceed
15 to trial should be accepted by this court as valid strategy when that decision is made in the absence
16 of the consultation of experts.

17 **B. Prior Counsel Failed to Challenge the Validity of the Search Warrant**

18 The search warrant to obtain Mr. Henderson's buccal swab was based upon the
19 representations of one chemist to another that there had been a "hit" on the CODIS database. Despite
20 being made aware of this issue at the preliminary hearing, prior counsel did not challenge the validity
21 of the search warrant. The Supreme Court of the United States has held time and again that a search
22 warrant issued based upon an affidavit containing materially false statements violates the Fourth
23 Amendment. Consequently, such a Constitutionally infirm search warrant may render the resulting
24 search invalid. Franks v. Delaware, 438 U.S. 154 (1978).

25 A defendant is entitled to an evidentiary hearing to examine the validity of an alleged Fourth
26

27 ² Counsel should have obtained reports that verified the chain of custody from
28 California when Mr. Henderson's DNA was taken and the reports from the lab that developed the
DNA profile and put that profile in the CODIS database.

1 Amendment violation provided he makes "a preliminary showing substantiating [his] claim that in
2 issuing the warrant [the Judge] was misled by the alleged material falsehoods in the affidavit."
3 Garrettson v. State, 967 P.2d 428, 430 (Nev. 1998); see also Weber v. State, 119 P.3d 107, 128 (Nev.
4 2005); also Franks, 438 U.S. at 171 (holding that allegations "of reckless disregard for the truth"
5 must be "accompanied by an offer of proof" to entitle defendant to an evidentiary hearing).

6 The 9th Circuit Court of Appeals has held that whether "the alleged judicial deception was
7 brought about by material false statements or material omissions is not of consequence", Liston v.
8 County of Riverside, 120 F.3d 965, 973 (9th Cir. 1997). See also, U.S. v. Gonzalez, 412 F.3d 1102,
9 1110 (9th Cir. 2005), amended by, 437 F.3d 854 (9th Cir. 2006). A Fourth Amendment violation
10 also "occurs where the affiant intentionally or recklessly omitted facts required to prevent technically
11 true statements from being misleading." Liston, 120 F.3d at 973.

12 Because there is no affidavit in the file, present counsel can only assume that prior counsel
13 did not have this material. By not challenging the search warrant, the State was able to use evidence
14 against Mr. Henderson that very well may have been suppressed. Mr. Henderson believes and
15 therefore alleges that had the DNA sample been suppressed, the outcome of the jury trial would have
16 been different because there is absolutely no evidence to link Mr. Henderson to this crime. .

17 **C. Trial Counsel Failed to Allow Mr. Henderson the Ability to Review and Correct**
18 **Errors in the Pre-Sentence Report**

19 Mr. Henderson believes and therefore alleges that because he was not allowed the
20 opportunity to review his Pre-Sentence Investigation Report (PSI) that the document contains errors.
21 These errors will serve to prejudice Mr. Henderson as he moves through the Department of
22 Corrections and could affect his eligibility and access to programs and present a cascading effect that
23 could push back his first appearance before the parole board and possibly keep him from getting
24 parole at all.

25 The Nevada Supreme Court recently decided that when a defendant fails to raise problems
26 or issues with the PSI before the district court and on direct appeal, the defendant has waived his
27 opportunity to have any and all alleged inaccuracies corrected. Stockmeier v. State, 127 Nev. Adv.
28 Rep. 19, 255 P.3d 209 (Nev. 2011). Because prior counsel failed to allow Mr. Henderson the

1 opportunity to correct errors, he is now foreclosed from having these errors corrected. Counsel's
2 performance fell below a reasonable standard and their deficient performance will continue to harm
3 Mr. Henderson as long as he is in prison.

4 **D. Trial Counsel Failed to Properly Secure an Adequate Record for Appeal and Post-
5 Conviction By Not Having the Bench Conferences Recorded**

6 Throughout the proceedings against Mr. Henderson, prior counsel failed to secure an
7 adequate record by failing to have a record of the bench conferences.³ Mr. Henderson believes, and
8 therefore alleges, that during this unrecorded conference, the trial judge took material, substantial
9 actions, ranging from everything including ruling on evidentiary matters and establishing courtroom
10 procedure and scheduling. Such proceedings are integral parts of a criminal case in general, and of
11 Mr. Henderson's case in particular.

12 There can be no strategic or tactical reason for allowing potential claims to be foreclosed
13 because of an inadequate record. The fact that there is not an adequate record of these proceedings
14 violates Mr. Henderson's constitutional rights, as well as those of the public to free and open
15 proceedings. The failure to secure an adequate record also violates Mr. Henderson's rights under
16 international law, which guarantees every person a fair and public hearing by a competent,
17 independent, and impartial tribunal.⁴

18 These constitutional violations were prejudicial per se; no showing of specific prejudice is
19 required in order to obtain relief for a violation of the public trial guarantee. Counsel's failure to
20 secure a complete record substantially and adversely affected Mr. Henderson's constitutional rights.
21 Prosecutors' cannot show, beyond a reasonable doubt, that the courtroom closures did not ultimately
22 affect and prejudice Mr. Henderson's conviction and sentence.

23 **E. Prior Counsel Failed to Keep Necessary Notes, Conduct Research or Properly
24 Document the File**

25 ³ The trial judge additionally failed to take any other measures to effectuate the
26 public interest in observation and comment on these judicial proceedings. These unrecorded
27 bench conferences are too large in number to list individually; however, they occur multiple
times during the preliminary hearing and the trial.

28 ⁴ International Covenant on Civil and Political Rights, Article XIV.

1 Post-conviction counsel requested all of prior counsel's files. Missing from the items
2 delivered were: any emails from the District Attorney's office⁵; handwritten notes; legal research;
3 memorandums from the investigator; memorandums to the file marking the case's progress; phone
4 logs; notes from interviews with the client, or other witnesses. If these items exist and prior counsel
5 has failed to turn over this information to post-conviction counsel, post-conviction counsel is
6 handicapped in performing their duties.

7 Supreme Court Rule 156(3)(b) provides that a waiver of privilege occurs when it becomes
8 necessary for counsel "to respond to allegations in any proceeding concerning the lawyer's
9 representation of the client." Additionally, the Legislature has instructed petitioners for writs of
10 post-conviction habeas corpus that, if a writ petition contains a claim of ineffective assistance of
11 counsel, the claim acts as a waiver of the attorney-client privilege. It follows by analogy and policy
12 that a defendant requesting withdrawal of his guilty plea for the same reason, but using NRS 176.165
13 as the statutory basis for relief, also waives the privilege in such proceedings. As such, prior counsel
14 should have turned over all notes and work product prior to the evidentiary hearing. *Molina v. State*,
15 120 Nev. 185, 87 P.3d 533 (2004).

16 Failing to turn over this information over falls below the professional standard for attorneys. See
17 N.R.P.C. 1.1, 1.3, and 1.4.

18 The acts and omissions by trial counsel were either not the result of tactic or strategy, and
19 were instead the result of lack of knowledge, lack of investigation or misunderstanding about the law
20 and/or the facts of the case. To the extent that trial counsel's actions were the result of tactic and
21 strategy, those decisions were unreasonable. Each instance of ineffective assistance of counsel set
22 forth above warrants a reversal of the judgment of conviction.

23 ///

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25 _____
26 s
27 There is a list of proposed questions in the file labeled "Henderson cross" this document references
28 an e-mail dated 6/15/05 where the chemist "offers to go back and try to get a complete STR match
on the vag (sic) swab" and an email from Investigator Gorski colloquially referred to as the "good
news e-mail" where Gorski expressed her "personal gratitude" and suggested that they couldn't do
their investigations "without your help". (Exhibit 1).

GROUND TWO

MR. HENDERSON'S CONVICTION AND SENTENCE ARE INVALID UNDER THE 6TH AND 14TH FEDERAL CONSTITUTIONAL AMENDMENT GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW AND ARTICLE 1 OF THE NEVADA CONSTITUTION BECAUSE OF THE STATE'S FAILURE TO TURN OVER EVIDENCE UNDER Brady v. Maryland, 373 U.S. 83 (1963).

A. Mr. Henderson Could Not Properly Challenge the DNA Information

There is no information in the file as to the manner in which the DNA sample that caused the "hit" in the CODIS database. There is no indication from the record or the documents in Mr. Henderson's file that the State made any attempt to verify the chain of custody in California or the procedures used by the California lab that placed the sample allegedly belonging to Mr. Henderson into the federal database.

Mr. Henderson believes and therefore alleges that the State of Nevada has in its possession information. The suppression of evidence favorable to the accused violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. See Brady v. Maryland, 373 U.S. 83 (1963), Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555(1995). The Nevada Supreme Court is in accord, "it is a violation of due process for the prosecutor to withhold exculpatory evidence, and his motive for doing so is immaterial." Jimenez v. State, 112 Nev. 610, 618 (1996).

Brady sets forth a three prong test to determine if a Brady violation has occurred: "the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). The State never turned over this evidence. The motivation behind this failure is irrelevant. Mr. Henderson has been prejudiced by this failure because he was unable to impeach the chemists at either the preliminary hearing or the trial.

CONCLUSION

Mr. Henderson's conviction is unconstitutional under the federal and state constitutions for each of the reasons herein. His judgment of conviction must therefore be vacated.

Wherefore, Petitioner prays that the Court grant petitioner an evidentiary hearing so that these issues can be explored.

Executed at Las Vegas, Clark County, Nevada on the 26th day of August, 2011.

/s/ Stephanie B. Kice
Stephanie B. Kice
Nevada Bar No. 10105
THE KICE LAW GROUP, L.L.C.
616 S. Eighth St.
Las Vegas, NV 89101
(702) 401-9115 [phone]
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I am the counsel of record for Joseph Henderson and have his personal authorization to commence this action.

2 AA 051

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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the WRIT OF HABEAS CORPUS, was made this 26th day of August, 2011 by facsimile transmission to:

H. Leon Simon
FAX #: 702-382-5815

/s/ Stephanie B. Kice
Stephanie B. Kice
Nevada Bar No. 10105

EXHIBIT 1

Henderson cross

1. Both the vaginal swab sample (KMG 2, item F) and the bed sheet samples (KMG 4, top sheet A, top sheet B) were mixtures of at least 2 people, were they not?
2. You didn't mention in your report that they were mixtures, did you?
3. Isn't that an incomplete representation of the information?
4. There were actually 2 top sheet samples, correct?
5. You represented them in your report as one sample, didn't you?
6. Isn't that an incomplete representation of the information?
7. You also represented that there was a single "STR DNA case profile" detected in this case, didn't you?
8. Isn't that an incomplete representation of the information?
9. In fact, in the vaginal swab sample, the major profile was from a female, was it not?
10. And the male profile was only a minor profile, correct?
11. Did you mention any of this in the body of your report?
12. And in fact, it is not possible to deduce a complete single source male profile solely from the vaginal swab sample, is it?
13. Yet that is exactly what you represent in our chart on page 3 of the report, isn't it?
14. It is possible that profiles other than that of Mr. Henderson could account for the minor male component in the vaginal swab sample, isn't it?
15. Joseph Henderson is not the sole possible contributor, is he?
16. Yet you don't document or take into account that possibility, in your report, do you?
17. You used a single source statistic for the minor male profile on the vaginal swab, didn't you?
18. Shouldn't you have used a mixture statistic for this sample?
19. If you had used a mixture statistic, such as a Combined probability of inclusion (CPI) wouldn't your statistic have been much less compelling?
20. Isn't it true that you decided that only a single profile could account for the minor male contributor in the vaginal swab sample only after seeing the reference sample of Joseph Henderson?
21. Did you list, anywhere, the other possible male profiles that could account for the minor male profile in the vaginal swab?
22. Didn't you use information from Henderson's reference sample to help interpret the vaginal swab sample?
23. Referring to your e-mail of 6/15/05, you offer to "go back and try to get a complete STR match on the vag swab," correct?
24. Referring to the "good news" e-mail from Investigator Gorksi, she expresses her "personal gratitude" and suggest that they couldn't do their investigations "without your help."
25. Did you already assume that Henderson was the sole possible contributor at that point?
26. Does the same e-mail mention that they will be executing a search warrant for Henderson's DNA?
27. So at that point, when you all assumed the perpetrator was Mr. Henderson, you did not even have a confirmatory sample of his DNA to compare, did you?
28. Were samples taken from any other potential suspects to compare to the vaginal swab in this case?



Stephanie B. Kice <skice@kicelaw.com>

Successful transmission to 17023825815. Re: Joseph Henderson Case No.: C212968

1 message

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To: skice@kicelaw.com

Fri, Aug 26, 2011 at 5:06 AM



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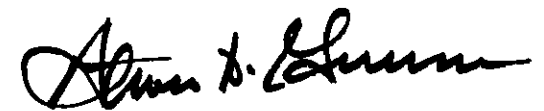


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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JOSEPH HENDERSON,
#1502730

Defendant.

CASE NO: **C-05-212968-1**

DEPT NO: **XV**

STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL

PETITION FOR WRIT OF HABEAS CORPUS

(POST-CONVICTION)

DATE OF HEARING: DECEMBER 1, 2011

TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction).

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On July 11, 2005, Joseph Henderson, hereinafter "Defendant," was charged by way of
4 Information with Count 1 - Conspiracy to Commit Burglary, Count 2- Burglary While in
5 Possession of a Firearm, Count 3 - Conspiracy to Commit First Degree Kidnapping, Counts
6 4 and 5 - First Degree Kidnapping With Use of a Deadly Weapon, Count 6 - Conspiracy to
7 Commit Sexual Assault, Counts 7, 8, and 9 - Sexual Assault With Use of a Deadly Weapon,
8 Count 10 - Conspiracy to Commit Robbery, Counts 11 and 12 - Robbery With Use of a
9 Deadly Weapon, Count 13 - Open or Gross Lewdness, and Count 14 - Battery With Use of a
10 Deadly Weapon Resulting in Substantial Bodily Harm. On June 27, 2008, Defendant was
11 found guilty by a jury of all counts.

12 On August 28, 2008, Defendant was sentenced as follows: As to Count 1 – to Twelve
13 (12) Months in the Clark County Detention Center; As to Count 2 – to a Maximum of One
14 Hundred Fifty-Six (156) Months with a Minimum Parole Eligibility of Sixty-Two (62)
15 Months, to run Concurrent with Count 1; As to Count 3 – to a Maximum of Sixty (60)
16 Months with a Minimum Parole Eligibility of Twenty-Four (24) Months, to run Consecutive
17 to Count 2; As to Count 4 – to Life with a Minimum Parole Eligibility after Sixty (60)
18 Months, plus an Equal and Consecutive term of Life with a Minimum Parole Eligibility after
19 Sixty (60) Months for the Use of a Deadly Weapon, to run Consecutive to Count 3; As to
20 Count 5 – to Life with a Minimum Parole Eligibility after Sixty (60) Months, plus an Equal
21 and Consecutive term of Life with a Minimum Parole Eligibility after Sixty (60) Months for
22 the Use of a Deadly Weapon, to run Consecutive to Count 4; As to Count 6 – to a Maximum
23 of Sixty (60) Months with a Minimum Parole Eligibility of Twenty-Four (24) Months, to run
24 Consecutive to Count 5; As to Count 7 - to Life with a Minimum Parole Eligibility of One
25 Hundred Twenty (120) Months, plus an Equal and Consecutive term of Life with a
26 Minimum Parole Eligibility of One Hundred Twenty (120) Months for the Use of a Deadly
27 Weapon, to run Concurrent with Count 6; As to Count 8 - to Life with a Minimum Parole
28 Eligibility of One Hundred Twenty (120) Months, plus an Equal and Consecutive term of

1 Life with a Minimum Parole Eligibility of One Hundred Twenty (120) Months for the Use of
2 a Deadly Weapon, to run Consecutive to Count 7; As to Count 9 – to Life with a Minimum
3 Parole Eligibility of One Hundred Twenty (120) Months, plus an Equal and Consecutive
4 term of Life with a Minimum Parole Eligibility of One Hundred Twenty (120) Months for
5 the Use of a Deadly Weapon, to run Consecutive to Count 8; As to Count 10 – to a
6 Maximum of Sixty (60) Months with a Minimum Parole Eligibility of Twenty-Four (24)
7 Months, to run Consecutive to Count 9; As to Count 11 – a Maximum of One Hundred
8 Eighty (180) Months with a Minimum Parole Eligibility of Seventy-Two (72) Months, plus
9 an Equal and Consecutive term of Maximum of One Hundred Eighty (180) Months with a
10 Minimum Parole Eligibility of Seventy-Two (72) Months for the Use of a Deadly Weapon,
11 to run Concurrent with Count 10; As to Count 12 – to a Maximum of One Hundred Eighty
12 (180) Months with a Minimum Parole Eligibility of Seventy-Two (72) Months, plus an
13 Equal and Consecutive term of Maximum of One Hundred Eighty (180) Months with a
14 Minimum Parole Eligibility of Seventy-Two (72) Months for the Use of a Deadly Weapon,
15 to run Consecutive to Count 11; As to Count 13 – to Twelve (12) Months in the Clark
16 County Detention Center, to run Concurrent with Count 12; As to Count 14 – a Maximum of
17 One Hundred Fifty-Six (156) Months with a Minimum Parole Eligibility of Sixty-Two (62)
18 Months, to run Consecutive to Count 13; with One Two Hundred Fifty-One (1,251) Days
19 credit for time served. Further Ordered, a Special Sentence of Lifetime Supervision is
20 imposed to commence upon release from any term of imprisonment, probation or parole.

21 Defendant's Judgment of Conviction (Jury Trial) was filed on September 24, 2008.
22 Defendant filed a Notice of Appeal on October 9, 2008. The Nevada Supreme Court
23 affirmed Defendant's conviction on February 3, 2010. Remittitur issued on March 2, 2010.

24 Defendant filed his pro per Petition for Writ of Habeas Corpus (Post-Conviction) on
25 January 11, 2011. The State's response was filed on March 29, 2011, which the State hereby
26 incorporates by reference. Defendant's court-appointed counsel filed the instant
27 supplemental petition on August 26, 2011. The State's response to Defendant's supplemental
28 claims is as follows.

1 **ARGUMENT**

2 **I. DEFENDANT’S TRIAL COUNSEL PROVIDED EFFECTIVE**
3 **ASSISTANCE.**

4 The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104
5 S.Ct. 2052 (1984), established the standards for a court to determine when counsel’s
6 assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution.
7 Strickland laid out a two-pronged test to determine the merits of a defendant’s claim of
8 ineffective assistance of counsel:

9 First, the defendant must show that counsel's performance was
10 deficient. This requires showing that counsel made errors so
11 serious that counsel was not functioning as the ‘counsel’
12 guaranteed the defendant by the Sixth Amendment. Second, the
13 defendant must show that the deficient performance prejudiced
14 the defense. This requires showing that counsel's errors were so
serious as to deprive the defendant of a fair trial, a trial whose
result is reliable. Unless a defendant makes both showings, it
cannot be said that the conviction or death sentence resulted
from a breakdown in the adversary process that renders the
result unreliable.

15 Id. at 687, 2064. The Nevada Supreme Court has held that “claims of ineffective assistance
16 of counsel must be reviewed under the ‘reasonably effective assistance’ standard articulated
17 by the U.S. Supreme Court in Strickland, requiring a defendant to show that counsel’s
18 assistance was ‘deficient’ and that the deficiency prejudiced the defense.” Bennett v. State,
19 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995); Kirksey v. State, 112 Nev. 980, 987, 923
20 P.2d 1102, 1107 (1996).

21 With respect to the first prong, a defendant is not entitled to errorless counsel. Rather,
22 “‘Deficient’ assistance of counsel is representation that falls below an objective standard of
23 reasonableness.” Kirksey, 112 Nev. at 987, 923 P.2d at 1107 (1997) citing to Dawson v.
24 State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992), cert. denied, 507 U.S. 921, 113 S.Ct.
25 1286 (1993). What appears by hindsight to be a wrong or poorly advised decision of tactics
26 or strategy is not sufficient to meet the defendant’s heavy burden of proving ineffective
27 counsel. “Judicial review of a lawyer’s representation is highly deferential, and a defendant
28 must overcome the presumption that a challenged action might be considered sound

1 strategy.” State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998) (quoting from
2 Strickland, 466 U.S. at 689, 104 S.Ct at 2052 (1984)). An attorney cannot be deemed
3 ineffective for failing to make futile motions or objections. Ennis v. State, 122 Nev. 694, 137
4 P.3d 1095 (2006).

5 In order to meet the second “prejudice” prong of the test, “the defendant must show a
6 reasonable probability that, but for counsel’s errors, the result of the trial would have been
7 different.” Kirksey, 112 Nev. at 988, 825 P.2d at 1107 (citing Strickland, 466 U.S. at 694,
8 104 S.Ct. at 2068). The Court may consider both prongs in any order and need not consider
9 them both when a defendant’s showing on either prong is insufficient. Kirksey v. State, 112
10 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

11 Strategy or decisions regarding the conduct of defendant’s case are “virtually
12 unchallengeable absent extraordinary circumstances.” Doleman v. State, 112 Nev. 843, 848,
13 921 P.2d 278, 280 (1996), quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180
14 (1990). There is a “*strong presumption* that counsel’s conduct falls within the wide range of
15 reasonable professional assistance.” Strickland, *supra* at 689, 2065, emphasis added.

16 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the
17 disputed factual allegations underlying his ineffective-assistance claim by a preponderance
18 of the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). In sum, the
19 framework for analysis is as follows:

20 Therefore, when a petitioner alleges ineffective assistance of
21 counsel, he must establish the factual allegations which form the
22 basis for his claim of ineffective assistance by a preponderance
23 of the evidence. Next, as stated in Strickland, the petitioner
24 must establish that those facts show counsel’s performance fell
below a standard of objective reasonableness, and finally the
petition must establish prejudice by showing a reasonable
probability that, but for counsel’s deficient performance, the
outcome would have been different.

25 Means, *supra* at 1013, 33.

26 In one of its most recent decisions on ineffective assistance of counsel, the United
27 State Supreme Court plainly pointed out that “[s]urmounting Strickland’s high bar is never
28 ... easy.” Harrington v. Richter, 562 U.S. ___, 131 S.Ct. 770, 788 (2011). “The question is

1 whether an attorney's representation amounted to incompetence under prevailing
2 professional norms, not whether it deviated from best practices or most common custom."
3 Id. Moreover, "[r]are are the situations in which the latitude counsel enjoys will be limited to
4 any one technique or approach...Counsel is entitled to balance limited resources in accord
5 with effective trial tactics and strategies." Id. at 789.

6 "A fair assessment of attorney performance requires that every effort be made to
7 eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's
8 challenged conduct, and to evaluate the conduct from counsel's perspective at the time."
9 Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (citing Strickland, 466 U.S. at
10 689. "The role of a court presented with allegations of ineffective counsel 'is not to pass
11 upon the merits of the action not taken but to determine whether, under the particular facts
12 and circumstances of the case, trial counsel failed to render reasonably effective
13 assistance...'" Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), (citing
14 Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)). "*[R]elying on 'the harsh light
15 of hindsight' to cast doubt on a trial" that took place many years ago "is precisely what
16 Strickland and AEDPA seek to prevent."* Harrington, 131 S.Ct. at 789 (citing Bell v. Cone,
17 535 U.S. 685, 122 S.Ct. 1843 (2002))(emphasis added).

18 Moreover, "an attorney may not be faulted for a reasonable miscalculation or lack of
19 foresight or for failing to prepare for remote possibilities." Harrington, 131 S.Ct. at 789. In
20 light of this very high standard of proof "...it is difficult to establish ineffective assistance
21 where counsel's overall performance reflects active and capable advocacy." Id. In order to
22 meet Strickland's prejudice prong, the United State Supreme Court has made clear that
23 "[t]here must be a substantial likelihood of a different result." Id.

24 **A. Counsel's Failure to Retain a DNA Expert.**

25 Defendant claims his attorney was ineffective for failing to retain his own DNA
26 expert to either retest or make an independent evaluation of the DNA report. The mere
27 failure to retain an expert does not render counsel per se ineffective. Harrington, 131 S.Ct. at
28 788. Occasionally, "Criminal cases will arise where the only reasonable and available

1 defense strategy requires consultation with experts or introduction of expert evidence,
2 whether pretrial, at trial, or both. There are, however, countless ways to provide effective
3 assistance in any given case. Even the best criminal defense attorneys would not defend a
4 particular client in the same way. Rare are the situations in which the wide latitude counsel
5 must have in making tactical decisions will be limited to any one technique or approach.” Id.
6 at 788 -789 (internal citations and quotations omitted).

7 Moreover, even if counsel was ineffective for failing to hire such an expert,
8 Defendant is still required to demonstrate that he was prejudiced.¹ Bare allegations that
9 mistakes “may have been made” during testing are insufficient. Defendant’s arguments are
10 no more than an attempt at engaging in an endless task of speculation of possibilities. Claims
11 asserted in a petition for post-conviction relief must be supported with specific factual
12 allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev.
13 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked” allegations are not sufficient, nor
14 are those belied and repelled by the record. Id.

15 **B. Counsel’s Failure to Challenge Validity of the Search Warrant.**

16 Defendant argues his counsel should have challenged the validity of the search
17 warrant. First, Defendant has again only set forth bare allegations that the search warrant
18 “may” have been based upon false statements. As noted above, bare and naked allegations
19 are insufficient for relief. Hargrove, supra. Defendant has also failed to demonstrate
20 prejudice even if his counsel fell below and objective standard of reasonableness. Simply
21 stating the evidence “may very well have been suppressed” does not show a reasonable
22 probability the outcome would have been different. Even if counsel challenged the warrant
23 the evidence “may very well have” not been suppressed as well. Counsel cannot be deemed
24 ineffective for making futile motions. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

26
27 ¹ Defendant’s claim that the Metro lab’s errors in an unrelated case can be attributed to the
28 DNA match in the instant case is a bare allegation insufficient for relief. Hargrove v. State,
100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Moreover, the DNA match in this case
involves two labs.

1 **C. Counsel’s Alleged Failure to Allow Defendant the Opportunity to Review His**
2 **PSI.**

3 Defendant claims that he was not allowed to review his presentence investigation
4 report, and his counsel was ineffective for failing to allow him to do so. However, Defendant
5 has failed to specifically state what errors his PSI allegedly contains. NRS 34.735(6) states,
6 in pertinent part:

7 [Petitioner] must allege specific facts supporting the claims in
8 the petition [he] file[s] seeking relief from any conviction or
9 sentence. Failure to raise specific facts rather than just
 conclusions may cause [the] petition to be dismissed.

10 See also Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that
11 bare or naked allegations are insufficient to entitle a defendant to post-conviction relief). As
12 such, even if counsel was remiss Defendant has failed to demonstrate prejudice, and he is not
13 entitled to relief under Strickland.

14 **D. Counsel’s Failure to Have Bench Conferences Recorded.**

15 Defendant has simply pointed to unrecorded bench conferences and has failed to
16 explain which judicial actions should have been preserved, how such actions did or did not
17 have merit, or a reasonable probability that their preservation would have alter the outcome
18 of his trial or appeal.² A proper petition for post-conviction relief must set forth specific
19 factual allegations. NRS 34.735(6); see also Hargrove v. State, 100 Nev. 498, 502-03, 686
20 P.2d 222, 225 (1984). Defendant’s claims are too vague per Hargrove and NRS 34.735(6).

21 **E. Counsel’s Alleged Failure to Keep Notes and/or Document the File.**

22 Defendant has failed to cite a single case holding an attorney ineffective for allegedly
23 failing to “keep necessary notes, failing to conduct research, or properly document the file.”
24 Post-conviction counsel’s opinion that trial counsel’s note taking abilities are inadequate
25 does not render him incompetent or ineffective. Trial counsel does not need to take every
26 conceivable action in order to protect himself against allegations of inadequacy. Donovan,

27 _____
28 ² It should also be noted that due process does not require every sidebar conference to be
recorded. See Daniel v. State, 119 Nev. 498, 78 P.3d 890 (2003)

1 94 Nev. at 675, 584 P.2d at 711. By the same token, counsel is not required to document
2 every step during litigation in his personal file for the purpose of making post-conviction
3 counsel's attempt at alleging him ineffective easier. Moreover, this is simply a bare
4 allegation insufficient for relief per Hargrove, and Defendant has failed to demonstrate how
5 the outcome of his trial would have been different had counsel done a better job at taking
6 notes. He is therefore not entitled to relief under Strickland.

7 **II. DEFENDANT'S CLAIM OF A BRADY VIOLATION IS WAIVED**

8 Defendant's claim in Grounds 2 that the State committed a violation of Brady v. Maryland,
9 373 U.S. 83 (1963) is waived because it was not raised on direct appeal. NRS 34.810 states
10 in relevant part:

11 1. The court shall dismiss a petition if the court determines that:

12 ...

13 (b) The petitioner's conviction was the result of a trial and the
14 grounds for the petition could have been:

15 ...

16 (2) Raised in a direct appeal or a prior petition for a writ of
17 habeas corpus or postconviction relief...

18 This claim should therefore be dismissed.

19 **III. AN EVIDENTIARY HEARING IS UNWARRANTED.**

20 Defendant has not set forth any claims sufficient to warrant an evidentiary hearing.
21 The Nevada Supreme Court has held that if a petition can be resolved without expanding the
22 record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d
23 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is
24 entitled to an evidentiary hearing if his petition is supported by specific factual allegations,
25 which, if true, would entitle him to relief unless the factual allegations are repelled by the
26 record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; See also Hargrove v. State, 100 Nev.
27 498, 503, 686 P.2d 222, 225 (1984) (1984) (holding that "[a] defendant seeking post-
28 conviction relief is not entitled to an evidentiary hearing on factual allegations belied or
repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by
the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at

1 1230 (2002). Defendant's claims can be resolved without expanding the record so no further
2 hearing is needed. Therefore, this court should deny Defendant's request for an evidentiary
3 hearing.

4 **CONCLUSION**

5 Based on the foregoing arguments, Defendant's petition should be denied.

6 DATED this 30th day of September, 2011.

7 Respectfully submitted,

8 DAVID ROGER
9 Clark County District Attorney
Nevada Bar #002781

10
11 BY /s/ JAMES R. SWEETIN
12 JAMES R. SWEETIN
13 Chief Deputy District Attorney
14 Nevada Bar #005144

15
16
17
18
19 **CERTIFICATE OF ELECTRONIC FILING**

20 I hereby certify that service of the above and foregoing, was made this 30th day of
21 September, 2011, by Electronic Filing to:

22 STEPHANIE KICE, ESQ.
23 Email: skice@kicelaw.com

24 /s/ HOWARD CONRAD
25 Secretary for the District Attorney's Office

26
27
28 hjc/SVU

REGISTER OF ACTIONS

CASE NO. 05C212968

The State of Nevada vs Joseph A Henderson

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Case Type: **Felony/Gross Misdemeanor**
Date Filed: **06/29/2005**
Location: **Department 15**
Cross-Reference Case Number: **C212968**
Defendant's Scope ID #: **1502730**
Lower Court Case Number: **05F05146**
Supreme Court No.: **62629**

RELATED CASE INFORMATION

Related Cases

05F05146X (Bind Over Related Case)

PARTY INFORMATION

Defendant Henderson, Joseph A

Lead Attorneys

Julian Gregory
Retained
702-471-1436(W)

Plaintiff State of Nevada

Steven B Wolfson

702-671-2700(W)

CHARGE INFORMATION

Charges: Henderson, Joseph A	Statute	Level	Date
1. CONSPIRACY TO COMMIT A CRIME	199.480	Gross Misdemeanor	01/01/1900
1. BURGLARY.	205.060	Gross Misdemeanor	01/01/1900
2. BURGLARY.	205.060	Felony	01/01/1900
3. CONSPIRACY TO COMMIT A CRIME	199.480	Felony	01/01/1900
3. KIDNAPPING IN FIRST DEGREE	200.320	Felony	01/01/1900
3. KIDNAP WITH USE OF A DEADLY WEAPON	200.310	Felony	01/01/1900
4. KIDNAPPING IN FIRST DEGREE	200.320	Felony	01/01/1900
4. KIDNAP WITH USE OF A DEADLY WEAPON	200.310	Felony	01/01/1900
4. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
5. KIDNAPPING IN FIRST DEGREE	200.320	Felony	01/01/1900
5. KIDNAP WITH USE OF A DEADLY WEAPON	200.310	Felony	01/01/1900
5. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
6. CONSPIRACY TO COMMIT A CRIME	199.480	Felony	01/01/1900
6. SEXUAL ASSAULT	200.366	Felony	01/01/1900
6. SEXUAL ASSUALT	200.364	Felony	01/01/1900
7. SEXUAL ASSAULT	200.366	Felony	01/01/1900
7. SEXUAL ASSUALT	200.364	Felony	01/01/1900
7. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
8. SEXUAL ASSAULT	200.366	Felony	01/01/1900
8. SEXUAL ASSUALT	200.364	Felony	01/01/1900
8. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
9. SEXUAL ASSAULT	200.366	Felony	01/01/1900
9. SEXUAL ASSUALT	200.364	Felony	01/01/1900
9. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
10.CONSPIRACY TO COMMIT A CRIME	199.480	Felony	01/01/1900
10.ROBBERY	200.380	Felony	01/01/1900
11.ROBBERY	200.380	Felony	01/01/1900
11.USE OF A DEADLY WEAPON OR TEAR GAS IN	193.165	Felony	01/01/1900

COMMISSION OF A CRIME.			
12.ROBBERY	200.380	Felony	01/01/1900
12.USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
13.OPEN OR GROSS LEWDNESS	201.210	Gross Misdemeanor	01/01/1900
14.BATTERY WITH THE USE OF A DEADLY WEAPON AND SUBSTANTIAL BODILY HARM	200.481-2E2	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

03/27/2012 **All Pending Motions** (9:00 AM) (Judicial Officer Silver, Abbi)
Evidentiary Hearing and Deft's Petition for Writ of Habeas Corpus

Minutes

03/27/2012 9:00 AM

- EVIDENTIARY HEARING..DEFT'S PETITION FOR WRIT OF HABEAS CORPUS Ms. Lisa Luzaich, Esq. and Mr. Brad Turner, Esq. present on behalf of the State of Nevada. Also present Mr. Norm Reed, Esq. and Ms. Violet Radosta, Esq. COURT noted the Nevada Department of Corrections did not transport the Deft. to this hearing. Accordingly, COURT ORDERED, matter is CONTINUED. Mr. Turner advised he will have another Transport Order prepared for the next hearing. Ms. Kice requested several procedural matters be addressed. COURT ORDERED, request is GRANTED. Ms. Kice advised she has received the discovery from the Deputy District Attorney however there is a missing DNA report from California, which was not in the file. Mr. Reed indicated they had their expert look at that report so he believes it is in the file. COURT FURTHER ORDERED, State to produce a copy of the missing report for Ms. Kice. Additionally, Ms. Kice requested permission to supplement the Petition following her review of the report, if needed. COURT FURTHER ORDERED, request is GRANTED. Ms. Kice advised she has been told in the past that the Deputy District Attorney does not allow counsel to view a file post conviction and requests clarification on that issue. Discussion ensued. COURT FURTHER ORDERED, State to make their files available to Ms. Kice. Ms. Kice requested Indigent Defense funds for independent expert. COURT FURTHER ORDERED, request is DENIED as there was already an independent expert, Nora Rudin therefore another one is not necessary as this is not another trial. COURT clarified the issue is Ineffective Assistance of Counsel and that would be a question of whether or not the Deft's attorneys fell below the standard of care pursuant to the Strickland factors. Discussion ensued regarding resetting this matter, when all parties will be available. COURT noted Mr. Reed will be beginning a capitol murder case on 6/11/12. COURT further stated, the Court will accommodate Mr. Reed's schedule and, if helpful, we could begin at 8:00 A.M. with his testimony. COURT stated it will do the best it can to accommodate. NDC
CONTINUED TO: 6/11/12 1:00 P.M.

[Parties Present](#)

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ORIGINAL¹

CASE NO. C212968

DEPT. NO. XV

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs.

JOSEPH ALEXANDER
HENDERSON,

Defendant.

Reporter's Transcript
of
Evidentiary Hearing

BEFORE THE HON. ABBI SILVER, DISTRICT COURT JUDGE

MONDAY, OCTOBER 22, 2012

1:00 P.M.

APPEARANCES:

For the Plaintiff: Shannon Clowers, Esq.
Deputy District Attorney

For the Defendant: Stephanie B. Kice, Esq.

Reported by: JoAnn Melendez, CCR No. 370

JO ANN MELENDEZ - (702) 283-2151

Electronically Filed

LAS VEGAS, CLARK COUNT¹ 11/13/2012 12:05:57 PM²

1:00 P.M.

-000-

CLERK OF THE COURT

PROCEEDINGS

THE COURT: Okay. So we are now on the
record on State of Nevada versus Joseph Henderson.
Case No. C212968.

And let the record reflect that Mr.
Henderson is present, the Defendant, he's present,
represented by his attorney Ms. Kice. And for the
State, Ms. Clowers.

This is the time set for the
evidentiary hearing on the Defendant's petition for
writ of habeas corpus post-conviction relief. This
is the first post conviction.

MS. KICE: That's correct, Your Honor.

THE COURT: So at this time, I've read
the points and authorities, we're gonna have an
evidentiary hearing with their two attorneys.

We have Mr. Reed sitting here as
well as Ms. Radosta who were the trial attorneys in
the defendant's underlying case in front of Judge
Mosley.

All right. So at this time,

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VIOLET RADOSTA

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EXHIBITS

STATE'S EXHIBIT	MARKED	OFFERED	ADMITTED
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None

defense.

MS. KICE: Could we have Norm Reed,
please?

THE COURT: Sure. Does either side want
a motion to exclude or care to exclude?

MS. CLOWERS: (Negative nod of the head.)

No.

MS. KICE: I think that out of an
abundance of caution I have an obligation to invoke
the exclusionary rule.

THE COURT: What I'm gonna do, now
there's been a motion to exclude, so we'll excuse
Ms. Radosta.

I don't know, who's the last lady
that just came into court? Can I get your name,
ma'am?

MS. KIM: I'm the victim.

THE COURT: What?

MS. KIM: I'm the victim.

THE CLERK: The victim.

THE COURT: Okay. Can you state your
name for the record?

MS. KIM: Julie Kim. Julie Kim.

THE COURT: Julie Kim?

MS. KIM: Uh-huh.

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1 THE COURT: Okay. And she's not gonna be
2 testifying, right? She's just observing, correct?

3 MS. CLOWERS: Correct.

4 THE COURT: Okay. All right, thank you.
5 Go ahead.

6 (Whereupon, Norman Reed was duly sworn to
7 tell the truth, the whole truth and
8 nothing but the truth.)

9 THE CLERK: Please be seated and state
10 your name for the record.

11 The witness: Norman Joseph Reed.

12 THE COURT: And we just had another
13 gentleman come in. Could I get your name for the
14 record, please?

15 MR. BERNZWEIG: Eric Bernzweig.

16 THE COURT: Okay.

17 MS. KICE: He's the other victim in this
18 case, Your Honor.

19 THE COURT: He's what?

20 MS. KICE: He's the male victim in this
21 case of the home invasion.

22 THE COURT: Okay. So he's also a victim
23 in this case, correct?

24 MS. KICE: That's correct.

25 THE COURT: So he won't be testifying, I
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1 won't need to exclude either one of them?

2 MS. KICE: No.

3 THE COURT: Okay, thank you.

4 MS. KICE: Your Honor, do you want me to
5 stand for this or is it okay if I sit?

6 THE COURT: You can go ahead and sit if
7 you feel comfortable.

8 MS. KICE: Okay.

9 DIRECT EXAMINATION

10 BY MS. KICE:

11 Q. Mr. Reed, thank you. I know this has
12 been set and reset several times. Just some
13 preliminary questions.

14 How long have you been an attorney?

15 A. Since 1989.

16 Q. How many jurisdictions are you licensed?

17 A. Just Nevada.

18 Q. Have you ever had any discipline issues?

19 A. Yes.

20 Q. Would you describe those for the court,
21 please?

22 A. I submitted to a voluntary disbarment and
23 was reinstated in 2003.

24 Q. What was that related to?

25 A. A conviction in federal court.

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1 Q. How many times prior to being licensed
2 did you take the bar exam?

3 A. Twice.

4 Q. How many trials have you done
5 approximately? I know you're not gonna know off the
6 top of your head.

7 A. I lost count at about 80 felony jury
8 trials.

9 Q. 80 felony jury trials. How many trials
10 have you won?

11 A. What do you mean by win?

12 Q. How many times did you get not guilty
13 verdicts on some or all charges?

14 A. Seven, maybe eight times at least.

15 Q. Okay. How many trials have you done that
16 revolved around DNA evidence?

17 A. Dozens.

18 Q. Dozens. Do you consider yourself to be
19 fairly competent when it comes to issues of DNA?

20 A. Depends on what you mean by fairly
21 competent. I don't know how to answer that
22 question.

23 Q. That's, that's a fair answer. Have you
24 attended any CLEs or extra training on DNA evidence?

25 A. Yes.

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1 Q. How many?

2 A. Two.

3 Q. How many hours total do you have in DNA,
4 forensic testing of DNA CLEs?

5 A. Oh, CLEs alone?

6 Q. Yeah.

7 A. About 15 or 16 hours.

8 Q. Okay. By the way you answered, it seemed
9 like there might be some additional classes that
10 you've taken.

11 Have you taken additional classes
12 beyond CLEs?

13 A. I have read up on this topic, I have
14 attended the conferences like I mentioned, we do a
15 lot of in-house training. And more importantly,
16 I've --

17 THE COURT: Hold on.

18 THE WITNESS: -- spoke --

19 THE COURT: Ms. Clowers, you can't text
20 as we're sitting here.

21 MS. CLOWERS: May we approach?

22 THE COURT: Yeah.

23 (Whereupon, the following proceedings
24 were had in open court outside the
25 presence of the jury panel.)

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1 MS. CLOWERS: I'm sorry. I swear I'm not
2 texting. I'm trying to get an advocate to come here
3 because I've dealt with these two victims here
4 before and they're still very emotional, just so you
5 know.

6 THE COURT: Okay. Go ahead and finish,
7 but otherwise this -- I don't expect either counsel
8 to be texting at table.

9 MS. KICE: I won't.

10 MS. CLOWERS: Thanks, judge.

11 THE COURT: Okay.

12 (Whereupon, the bench conference ended.)

13 THE COURT: All right. Just a moment.

14 MS. CLOWERS: Thank you, judge. Should
15 be good.

16 THE COURT: All right, thank you. Go
17 ahead and proceed.

18 THE WITNESS: Should I finish my answer,
19 Your Honor?

20 THE COURT: Please.

21 THE WITNESS: I've spoken to a number of
22 forensic DNA experts over the years and have learned
23 from them in actual cases that I've been assigned
24 to.

25 BY MS. KICE:

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1 Q. When did you come into this case? Were
2 you with Mr. Henderson from the moment he was
3 arrested until trial?

4 A. No.

5 Q. Okay. Do you recall when you first came
6 on the case?

7 A. Time wise or procedurally?

8 Q. Procedurally.

9 A. It was shortly before the trial started.

10 Q. Shortly?

11 A. In terms of maybe months.

12 Q. Okay. Less than three, more than six?

13 A. I would -- Ms. Radosta could probably
14 answer that better, but I would estimate probably
15 two-to-three months before trial.

16 Q. What were your responsibilities? Were
17 you lead counsel on this or were you co-chair?

18 A. I was second chair in this case.

19 Q. Second chair. So what were your
20 responsibilities as second chair?

21 A. To examine, interpret and attack the DNA
22 evidence.

23 Q. What were Ms. Radosta's responsibilities?

24 A. Everything else.

25 Q. Everything else. Okay. Who was your

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1 investigator from your office on this case?

2 A. I don't remember.

3 Q. Do you remember if there was one?

4 A. There is one assigned in every case. I
5 just wouldn't know who that is off the top of my
6 head.

7 Q. Okay. Do you recall reviewing, since
8 your primary responsibility was to examine,
9 interpret and attack DNA evidence, was -- would you,
10 would you recall ever reading any reports from an
11 investigator in this case?

12 A. I don't remember off the top of my head
13 that would have been related to DNA.

14 Q. Okay. Or related to anything?

15 A. Well, I read lots of reports, but not
16 from an investigator. And I would have only looked
17 at the ones that would have pertained to DNA. I
18 don't recall that happening.

19 Q. Okay. Since you read the case, you knew
20 there were potential co-defendants in this case?

21 A. Yes, but I didn't really know much about
22 that, but yes, I did know that there was potential
23 co-defendants.

24 Q. In your conversations with Mr. Henderson,
25 did he always maintain his innocence?

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1 THE COURT: Well, maybe this is a good
2 time that the defendant states on the record he's
3 waiving his attorney/client privilege.

4 You are for purposes of this
5 hearing; is that correct?

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: All right.

8 THE WITNESS: Again, Ms. Radosta would be
9 probably best to answer this question. I would say
10 the simple, the simple end of that question is no,
11 he really didn't maintain his innocence throughout
12 all of our conversations.

13 BY MS. KICE:

14 Q. And how did he not maintain his innocence
15 throughout your conversations?

16 A. There were some admissions that were made
17 prior to trial concerning him being present, but not
18 necessarily participating in the sexual assault.

19 Q. And when did he make those
20 representations?

21 A. It had to be right near calendar call or
22 thereabouts.

23 Q. Did you memorialize those?

24 A. I did not memorialize those myself, no.

25 Q. When you, you may or may not recall this,

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1 the physical description that's initially given of
2 the assailant of the sexual assault differs greatly
3 from Mr. Henderson.

4 Do you recall that?

5 A. Yes. As I recall, there wasn't, there
6 wasn't any real positive identification from either
7 of the victims of the assailants.

8 Q. Of two of the assailants --

9 A. That's correct.

10 Q. But one was, one came to the door
11 unmasked and two masked individuals came in the
12 house?

13 A. That's correct.

14 Q. Is that your recollection?

15 A. That sounds correct, yes.

16 Q. So the victims could in fact identify one
17 of the assailants?

18 A. Yes.

19 Q. But not all three?

20 A. Yes.

21 Q. Okay.

22 A. That's correct.

23 Q. And the initial police reports listed
24 directly after the incident that the female victim
25 described her assailant as being five foot, eight

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1 and medium built.

2 Do you recall that?

3 A. I don't remember the specifics, but I
4 take your word for it if that's in the discovery.

5 Q. Okay. And because Mr. Henderson is
6 approximately six feet tall and about 230 pounds,
7 there's a big discrepancy in the original
8 description versus his physical characteristics?

9 A. Yes.

10 Q. So essentially this case came down to
11 DNA?

12 A. Yes.

13 Q. Mr. Henderson had a number of previous
14 convictions which are both in Nevada and California.

15 They were all -- do you recall what
16 they were for?

17 A. No, I don't. I just know he had
18 convictions.

19 Q. Okay. They were all for midlevel to low
20 level drug related activity. In your experience,
21 since you are so well versed in DNA, I assume that
22 you do a lot of sexual assault cases?

23 A. No, I do murder cases.

24 Q. Murder cases?

25 A. Yes. At this point, yes.

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1 Q. In your experience in dealing with
2 defending individuals, is it unusual for someone to
3 commit a sexual assault with sort of no lead up in
4 their 30s?

5 A. Yes, that is unusual.

6 Q. Okay.

7 MS. CLOWERS: And, judge, just for the
8 record, his priors don't just include drugs.
9 There's gun charges as well. So I don't want to
10 just put out there that some person who just deals
11 in drugs never --

12 THE COURT: You'll have time to
13 cross-examine and you can certainly follow-up.

14 MS. CLOWERS: Okay.

15 THE COURT: He said he didn't remember
16 what the convictions were for and then she just
17 asked him were some of them for X, Y and Z.

18 So your objection will be -- I don't
19 even know if it's an objection.

20 MS. KICE: I'll clarify, Your Honor, for
21 the record.

22 THE COURT: I think she's saying the
23 objection will be like a misrepresentation of the
24 facts.

25 MS. KICE: And I'm not. That not
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1 necessarily is not true.

2 THE COURT: So what I'll do is just since
3 I was not the trial judge and I don't know what his
4 convictions are, I will overrule that objection and
5 I'll just allow both sides to more completely
6 question regarding the priors.

7 MS. CLOWERS: Thank you, judge.

8 THE COURT: Thanks.

9 BY MS. KICE:

10 Q. Do you recall him having priors for
11 sexual assault?

12 A. That I was certain he did not have, yes.

13 Q. Okay, thank you. And I apologize if I
14 may not have stated it correctly. It certainly
15 wasn't my intention to be dishonest.

16 Since it was your responsibility to
17 examine, interpret and attack the DNA, if there were
18 any alibi witnesses that Mr. Henderson would have
19 had, that wouldn't have been within your purview for
20 the trial?

21 A. That's correct. I would have talked to
22 Ms. Radosta about it, but that would have been up to
23 her to examine and decide whether that was worthy of
24 presentation.

25 Q. Okay. In the box of material that I
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1 received from the PD's office, there were a lot of
2 documents related to investigation against one of
3 the dentists in the practice of the male half of the
4 victims in this case.

5 Do you recall what that was related
6 to?

7 A. No, I don't. I don't know off the top of
8 my head.

9 Q. And that might be a better question for
10 Ms. Radosta?

11 A. Yes. I'm certain that that was her, her
12 job to look into that.

13 Q. Okay. Since the DNA was your specific
14 area, there were -- do you recall that there were
15 two crime scenes associated with this case?

16 A. I didn't remember that off the top of my
17 head. Oh, you mean within the residence is what
18 you're talking about?

19 Q. No. I mean there were two crime scenes.
20 One was in the house and then after the male victim
21 went to his dental office.

22 A. I don't remember the second --

23 THE COURT: Hold on.

24 THE WITNESS: -- location.

25 THE COURT: I'm sorry, sir. You can't
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1 raise your hand, you can't shake your head. And I
2 apologize. And I know that it's difficult, I'm
3 sure, to listen to any testimony in any proceeding,
4 but it's disruptive to the witness that's up here
5 and it's disruptive to the Court. So --

6 MR. BERNZWEIG: Even if the information
7 isn't correct?

8 THE COURT: This is a post-conviction
9 relief hearing for ineffective assistance of
10 counsel. And so there are certain things that the
11 Court is looking at as far as whether or not these
12 people have been ineffective. So what you think may
13 be important as far as facts may be absolutely
14 irrelevant to these proceedings.

15 Have you spoken to anybody from the
16 district attorney's office prior to this proceeding?

17 MR. BERNZWEIG: Meaning?

18 THE COURT: About what this proceeding
19 involves?

20 MR. BERNZWEIG: No. Let's just move on.
21 I'm sorry.

22 THE COURT: Okay. What will happen is I
23 know Ms. Clowers called, that's what she was doing
24 when she was texting. She was texting for a victim
25 advocate, although I'm not sure they understand what
JO ANN MELENDEZ - (702) 283-2151

1 this is involved, but at the next break, I'm sure
2 Ms. Clowers can talk to you what this hearing
3 actually entails.

4 And it's not reliving the facts of
5 the case necessarily. It's whether or not the trial
6 counsel during the proceedings at trial were
7 ineffective to where the district court must grant a
8 new trial. That's what this evidentiary hearing is
9 about. And she can go into that more with you
10 later.

11 MR. BERNZWEIG: Okay.

12 THE COURT: So thank you. Thank you. Go
13 ahead.

14 THE WITNESS: I believe I answered the
15 question. If I didn't, would you just please repeat
16 it.

17 BY MS. KICE:

18 Q. I don't recall what your answer was.
19 Sorry.

20 A. Could you repeat the question?

21 Q. Do you know that there were, there were
22 two event numbers associated with this case?

23 A. I wouldn't know that off the top of my
24 head.

25 Q. There's 040903-152 and 040903-0158.
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1 There was evidence collected at the residence and
2 then there was evidence collected at the male
3 victim's dental office.

4 A. I don't remember that second part.

5 Q. Eventually those two event numbers are
6 evidence collected from one scene and the other
7 scene are mixed together.

8 Do you recall that at all?

9 A. No, not specifically. I can only testify
10 as to what the normal practice is. Each time that
11 there's a call out to Las Vegas Metro, there would
12 be a new event number placed, but that when we go to
13 obtain discovery the search would cover multiple
14 event numbers and discovery would be produced based
15 on multiple event numbers.

16 Q. Certainly. Is it customary that evidence
17 from two different locations would be mixed
18 together?

19 A. I don't know what you mean by mixed
20 together. Like in our file, in discovery?

21 Q. In a file, in discovery, in the evidence
22 vault.

23 A. I'm not even sure how to answer that.
24 Every lawyer organizes their file in different ways.
25 I mean, I have some people's files look like they,
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1 they've never been looked at at all, but yet the
2 lawyer knows where everything is. I don't even know
3 how to answer that question.

4 Q. Okay, fair enough. Did you at any -- any
5 of the evidence that you were in charge of, for a
6 better, lack of a better word, did you challenge the
7 admission of any of the evidence that was going to
8 be admitted against Mr. Henderson?

9 A. In terms of like a search warrant?

10 Q. Like chain of custody.

11 A. No.

12 Q. Search warrant, anything like that?

13 A. No. The only thing that was challenged
14 that I recall, because this was my responsibility,
15 is there was a rebuttal expert witness that we
16 objected to, asked for time to, on DNA that we asked
17 for time to consult with our expert on. And that
18 was denied. But that was the only evidentiary
19 challenge that I recall to the DNA part of the case.

20 Q. Okay.

21 THE COURT: Let me expand on that because
22 I wasn't the trial judge. When you say that
23 there's -- you had asked a rebuttal expert witness
24 testify in the proceedings --

25 THE WITNESS: Right.

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1 THE COURT: -- at trial?

2 THE WITNESS: Let me explain, judge.

3 What happened is that the original forensic examiner
4 from Metro testified, we cross-examined that.

5 THE COURT: Who was that?

6 THE WITNESS: I don't recall the name off
7 the top of my head.

8 THE COURT: So their DNA expert
9 testified?

10 THE WITNESS: Yes. And we challenged
11 them through cross. And part of our challenge was
12 interpretation of the data.

13 And as the Court is well aware, they
14 use a peer review system. So the examiner
15 themselves has another person who basically double
16 checks their work. They put that person who checked
17 the supervisor on the stand over our objection. We
18 said it was prejudicial, that we didn't have an
19 opportunity to get any notes, reports or anything
20 from that person, nor did the trial judge give a
21 continuance to consult with our expert to see if we
22 could challenge that rebuttal expert.

23 So because we had challenged the DNA
24 expert, they put on the rebuttal to basically be
25 able to say, you know, two examiners looked at this

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1 data and both of them came up with the same result.
2 THE COURT: Was that other person who had
3 secondarily followed up, was that person also
4 endorsed as a witness?

5 THE WITNESS: I do not recall if they
6 were endorsed off the top of my head. This was
7 right along the time that the case law was coming
8 out about endorsing rebuttal witnesses.

9 There's a Nevada case that says now
10 they have to endorse. It was probably right around
11 that time. But we made that objection either,
12 either way that we didn't have notice to be able to
13 prepare to cross, but I don't know if they were
14 listed. It was before that case that discusses that
15 issue.

16 THE COURT: Okay.

17 THE WITNESS: So I hope that answered the
18 Court's question.

19 THE COURT: Yeah, it did. Thank you.

20 BY MS. KICE:

21 Q. There are a number of forensic reports
22 involved in this case. Specifically what you just
23 addressed, do you remember which report that dealt
24 with?

25 A. No, I don't. I know that the focus was
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1 on, on the DNA result of the alleged, of the alleged
2 sexual assault. I believe that's where they put on
3 the second examiner, but the record would speak for
4 itself. There's a trial transcript that would be
5 able to answer that question for you.

6 Q. When the initial SANE exam was done, the
7 SANE nurse doesn't find any sperm with a blue dye
8 test.

9 Do you recall that?

10 A. Yes.

11 Q. Okay. And then eventually there is semen
12 that is found in this case. Do you recall where
13 that came from?

14 A. Not off the top of my head. I'd have to
15 look at the file again to see.

16 Q. In the initial police reports, do you
17 recall that the victim claimed that that person who
18 assaulted her did not ejaculate?

19 A. That sounds correct. I don't -- like I
20 said, it's been many, many years and I've had a lot
21 of trials since. So I'll take your word for it if
22 it's in the reports.

23 Q. And that was at both sites according to
24 the initial report?

25 A. Both sites in terms of --

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1 Q. There's, there's two --

2 A. -- the dental office?

3 Q. There's two sexual assaults that take
4 place in the home.

5 A. That's correct.

6 Q. One is downstairs and then one is
7 upstairs.

8 A. In the bedroom, yes, that's correct.

9 Q. Do you recall in the initial police
10 report that there is no allegations of ejaculate at
11 either location?

12 A. I'll take your word for it. I don't
13 remember if it was in both sites. So I'll take your
14 word for that.

15 Q. Eventually Ms. Guenther testifies that
16 she has Mr. Henderson's semen on file.

17 Do you recall that?

18 A. Has it on file. I think she had a DNA
19 profile. I don't believe -- I don't know if she had
20 semen on file.

21 My understanding is she had a buccal
22 swab which would have been taken by rubbing the
23 mouth with a Q-Tip and that that was the
24 standardized sample from your client.

25 Q. There is a profile mixture of that
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1 obtained from a bed sheet.

2 Do you recall that?

3 A. Yes. That's correct.

4 Q. Did you -- how did you challenge the
5 mixture issue on that?

6 A. How we challenged the mixture issue?

7 Q. Yes.

8 A. Well, I'd have to speak more generally in
9 terms of all of the DNA.

10 Q. Okay.

11 A. But it's our practice, and the reason why
12 I was called into this case was I had a little bit
13 of experience with this, this topic, and we needed
14 to have someone look at the DNA.

15 So our first step was to make sure
16 we subpoenaed all of the forensic lab's records for
17 the DNA testing that was done by the Las Vegas
18 Metropolitan Police Department.

19 There was also a CODIS hit that came
20 up. And that was investigated as well.

21 So all the data was sent to Norah
22 Rudin who is a forensic DNA consultant that we
23 hired. Norah's worked with us many times in many
24 cases. She's very competent, very good at what she
25 does. And very good at explaining things to us.

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1 So her first order of business was
2 to examine all of those materials and determine was
3 the process -- was the scene processed correctly,
4 was the DNA collected properly, and was it examined
5 properly.

6 If there's any issues regarding
7 retesting, she would let us know, you know, and then
8 we would consult with her at that point and then
9 take it from there.

10 So once she received all the
11 materials, it was a matter of just consulting with
12 her and then making some decisions from there about
13 what to do next.

14 Should I continue?

15 Q. Please.

16 A. So she started with going through all the
17 records, including the items that we spoke of and
18 said that the best avenue --

19 THE COURT: Hold on for a second. Sorry.
20 This is not -- this is the whole issue, okay.

21 MS. CLOWERS: I understand, Your Honor.

22 THE COURT: So this is probably not the
23 best time for you to be talking to a victim
24 advocate. Because as I furiously type, both sides
25 are gonna be making orders, and this is the issue on
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1 post-conviction right here so.

2 MS. CLOWERS: I apologize. I had this
3 conversation with Mr. Reed.

4 THE COURT: Why don't we have you start
5 with after --

6 MS. KICE: Your Honor, just to make this
7 easier for everyone, is it okay if we take a break,
8 let Ms. Clowers speak to the victim advocate?

9 THE COURT: No, it's not.

10 MS. KICE: Okay.

11 THE COURT: This is the time set for
12 hearing. With all due respect to Ms. Clowers, I'm
13 looking at a motion for post-conviction relief, and
14 it's clearly based on DNA and he's talking about DNA
15 and I got a prosecutor walking over.

16 I need to have everybody listen
17 because there's gonna be an order by either side and
18 it's gonna be done by both sides. So this is the
19 crux of it.

20 Mr. Reed, slow down for me because
21 I'm taking as much as I can as far as the notes that
22 I need to take right now.

23 So why don't you go after Ms. Rudin
24 examines it and looks at the reports and you consult
25 with her.

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1 THE WITNESS: Yes.

2 THE COURT: Tell me what happens then.

3 THE WITNESS: Okay, judge. Just to make
4 sure we're clear, what Ms. Rudin receives is
5 actually the entire forensic file.

6 And so a lot of times, and in this
7 case we'll get a copy of it, but the lab at that
8 time was sending, Metro's lab was sending it
9 directly to our expert consultant.

10 And so basically it allows her,
11 absent the actual physical testing, to be able to
12 input all the data, to basically look at exactly all
13 the data that Metro's forensic lab had, and to be
14 able to then do her own interpretation of it.

15 And that is where the consulting
16 really becomes more interesting in this case.
17 Because her job is to, you know, first to decide was
18 the testing procedures done correctly. And in this
19 case she found that they were; was the
20 interpretation of the data correct.

21 And this is where it is a little
22 complicated because the shortest way to answer that
23 part of it is the ultimate conclusion that was
24 reached by the Metro examiner she agreed with.
25 There were, however, in terms of analyzing

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1 particular parts of the data, there were some areas
2 we could challenge.

3 The way I would understand it as a
4 lay person is both experts got to the end of the
5 same road she, meaning Ms. Rudin, probably would
6 have made a couple of different turns, but ended up
7 in the same -- at the, the same location at the end.
8 That was the area we could focus on in terms of
9 being able to cross-examine their forensic experts.

10 There is, there is -- as the Court
11 probably is aware, in the DNA there's some
12 subjectivity to it in terms of if there is
13 particular alleles, that is the presence of possible
14 DNA, below the RFU which is a threshold that's
15 established by the lab, our expert can dig into
16 those and say these peaks might be the existence of
17 another mixture or another person possible source.
18 And so that was the primary area where we could
19 focus.

20 However, like I said in the end, it
21 would, there would have been no way to put Ms. Rudin
22 on the stand because she would have had to say,
23 while I disagree with some of the interpretation, I
24 agree with the overall results, including that
25 portion on the bed sheet.

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1 THE COURT: So she agreed with the DNA
2 conclusion?

3 THE WITNESS: Yes.

4 BY MS. KICE:

5 Q. And if I remember correctly, we've spoken
6 about this before and that's why you ultimately
7 chose for Ms. Rudin not to come in and testify,
8 correct?

9 A. Yes. So her role was for us to
10 cross-examine the State's experts. We didn't bring
11 her physically to the courtroom to do that, but
12 spoke to her on the phone multiple times, exchanged
13 information. We had a pretty well thought out cross
14 for what we could cross on.

15 Q. And she actually provided you with a list
16 of cross-examination questions; is that correct?

17 A. She did.

18 Q. Okay. Now, you said that there were
19 several areas not, maybe settled is not an accurate
20 representation of what you said, there were some
21 areas that you could challenge?

22 A. That is correct. And one of them you
23 identified is any time there's not a single source,
24 and I believe, if I recall, there were some single
25 source samples here and there were some mixtures,

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1 which are dealing with generally with DNA is in a
2 single source, it's usually if there's enough DNA
3 data, they could mix very strong conclusions about
4 the DNA. Typically that it is eight or nine or even
5 10 times the world's population in terms of their
6 certainty of that single source being that
7 individual.

8 When you get into mixtures, the
9 numbers are, are a lot less and a lot more
10 unpredictable because there's several different
11 people that could or could not be in the source and
12 so the numbers mathematically aren't as strong.

13 And then you have the third variable
14 which is where you have a mixture, but you have a
15 major and a minor contributor. That is the expert
16 is able to pull out and say this particular portion
17 of that sample is this person or is likely this
18 person and then make conclusions about the minor
19 contributor or contributors. And so when you have a
20 mixture sample like you have here, it is a good area
21 to attack and that's where the cross-examine
22 focused.

23 THE COURT: This was a major and a minor
24 mixture you're saying?

25 THE WITNESS: I believe there was, there

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1 was both. There was some where there was mixtures,
2 just a mixture, and there was some where there was a
3 major, minor contributor.

4 And I know, if I recall correctly,
5 there were single sources too because there was a
6 lot of different DNA, but the report I'm sure speaks
7 for itself.

8 BY MS. KICE:

9 Q. Okay. When you said that you sent Ms.
10 Rudin the complete forensic file -- let me just
11 backtrack a little bit.

12 Mr. Henderson was not identified
13 initially through Nevada?

14 A. That's correct. It was a CODIS hit out
15 of California.

16 Q. Okay. What information did you receive
17 from CODIS as to how he was matched?

18 A. There -- my understanding of the way it
19 was matched is -- well, let me back up. The Court
20 knows what CODIS is. So we -- a CODIS hit could
21 come from any jurisdiction.

22 It was unusual that the CODIS hit
23 did not come from Nevada because Mr. Henderson's
24 DNA, because he has a conviction in Nevada, should
25 have been present in the system from reporting from

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1 Nevada, but the CODIS hit came from California.

2 And the policy is that when you get
3 a CODIS hit, the CODIS hit then notifies the lab in
4 which the source came from.

5 So in this case Nevada would have
6 been notified. At that point, it's Nevada's
7 responsibility to do an independent exam, an
8 independent examination of the evidence a manual
9 comparison and then go from there.

10 So in other words, the CODIS is only
11 a probable cause determination. It is not a
12 conclusive determination.

13 Does that answer your question?

14 Q. And was that done?

15 A. That was done. And we did have a review
16 and discussion with our expert concerning the CODIS
17 hit. And that also became an issue at trial as
18 well.

19 Q. Okay. What do you recall about that at
20 trial?

21 A. I recall that the -- when we approached
22 the prosecutor, obviously the prejudice would be,
23 you know, two-fold. We have a CODIS hit from an
24 independent lab that the prosecution didn't want to
25 call and you'd have to identify Mr. Henderson as

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1 being a felon in order to establish the CODIS hit.

2 So the prosecution, with our
3 request, agreed we'd eliminate any discussion of
4 CODIS at all and we would only focus on the manual
5 comparison done here in Nevada.

6 Q. So did you do any sort of independent
7 review or attempt to find out about the lab in
8 California that processed this sample?

9 A. The only thing I do recall is discussing
10 it with Norah Rudin. And her discussion with us was
11 what they did in California is -- was inaccurately
12 done and obviously you'd have two labs then
13 basically coming to the same conclusion.

14 Q. Okay. And what did she base that upon?

15 A. Whatever information was provided to her.
16 I don't recall exactly what it was, but she was
17 aware of the California CODIS hit.

18 Q. Okay. Was she specifically aware of
19 their testing procedures, their, the manner in which
20 the DNA was collected? What information was given
21 to Ms. Rudin about the California?

22 A. I don't recall exactly. I would presume
23 that she had -- well, I know that she -- just
24 generally speaking, she told taught us about the
25 procedure in CODIS, but also she may have had the

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1 independent data, too. I just, I wouldn't be able
2 to say off the top of my head if she did or didn't.

3 Q. So to save a jury from hearing that Mr.
4 Henderson had been convicted of a prior felony,
5 which was not of a sexual nature, the CODIS people
6 weren't brought in to testify; is that correct?

7 A. That's not completely accurate.

8 Q. Okay.

9 A. That's only partially accurate.

10 Q. Can you clear it up for me? Because I'm
11 confused.

12 A. That part's true, but it's more than just
13 that. It's the fact that now you'd have two labs
14 that conclusively place Mr. Henderson at the crime
15 scene rather than one to attack.

16 Q. Okay. I understand what you're saying
17 now. Sorry. I lost my place on my --

18 THE COURT: And just so the record's
19 clear, Norah Rudin did in fact review the CODIS DNA
20 information from California?

21 THE WITNESS: Yes. And what counsel was
22 asking --

23 THE COURT: Right.

24 THE WITNESS: -- is whether she had all
25 the specifics.

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1 THE COURT: Right.

2 THE WITNESS: I don't know exactly what
3 she had, but we were aware of the CODIS hit from
4 California. We did --

5 THE COURT: Did she have any of the
6 reports from the CODIS hit?

7 THE WITNESS: I'm pretty sure she did
8 because we had at least the general reports. But I
9 don't know if she got the, you know, the peak height
10 ratios and the specific data itself, but she had the
11 report and all the related information from that.

12 THE COURT: And the conclusion was it was
13 the defendant?

14 THE WITNESS: Yes.

15 THE COURT: All right.

16 BY MS. KICE:

17 Q. Was -- let me back -- we went through a
18 lot of my questions on my notes. So I apologize.

19 A. That's okay.

20 Q. Do you recall what is started to be
21 referred to as the good news e-mail in this case?

22 A. No. I'm not sure what you're talking
23 about.

24 Q. Okay. There's initial testing done on
25 the buccal -- buccal, buccal?

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1 A. Buccal.

2 Q. Buccal swab for Mr. Henderson, and it
3 talks about minor peaks. This is an e-mail from the
4 lab to the district attorney's office.

5 A. The lab, the Las Vegas Metro lab?

6 Q. Las Vegas Metropolitan lab.

7 A. Okay.

8 Q. And it talks about there being minor
9 peaks in the identification. And then the material
10 is tested yet again and the Las Vegas Metropolitan
11 Police Department lab was able to match him to one
12 in 600 billion people.

13 Do you recall that?

14 A. Not off the top of my head. If you maybe
15 showed me the e-mail or whatever you had, but I
16 know, I do recall that there was some issues
17 regarding minor peaks, but it'd be better if I can
18 review it if you want me to answer that specific
19 question.

20 Q. Okay. Hold on just a second. Okay. I'm
21 trying to pull it up on my computer. I apologize.
22 Okay. I can't, I can't find it right now. Let me
23 just -- let me move on and we'll come back that.

24 Is it your recollection that there
25 were a number of tests done on the forensic material

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1 in this case?

2 A. When you say a number, I do recall there
3 was more than one, but I wouldn't be able to say
4 there was like three or four or five.

5 Q. Okay. How many do you recall?

6 A. At least two.

7 Q. At least two?

8 A. Yeah.

9 Q. Okay. And at some point in time there
10 was a motion made to retest the DNA. Do you recall
11 that?

12 A. I do.

13 Q. And what was the result of that?

14 THE COURT: Wait. Hold on. Let me ask,
15 who's motion was it? The defenses?

16 THE WITNESS: It was the defense's
17 motion. It was filed by Violet before she consulted
18 with me on this case.

19 BY MS. KICE:

20 Q. Okay. Well, do you know what the result
21 of that was?

22 A. We never did the retesting. And we did
23 everything we could to make sure that somehow people
24 forgot about that motion because there was no basis
25 to retest because our expert said don't retest.

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1 Q. Okay. But was that done before Norah's
2 conclusions were --

3 A. That's correct.

4 Q. -- or Dr. Rudin's conclusions?

5 A. And Ms. Radosta can speak of that more
6 specifically about what the court was asking of her
7 and why she filed that motion, but I can tell you
8 that there was no retesting done because our expert
9 advised against it.

10 Q. Okay.

11 THE COURT: Let me follow-up. If there
12 had been a retest done, you would have had to turn
13 that over to the State, correct?

14 THE WITNESS: If we intended on using it
15 in trial, that's correct, Your Honor. If we
16 didn't -- you know, we retest things all the time as
17 the Court knows. And if the evidence were to be,
18 you know, not favorable to the defense, we wouldn't
19 turn it over, but the statute does require if we're
20 gonna introduce it in our case-in-chief, we have to
21 turn it over.

22 THE COURT: Was that part of the
23 consideration as to why you didn't want to retest
24 it?

25 THE WITNESS: Absolutely.

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THE COURT: All right.

BY MS. KICE:

Q. Okay. Do you know whether or not there's still forensic material in this case to be tested?

A. I wouldn't know that off the top of my head, but I can tell you the procedure with the lab for these types of cases is that they will actually maintain additional swabs for retesting. It's their standard protocol. I don't know the condition of the samples, but I'm sure you can check with the lab and find out.

Q. Do you know if extractions can be retested?

A. Extractions can be retested, but typically what the lab will do, and like I said, this is getting a little beyond my area of expertise but we talked about this with Norah, they're better off taking the original sample and doing the extractions again rather than using a preserved extraction because of aging.

Q. Correct.

A. So typically they'll use the original sample, if it's properly preserved, re-extract and then retest.

Q. And the reason is over time there's some
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1 enough time. I don't think there -- 30 minutes, an
2 hour maybe, I don't know. It wasn't enough time
3 let's put it that way.

Q. And you don't recall specifically the plea negotiation?

A. I do not recall the specifics. Ms. Radosta probably even had that in writing I presume, but I know she'll recall it because it bothered us that we had to basically deal a potential life sentence case at the last minute.

And if I recall, the offer was a pretty good one for what we were looking at.

Q. Right.

A. But, you know, it's very difficult to -- and I understand Mr. Henderson's predicament if I was in the situation at the last minute.

And again, it's -- I don't know if it's any fault to anyone, but the fact of the matter is that that was troublesome that that offer came in at the last minute.

Q. Did you ask the judge, and I know it was Judge Mosley, but did you ask him for more time to --

A. Yes.

Q. And was that granted?

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denigration of the genetic material, is that why it's preferred to use the original over the extractions?

A. Potentially there's denigration, yes. Not exclusively, but potentially there is, yes.

Q. Okay. At some point in time there was a plea offer on the table in this case.

Do you remember when that was given to you?

A. I remember when it was given, but I don't remember the exact details of the deal. But what -- the reason why it stuck in my mind is because this was like right before we were getting ready to start trial. I think the jury was getting ready to come in, it was -- I tell you it's awful for Mr. Henderson that the deal came in when it did because it's very, very difficult as a defense lawyer to be talking about someone's life on the line when the jury's standing in the hallway. So I remember it was at the very, very last minute.

Q. Okay. And do you recall how much time you were able to spend with him discussing the possibility of multiple life sentences to be run consecutively versus a 10 on the bottom deal?

A. Not that much. I mean, it was, it wasn't
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A. No.

Q. In light of Missouri versus Fry and Lafler (phonetic) versus Cooper, do you feel that your performance meets the requirements of Strickland, given the time constraints and given the severity of the penalties, the time you were allowed to discuss with him?

A. It certainly would have been nice to have more time. I don't know. I'm not the one to make the decision about whether I did something wrong or not, but I certainly did not feel comfortable about the amount of time that we had.

It's extremely difficult to get a deal down for that kind of time with, you know, a half an hour or an hour.

Q. Okay. So over the course of our careers and everything that sticks with us, does it still stick with you that you didn't have enough -- that you don't feel that you had adequate time to discuss the potential plea negotiation with him?

A. Yes. And especially in light of the rest of my testimony which is I think that the DNA was conclusive and his chances of winning this case were almost nonexistent.

Negotiating this case was his best
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1 option. It's too bad we only had the last minute to
2 do it.

3 Q. And you did ask Judge Mosley for more
4 time and he didn't give you more time?

5 A. Yes. And, you know, when I say ask, I
6 don't know, we probably didn't put it on the record.

7 Q. Right.

8 A. It was probably through the bailiff
9 saying can you just give us some more time and the
10 judge jumping on the bench and saying we're going
11 now or never.

12 Q. And, Mr. Reed, I appreciate all the time
13 that you've --

14 A. Sure.

15 Q. -- to this today. I just have a few more
16 questions.

17 A. Sure.

18 Q. Were you aware of an individual named
19 Ahud Chaziza or Abdul Chaziza at any point in time
20 during this?

21 A. It doesn't ring a bell.

22 Q. Okay. Mr. Chaziza was arrested and
23 through a confidential informant at the DAs office
24 became aware of him and he was identified by both
25 victims as the individual who came to the door.

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1 You don't recall ever knowing
2 anything about him?

3 A. No. You should ask Ms. Radosta about
4 that. I don't recall that we had that information
5 at the time.

6 Q. Okay.

7 A. But she would know for sure.

8 Q. Okay. Can I ask for the Court's
9 indulgence for just a moment.

10 THE COURT: Yes.

11 BY MS. KICE:

12 Q. By the time that the motion to retest the
13 DNA had come before Judge Mosley, were you on the
14 case at that point in time?

15 A. Yes.

16 Q. Okay. And do you recall that Judge
17 Mosley was willing -- if there weren't original
18 samples to test, that Judge Mosley was willing to
19 dismiss this case? Do you recall that?

20 A. I don't recall that he said it in exactly
21 those words, but certainly we raised issues
22 concerning preservation of samples.

23 The problem that you have in this
24 case is that there were extractions and the physical
25 evidence at the time was available for retesting.

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1 Q. Okay. Do you recall having a
2 conversation with Mr. Henderson where you told him
3 that they couldn't retest extractions?

4 A. Couldn't retest extractions? I hope I
5 didn't tell him that because that'd be wrong.

6 MS. KICE: Okay. I don't have any
7 further questions, Your Honor.

8 THE COURT: Cross-examination.

9 MS. CLOWERS: Thank you, judge.

10 CROSS-EXAMINATION

11 BY MS. CLOWERS:

12 Q. I didn't try this case with you; is that
13 correct?

14 A. That's correct.

15 Q. And you tried this case in August of 2008
16 about four years ago?

17 A. I'll take your word for it. It's been
18 awhile.

19 Q. So some of your memory might not be as
20 fresh; is that fair to say?

21 A. That's true.

22 Q. And then just based upon your experience
23 in the office at the Public Defenders Office, you've
24 recently had two very successful cases; is that
25 correct?

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1 A. That's true.

2 Q. And you're relied upon at your office for
3 your experience and your knowledge in regards to DNA
4 cases?

5 A. Yes.

6 Q. And so you were brought into this case
7 for the very specific reason of your knowledge
8 regarding DNA?

9 A. Yes.

10 Q. So the other stuff surrounding the case
11 you might not have been as familiar with as the DNA?

12 A. That's correct.

13 Q. So whether or not somebody by the name of
14 Ahud Chaziza was currently charged and pending trial
15 while this case was, you might not remember that?

16 A. Yeah, I don't remember that.

17 Q. I just want to talk about that
18 negotiation real quick. And when it was offered,
19 did Mr. Henderson want to take it?

20 A. He rejected the offer.

21 Q. Okay. And as to the facts that you
22 remember them, if you remember them, and I apologize
23 if you don't, but the one person who was ID'd being
24 Mr. Chaziza was not wearing a mask, and I don't know
25 if you recall that, but your client, do you remember

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1 he was wearing a mask during the incident?

2 A. That's correct. That's one of the
3 reasons why the victims were unable to identify him.

4 Q. And when the preparation of this writ of
5 habeas corpus came forward, were you ever asked for
6 your file, your personal file, your notes or
7 anything of that nature?

8 A. Yes. We -- it's our normal policy to
9 give over everything to the new attorney in the
10 case. With respect to new defense counsel, I think
11 initially, usually they'll come to us and say, you
12 know, someone's here for the file, do you want to go
13 through it and give them what's appropriate.

14 Because I don't think she had all of our file
15 initially.

16 And so that's, that's just not -- I
17 apologize, but typically we make sure that the new
18 attorney gets everything and there were some things
19 we had worked on that were not provided.

20 Q. Do you remember during the pendency of
21 Mr. Henderson's case that he also had an open and
22 gross lewdness pending?

23 A. I did not remember that.

24 Q. And your experience with more than 80
25 jury trials, which means you've probably done

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1 thousands of preliminary hearings or just dealt with
2 thousands and thousands of cases?

3 A. Yeah, I've lost count. I don't know how
4 many. It's got to be somewhere in that
5 neighborhood.

6 Q. I don't know if that's a good or bad
7 thing, but let me ask you this: Often times the
8 victims will describe one person multiple ways;
9 taller, shorter, small or fatter, or even racial
10 tones can be different, is that fair to say?

11 A. Absolutely. Especially someone in a
12 stressful situation like a sexual assault.

13 Q. And so it's common in the cases that you
14 see that victims might not describe people as they
15 end up being?

16 A. That's very true.

17 Q. Now, you said you challenged the
18 admission of some of the evidence. You didn't
19 challenge any of the chain of custody; is that
20 correct?

21 A. No.

22 Q. If you recall?

23 A. I don't believe we challenged any of the
24 chain of custody.

25 Q. Would you have if you thought there was

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1 an issue?

2 A. Absolutely.

3 Q. When it comes to a CODIS hit, and I'm
4 gonna sound like I don't really know what I'm
5 talking about right now, but the lab here in Nevada
6 will actually get the information from California
7 and test it here; is that correct?

8 A. Kind of. The --

9 Q. Compare it?

10 A. The procedure is, is -- I already
11 answered this part of it, is, you know, CODIS hits,
12 it has the DNA of millions of individuals.

13 And then what happened here is the
14 initial testing came up with an unknown source. So
15 they did not -- Nevada put it into CODIS as an
16 unknown source. The hit came actually out of
17 California which like I said was an oddity because
18 his DNA should have been here.

19 Once the CODIS hit happens, they
20 notify the institution that requested. So it comes
21 back to Nevada, back to Metro saying we've got a
22 CODIS hit on Mr. Henderson.

23 At that point it's our -- it's
24 Metro's duty then to do a manual comparison. So a
25 buccal swab's taken, the source samples are tested

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1 directly to Mr. Henderson.

2 Q. And that's what happened to the best of
3 your memory in this case?

4 A. Yeah. I'm certain that part happened,
5 yes.

6 Q. And again, one of the reasons that you
7 didn't bring up the CODIS is one, the jury would
8 have found out perhaps that he was a felon?

9 A. That would be one of the main reasons,
10 yes.

11 Q. And the second you would have helped the
12 State's case by showing two experts had determined
13 it was his DNA; is that correct?

14 A. Exactly. And the risk we ran too is if
15 we bring in the CODIS people, it would also be -- we
16 don't know how their interpretation of the data
17 would necessarily be, other than we have two sources
18 with the same conclusion and we thought the better
19 strategy would be to have one examiner be attacked
20 with results that we knew rather than the unknown
21 and have two positive conclusions for the
22 prosecution.

23 Q. And then did Ms. Rudin -- that's her
24 name; is that correct?

25 A. Yes.

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1 Q. She's well-known in the area of DNA; is
2 that fair to say?

3 A. She's one of the nation's leading
4 experts.

5 Q. Your office used her quite a bit?

6 A. Still use her to this day.

7 Q. Okay. So you have a comfortability level
8 with her?

9 A. Absolutely.

10 Q. When she was reviewing all this
11 information for this trial, did she ever ask you for
12 more information that had yet to be provided by
13 either yourself or Metro?

14 A. Initially she did ask for information
15 because that happens a lot. We may not have the --
16 all the data. I think she asked for the CODIS
17 information, you know, that kind of thing, but when
18 we started the trial, I don't believe there was
19 anything that she asked for that we didn't provide.

20 Q. So she had been given everything she
21 needed to make the determination?

22 A. Yes.

23 Q. And she agreed with the conclusion,
24 although the road she took to get there was a bit
25 different than the DNA analyst here in Nevada?

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1 A. Yes.

2 Q. And based upon your experience, is it
3 unusual that there will be two sources of DNA in a
4 swab or something that's taken or collected?

5 A. You mean like a mixture?

6 Q. Sure.

7 A. It's not unusual at all to find mixtures,
8 no.

9 Q. And it's not unusual for there to be a
10 major contributor and a minor contributor; is that
11 correct?

12 A. No, no. On many of the cases that I've
13 seen, that will come up.

14 Q. Do you remember the exact results of the
15 DNA in this case?

16 A. I do not.

17 Q. Would it refresh your memory if I told
18 you -- do you remember that the facts are that she
19 was touched downstairs in the house and then taken
20 upstairs? You remember that, sir?

21 A. Yes.

22 Q. And downstairs she was touched on her
23 breasts, do you recall that?

24 A. Yes, I do.

25 Q. When she was taken upstairs, she was

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1 sexually assaulted on a bed. Do you recall that?

2 A. That was her testimony, yes.

3 Q. Okay. And do you recall that DNA was
4 taken from the sheets that were upstairs?

5 A. Yes.

6 Q. As well as during the SANE exam there was
7 DNA swabs collected as well?

8 A. Correct.

9 Q. Do you remember that the sheets, the
10 determination by the Metro lab was that the sheets
11 upstairs identity assumed 100 -- one in 600 billion
12 was the results that the DNA belonged to Mr.
13 Henderson?

14 A. Right. That was the single source I was
15 talking about.

16 Q. And do you remember the same for the swab
17 during the SANE exam belonged to him as well?

18 A. Yes.

19 Q. And then just talking quickly about the
20 breast.

21 THE COURT: Wait, wait. Hold on one
22 second. The sheets were the single source, and on
23 the sexual assault kit, was it -- where was it taken
24 from? Do you remember what part of her body it was
25 taken from?

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1 MS. CLOWERS: It was vaginally, Your
2 Honor.

3 THE COURT: It was the vaginal area?

4 THE WITNESS: Yes.

5 THE COURT: What was the mixture then?

6 THE WITNESS: Well, theirs you'd expect
7 it to be a mixture, but what they'll do is
8 genatome -- genome, genome, excuse me, testing.

9 And now I'm trying do the science
10 part, but basically what it is is they can, they can
11 eliminate male, female. So they can only do the
12 testing as to a male contributor and they can
13 eliminate the female part of it to an attempt to
14 separate out because obviously the victim's DNA
15 would be in her vaginal cavity. You know, that
16 would be unusual. So that's how they then separate
17 with the genome. They can identify only a male
18 source and get a more accurate source.

19 So basically it's a mixture, but
20 it's a single source when they genome test it
21 because they are eliminating any female DNA.

22 THE COURT: So that single male source
23 was also the defendant?

24 THE WITNESS: That's correct.

25 THE COURT: Okay.

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1 BY MS. CLOWERS:

2 Q. And that was also one in 600 billion; is
3 that correct?

4 A. Yes. Which is like seven or eight times
5 the world population identity assumed.

6 Q. And then as for the breast area, it was
7 also his identity assumed that one in 600 billion as
8 well?

9 A. That's correct. And it's the same thing
10 there in terms of separating out the DNA from the
11 female source and the male source.

12 THE COURT: And so there was DNA also
13 taken from her breast as well?

14 THE WITNESS: Yes, presumably. And I, I
15 think that the victim might have mentioned that the
16 assailant had licked her or -- in the chest area.

17 BY MS. CLOWERS:

18 Q. And that's your memory of that; is that
19 correct?

20 A. Yes. Which would then lead, you know,
21 saliva's a great source of skin, especially the
22 tongue running across surface is a great source or
23 epetheial cells which are skin cells.

24 MS. CLOWERS: I have no further
25 questions, Your Honor.

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1 determination by a court of law.

2 Q. Okay.

3 A. And so we had that data and then we had
4 the manual comparisons. And so the result in the
5 CODIS hit, if we were to allow it in, has a two-fold
6 problem; felony conviction as being the source of
7 the CODIS that he provided, and secondarily that it
8 would be another lab that made a conclusive decision
9 as to his identity. So that was the two.

10 Q. Okay. And I believe that is exactly
11 where I was going with that was CODIS could have
12 done more perhaps?

13 A. No. That's not, that's not how it works.
14 CODIS, CODIS only does what I just described for
15 you.

16 Q. Exactly what they did in this case?

17 A. That's it. You can't go back to CODIS
18 and say can you retest this or check your data or --
19 it doesn't work that way. If they get the hit, they
20 send it to the lab and they wash their hands of it.
21 They're done.

22 Q. Okay. And did you ever receive a
23 satisfactory answer as to why Mr. Henderson wasn't
24 in the Nevada database?

25 A. No, I didn't.

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1 THE COURT: Redirect.

2 REDIRECT EXAMINATION

3 BY MS. KICE:

4 Q. There was a question I had about the
5 CODIS. You said there was a representation made
6 that you didn't want the information from the
7 California lab to come in because it had
8 conclusively matched Mr. Henderson to the crime,
9 correct?

10 A. Right.

11 Q. Then you said something about some
12 information about CODIS or the procedures that you
13 could have done but you didn't do?

14 A. I did?

15 Q. At least that's what I recall.

16 A. I would hope that that wasn't the case.
17 That's not what I meant if that's what I said.

18 Q. Okay.

19 A. Do you want me to repeat my answer on
20 that? The CODIS hit was conclusive in this way:
21 CODIS says this is Mr. Henderson's DNA; however,
22 they always -- the caveat at the bottom is this is
23 done for probable cause purposes, the lab has to do
24 its own independent testing. The presumption is
25 CODIS doesn't want to be the conclusive

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1 Q. Okay. Did that call into question this
2 entire procedure?

3 A. No. Because we raised that with Norah.
4 We saw it and said is this a problem, why wouldn't
5 they have hit it. And the -- basically her answer
6 was I don't know, I don't know why they didn't catch
7 it, but all I know is California got it right.

8 Why Nevada didn't catch it, I don't
9 know, but it really, it kind of didn't matter in her
10 mind because the conclusion that California coupled
11 with Metro's retesting basically sealed her opinion.

12 Q. Okay. And just because I'm annoying,
13 why, why didn't you press to find out why he didn't
14 match in Nevada?

15 Because either Metro didn't take his
16 DNA correctly when they did the swab when he was
17 taken into prison or it wasn't uploaded right or
18 there's some problem with the database or there's
19 something wrong with how things are collected,
20 stored, maintained, matched, height, et cetera, et
21 cetera.

22 Why didn't you pursue that?

23 A. Because it wouldn't have mattered
24 according to our expert. California got it right
25 and then Metro got it right with the manual test.

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1 So we were -- it was much ado about nothing as to
2 why that was the case.

3 The focus of the cross was better on
4 the interpretation of the data. And what was found
5 in those minor peaks and below the RFU where there
6 could be another source or challenging the fact that
7 that's identity assumed by saying these particular
8 alleles are not interpreted correctly. And that's,
9 that's all we really had. It was a difficult cross.

10 MS. KICE: Okay, thank you.

11 MS. CLOWERS: May I just ask a couple
12 follow-up?

13 THE COURT: Sure.

14 CROSS-EXAMINATION

15 BY MS. CLOWERS:

16 Q. Didn't -- and I can't remember where I
17 learned this information. Didn't his DNA show up in
18 CODIS in Nevada after the fact?

19 A. It may have. I'm not certain of that. I
20 know that, that we talked to the examiner about this
21 because it seemed kind of odd. And she wasn't
22 familiar with how, you know, Nevada was uploading
23 information into CODIS. And we didn't ask the, the
24 Metro expert because it was, it was gonna be not an
25 issue because they manually came to the results.

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1 Q. So it wouldn't have changed the result of
2 the trial?

3 A. Not according to our expert.

4 Q. And is it possible that his DNA just
5 hadn't been entered into CODIS in Nevada yet?

6 A. That is possible.

7 Q. Is it, with your experience or if you
8 have knowledge that the Nevada DNA system,
9 especially in the metro jurisdiction, has or was
10 behind for very many years with entering DNA?

11 A. No system is foolproof about entering
12 DNA. So that's true.

13 MS. CLOWERS: Okay. I have nothing
14 further, judge.

15 EXAMINATION

16 BY THE COURT:

17 Q. Just a couple followup. How long have --
18 you stated you practiced law about 25 years.

19 How long have you been practicing
20 criminal defense work?

21 A. That whole time.

22 Q. 25 years?

23 A. Yes.

24 Q. And how long have you been at the Public
25 Defenders Office?

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1 A. 10 years.

2 Q. All right. And what unit are you
3 currently on?

4 A. On the homicide team currently.

5 Q. How long have you been on the homicide
6 team?

7 A. Eight years.

8 Q. So you're on the homicide team during the
9 time period by which this case was tried?

10 A. Yes, I was.

11 Q. And you just assisted as far as being the
12 co-chair with Ms. Radosta and helping in this DNA
13 area?

14 A. Yes. Because at that time especially
15 there was a lot more homicides that had DNA cases
16 than just a routine track case.

17 Q. This would be a sexual assault case,
18 right, SVU case?

19 A. At the time, our SVU unit didn't take
20 adult sexual assaults. That has since changed, but
21 I don't believe in 2008 they were -- it had to be a
22 child for that special unit to take it. Although
23 Ms. Radosta's on that team --

24 Q. Yeah.

25 A. -- now so she would probably know the

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1 answer to that. But my recollection was Ms. Radosta
2 was on the track at the time and that's how she got
3 assigned this case.

4 Q. About how many murder cases and sexual --
5 and/or sexual -- well, how many murder cases do you
6 think you've handled? Not just trial, but handled
7 in the time that you've been in your entire career.

8 A. Oh, hundreds.

9 Q. All right. And how many sexual assault
10 cases, even within the murder cases or just
11 otherwise, have you handled?

12 A. Primarily within the murder cases, I'd
13 say probably half of that.

14 Q. And Norah Rudin is the one, she's the DNA
15 expert that both your SVU and your homicide team
16 uses as a consultant in these cases?

17 A. She's one of them, but yes, she's worked
18 on a lot of cases with our office, yes.

19 Q. Where's she located out of, do you know?

20 A. I think it's California.

21 MS. KICE: California.

22 THE WITNESS: Los Angeles area I believe.

23 THE COURT: All right. And before you
24 leave the stand, can I ask, there were some other
25 issues, are you gonna be asking him or Ms. Radosta

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1 or can you just go over -- there's a couple other
2 issues regarding that he's raised in the
3 post-conviction such as validity of the search
4 warrant trial counsel failed to correct the PSI.

5 He's on the stand. You might as
6 well ask him a couple questions regarding that. If
7 he's already here, I don't --

8 MS. KICE: That's fine, judge.

9 THE COURT: I don't think it will take
10 more than 10 minutes to ask him a couple more
11 questions regarding what else has been raised in the
12 evidentiary hearing. I mean what has been raised in
13 the petition. Excuse me. For example, no bench
14 conferences were recorded.

15 MS. KICE: That's my favorite issue, but.

16 THE COURT: That's, that's your what?

17 MS. KICE: That's my favorite issue.

18 THE COURT: You'll notice mine are.

19 MS. KICE: I know. And I've always been
20 very impressed with that. I'm sorry, Your Honor, I
21 have to kind of scroll through this.

22 FURTHER EXAMINATION

23 BY MS. KICE:

24 Q. Why weren't the bench conferences
25 recorded?

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1 THE COURT: Sure.

2 BY MS. KICE:

3 Q. Was there a search warrant that was
4 issued in this case to get the buccal swab from Mr.
5 Henderson?

6 A. I don't recall off the top of my head.
7 Typically they do a search warrant to get it, but
8 they don't have to.

9 Q. They don't have to? Why don't they have
10 to?

11 A. Well, sometimes they can get it by
12 consent or depends on, and I don't recall if Mr.
13 Henderson was on parole or anything like that at the
14 time. I'm not -- I just don't remember, but there's
15 a lot of ways they can get that besides the search
16 warrant. If there was one, it should have, it
17 should have been in our file.

18 Q. Okay. Would it surprise you that there
19 was no affidavit in the file about getting a search
20 warrant?

21 A. No. It wouldn't surprise me at all.
22 Typically we'll just get the search warrant. And
23 then if there's an issue, we should raise that and
24 ask for that discovery as to the affidavit attached
25 to the search warrant.

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1 A. I don't have any idea.

2 Q. Is it standard policy at the time and in
3 that courtroom not to record bench conferences?

4 A. I don't know how many trials you've done
5 in front of Judge Mosley, but there are a lot of
6 conferences with Judge Mosley that might not be on
7 the record initially. But everything I thought was
8 material in every trial I've ever done with, with
9 Judge Mosley since like 1990 I think was my first
10 trial in there, he'll go back and put it on the
11 record or give you an opportunity to put it on the
12 record.

13 So his normal, whatever was said, if
14 it was material I would have presumed was put on the
15 record.

16 Q. If there was something that stood out to
17 you that you would have recalled, you would still be
18 able to remember that today since he did give an
19 opportunity to make a record?

20 A. He always gave me an opportunity to make
21 a record. I've never remembered Judge Mosley saying
22 you can't, you know, make a record about an issue,
23 even if he disagreed with me.

24 MS. KICE: If I can just have the Court's
25 indulgence just for a moment.

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1 MS. KICE: Sorry, Your Honor. Just one
2 more moment.

3 THE COURT: That's all right.

4 BY MS. KICE:

5 Q. And prior to sentencing, did you get a
6 chance to go over the PSI with Mr. Henderson?

7 A. I'm sure we did. I don't remember. Ms.
8 Radosta would be the best person to answer that
9 question.

10 Q. Okay. Are you aware of the case of
11 Stockmeier versus State?

12 A. Very much so.

13 Q. Are you aware of the consequences of
14 Stockmeier versus State?

15 A. The consequences? The consequences are
16 that you can not sentence someone with an incorrect
17 PSI. But that case came out long after this case
18 was sentenced.

19 Q. Okay. But you -- it is your best
20 recollection that either you or Ms. Radosta went
21 over the PSI with Mr. Henderson?

22 A. Yes. And it's our practice, too. I mean
23 before Stockmeier, we wanted, we wanted Mr.
24 Henderson to have a correct PSI. If there were any
25 issues, you know, we would normally bring them up.

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1 As far as how they are -- the only
2 difference I see now with Stockmeier in terms of how
3 I practiced it is a lot of times we would
4 interlineate or write things in the PSI only later
5 to discover that that wasn't effective.

6 So Stockmeier in my opinion only
7 basically solidified the idea that the correct PSI
8 ends up in the hands of the Department of
9 Corrections.

10 Q. And there's collateral consequences for
11 not having a correct PSI; is that correct?

12 A. Absolutely. It has to do with
13 classification, parole. There's a lot of factors in
14 terms of a prison sentence. You want a correct PSI.

15 Q. Okay. And because this case was older,
16 when I requested the file from your office, is it
17 your understanding that I received everything that
18 you had in the file?

19 A. Not at the time. After the fact you did.

20 Q. After the fact, yes.

21 A. And I apologize for that. Hopefully
22 we've corrected that procedure. As you can
23 appreciate, we have a lot of people and a lot of
24 cases, but on any serious offense like this, it is
25 typically the assigned attorney that gets notified

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1 and then provides the file to the subsequent lawyer.
2 It's our responsibility. We fell down on the job on
3 that one. I apologize.

4 Q. At this point in time, are you confident
5 that I had everything that I needed?

6 A. Yes.

7 MS. KICE: That's all, Your Honor.

8 MS. CLOWERS: May I?

9 THE COURT: Go ahead.

10 MS. CLOWERS: Thank you.

11 FURTHER EXAMINATION

12 BY MS. CLOWERS:

13 Q. It sounds like you have a great deal of
14 experience, especially with search warrants; is that
15 fair to say?

16 A. Yes.

17 Q. You probably have a search warrant in
18 probably almost every case you've tried?

19 A. I'd say that's true.

20 Q. If not multiple search warrants?

21 A. Yeah, usually there's more than one,
22 especially in homicides.

23 Q. Have you ever raised an issue or taken
24 issue with a search warrant where the PC is based
25 upon a probable cause? Or I'm sorry. The PC is

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1 based upon a CODIS hit to then get buccal?

2 A. No.

3 Q. So you don't see any problem with that;
4 is that correct?

5 A. That's what I was trying to say, maybe
6 inartfully, is there's really -- there really isn't
7 a reason to search the affidavit. Because if the
8 probable cause is the CODIS hit, we had that
9 information and it's, it's more than probable cause
10 really. It's pretty conclusive.

11 Q. Okay. The Stockmeier case did change
12 things, how we do them procedurally; is that
13 correct?

14 A. Yes.

15 Q. Now we have the PSI's amended in the
16 paper form before somebody's allowed to be
17 sentenced?

18 A. That's correct.

19 Q. Previous to this, were there ever times
20 where you would review a PSI with somebody and find
21 an error and bring it up?

22 A. I've always tried to bring it up if it
23 was a legitimate complaint, that we'd either ask it
24 be amended, send a supplement, judges would
25 handwrite corrections on the PSIs. There was a

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1 variety of ways it was done.

2 Q. So Mr. Henderson faced hundreds of years
3 basically in prison in this case; is that correct?

4 A. That's correct.

5 Q. So you would have made sure that the PSI
6 was correct and to review it with him?

7 A. I would certainly hope so, yes.

8 Q. And that's your office policy?

9 A. Yes.

10 Q. And I assume it's your policy as just
11 being a good attorney as well?

12 A. Absolutely. It's important.

13 Q. Bench conferences, had the bench
14 conferences in this trial been recorded, would it
15 have changed the outcome of this trial?

16 A. Not based on my experience with Judge
17 Mosley. Because like I said, everything that I
18 thought was material was always put back on the
19 record.

20 Q. So as an experienced defense attorney,
21 you recognize and appreciate the value of a record?

22 A. I do. And the reason why I'm especially
23 in tune with that is Supreme Court Rule 250 which
24 governs death penalty cases, which I do a lot of,
25 requires that bench conferences be record.

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MS. CLOWERS: Thank you very much.

FURTHER EXAMINATION

BY THE COURT:

Q. Hold on. There's something. Is there anything that the defendant told -- do you recall -- let me strike that.

Do you recall anything the Defendant told you about his PSI that was incorrect at all that you needed to correct it to the judge?

A. Not off the top of my head. Like I said, Judge -- Violet Radosta probably did most of that part of it. So if there was anything, she would be able to address that better. I just don't remember. I'm sorry.

Q. And even if there had been no affidavit of the search warrant in this case regarding the buccal swab, do you think that would have changed the outcome in this particular case?

A. No.

Q. And why is that?

A. Because as long as they had a comparison sample, they would be able to make the same conclusions. They could have technically used the buccal swab that was sent up to CODIS or one from the prison system, but they independently did it

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just as a matter of procedure to be able to show that they took a fresh swab.

But as the Court knows, you know, DNA never changes. A buccal swab from 20 years ago is the same DNA that is presently in existence.

Q. Did you check over -- I know you and Ms. Kice have just been bantering back and forth regarding what was in the public defender's file.

Are you aware of what Ms. Kice now has in her file and do you feel that is sufficient for this hearing?

A. I didn't go through the whole file, but I can tell you that from the initial petition it looked like there was some conclusions, like we didn't do DNA.

And I again apologize, it wasn't given to her initially. So whatever we have was subsequently provided.

Q. That being perhaps the consultations with Dr. Rudin?

A. That's correct.

Q. So they didn't have that during -- either the defendant nor Ms. Kice had that during the initial petitions?

A. That's correct.

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Q. But subsequently you turned all of that over?

A. Yes, Your Honor.

THE COURT: Is there anything based on what I've asked, it's just what I noticed was in the petition just to make sure I've covered everything for this hearing, is there anything more that I've asked that either side wants to follow-up with? Ms. Kice.

MS. KICE: I have one follow-up question.

THE COURT: Okay.

FURTHER EXAMINATION

BY MS. KICE:

Q. Based upon the offer, I know you don't remember the specifics of the plea, possible potential plea negotiation, did it strike you as being something that Judge Mosley would not have accepted had Mr. Henderson agreed to it?

A. No.

THE COURT: No, I -- that is so, that is so beyond objectionable. I'm not gonna allow -- I mean, it's just so speculative, that question. So it's gonna be irrelevant.

MS. KICE: Okay.

THE COURT: Who knows what Judge Mosley
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would have done and there was just so much speculation.

The actual question you just asked was just so -- if you want to rephrase it you can, but what you just asked was so -- it was speculation upon speculation upon speculation, the actual question.

If you want to rephrase it. Maybe I'm just missing the point you're trying to make.

BY MS. KICE:

Q. Do you recall any specifics about the term of years of the plea agreement?

A. I don't, but I pretty confident that Ms. Radosta would.

Q. Okay.

A. I just remember there was an offer, it was at the last minute, we didn't have a lot of time to talk about it, and the jury was standing out there ready to go and that was it.

Q. Had you ever had a plea negotiation that Judge Mosley rejected?

A. No. But I mean, Judge Mosley, you would have to talk to him about a deal if it was a set deal, not if it was a range. But if you said hey, we're gonna agree on a particular sentence, a

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1 stipulated plea, and I think a lot of judges may do
2 this, you (sic) would like to have you discuss in
3 advance so we don't go through the steps of him
4 saying I'm just not gonna accept this plea. So that
5 would be his normal procedure.

6 Q. Okay.

7 A. But I've dealt with him.

8 Q. And I apologize for not asking that
9 correctly the first time. That's all.

10 THE COURT: Is there anything, Ms.
11 Clowers? Do you have anything else as follow-up?

12 THE COURT: No, Your Honor.

13 THE COURT: Are both sides -- can I
14 excuse Mr. Reed now?

15 MS. KICE: Yes.

16 MS. CLOWERS: Yes.

17 THE COURT: Thank you very much for your
18 testimony, Mr. Reed. And you're excused.

19 THE WITNESS: Thank you.

20 THE COURT: We'll call Ms. Radosta.

21 (Whereupon, Violet Radosta was duly sworn
22 to tell the truth, the whole truth and
23 nothing but the truth.)

24 THE CLERK: Please be seated and state
25 your full name for the record, please.

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1 THE WITNESS: Violet Radosta.
2 R-a-d-o-s-t-a.

3 DIRECT EXAMINATION

4 BY MS. KICE:

5 Q. Ms. Radosta, how long have you been an
6 attorney?

7 A. How long have I been an attorney in
8 Nevada or total?

9 Q. How long have you been an attorney total.

10 A. Since 1990. I'm sorry. Since 1994.

11 Q. Okay. And based upon that, how many
12 jurisdictions are you licensed in?

13 A. Two.

14 Q. And where's the other jurisdiction?

15 A. California.

16 Q. And when you became licensed in
17 California in 1994, was that the first time you took
18 the bar exam?

19 A. Yes.

20 Q. And you became licensed in Nevada in what
21 year?

22 A. 1995.

23 Q. Did you take the Nevada exam more than
24 once?

25 A. No.

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1 Q. Okay. Have you ever had any discipline
2 issues?

3 A. No.

4 Q. How long have you been at the Public
5 Defenders Office?

6 A. Since December '98.

7 Q. And what did you do prior to the public
8 defenders office?

9 A. I worked at the Las Vegas city attorneys
10 office as a deputy city attorney.

11 Q. And in your role at the city attorney's
12 office, were you in the civil or criminal division?

13 A. Criminal.

14 Q. Okay. So how long have you been
15 practicing criminal law?

16 A. Since October 1995 if you count the years
17 I prosecuted.

18 Q. Okay. How many trials have you done?

19 A. Uhm.

20 Q. Ballpark.

21 A. Ballpark, including nonjury trials, I
22 would --

23 Q. Let's stick with felony jury trials.

24 A. Felony jury trials, I would have to say
25 30 or 40.

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1 Q. Okay. How many of those have you won?

2 A. I really don't keep track like that. I'd
3 say maybe 10, 12.

4 Q. How many of the felony jury trials have
5 you done included --

6 A. And by won -- I'm sorry. By won do you
7 mean --

8 Q. Not guilty.

9 A. Across the board not guilty so I
10 understand?

11 Q. How many of them have dealt with issues
12 involving DNA identification?

13 A. Of all of the, the jury trials?

14 Q. Yes.

15 A. I don't know. Maybe eight or 10.

16 Q. Okay. When did you first come into Mr.
17 Henderson's case? Not necessarily time wise but
18 procedurally.

19 A. I would say I had the case at least a --
20 I'm gonna -- I have to guess. I would say at least
21 a year before he went to trial I was assigned to the
22 case.

23 Q. Okay. And in that year time frame, what
24 were your primary responsibilities on the case?

25 A. I was the, I was the person that was

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1 assigned to the case.

2 Q. Okay.

3 A. It was primarily, I was the only person
4 assigned to the case until I brought Mr. Reed in
5 however many months before trial was scheduled to
6 go.

7 Q. And how -- why did you bring Mr. Reed in?

8 A. For any number of different reasons.

9 Generally speaking, in the public defenders office
10 we're encouraged to do trials in pairs. So number
11 one, I needed a second chair; number two, I felt
12 that given the nature of the charges that it would
13 be helpful to have a male attorney as opposed to
14 another female attorney on the case.

15 And I had done others trials with
16 Norm and so I felt that that would be -- we already
17 had a good working relationship so.

18 Q. Okay.

19 A. Asked him if he was free during the,
20 whenever the trial was scheduled and he had the time
21 available.

22 Q. Okay. And he testified -- what were his
23 primary responsibilities?

24 A. Primarily I brought him in because I knew
25 he had been dealing with DNA on a couple of murder

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1 cases that were well-known within the office. So I
2 brought him in to help me with the DNA on this
3 particular case because this particular case in my
4 opinion, it all came down to the DNA.

5 Q. Okay. In the time that you the case with
6 Mr. Henderson, did he maintain his innocence?

7 A. Yes.

8 Q. Okay. Fully and completely?

9 A. That's a difficult -- there were
10 conversations that we had that -- there were
11 conversations that we had that he changed his
12 version of, of his defense to us.

13 So certain parts of the case he, he
14 told -- he gave us two different defenses at one
15 point in time.

16 Q. Were they the same version of I wasn't
17 there or?

18 A. No.

19 Q. Okay. Who was the investigator that you
20 hired on this case? I mean, who's the investigator
21 from your office on this case?

22 A. I don't recall.

23 Q. Okay.

24 A. I honestly don't recall. At this point
25 in time we were -- sorry. I don't recall. We

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1 always got so many different investigators in the
2 office. I'm trying to remember back to when I was
3 on that team who my investigator was. It might have
4 been -- sorry. I'm drawing a blank on his name.

5 Q. Okay.

6 A. Sorry.

7 Q. But are you confident that you had an
8 investigator in this case?

9 A. I don't recall if I had the investigator
10 do -- I myself had any investigation done in this
11 case.

12 Prior to myself being assigned to
13 the case, other public defenders in the office had
14 been assigned to the case because I know they had
15 some investigation done on the case.

16 Q. Such as?

17 A. There was some oddness to the facts of
18 the case having to do with the circumstances
19 surrounding how the individuals came into the house
20 and things that were said when they are were inside
21 the house that led I think all the defense attorneys
22 involved to think that there was something not told
23 to the police in this case.

24 The public defenders prior to me I
25 know explored that more than I did with their

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1 investigators.

2 Q. And that involved the, the victims -- one
3 of the victims didn't want to go to the hospital; is
4 that --

5 A. Yes. And also comments that were made
6 such as to the alleged -- from what I recall,
7 comments that were made to the alleged male victim
8 and male victim in this particular case of do you
9 want to know who sent us, do you want to know why
10 we're here, do you want to know what this is about
11 which caused us to believe that there was some
12 connection between the individuals that came into
13 the house and the people that were inside the house
14 or potentially mistaken identity of the victims that
15 were inside the house, if the people that came in
16 thought they were people that weren't.

17 But those parts of the case were
18 investigated prior to the case being assigned to me
19 by other public defenders that weren't in the
20 office.

21 Q. Okay. And in the file that I received
22 from you, there were a lot of information about the
23 male victim's partner in his dental office.

24 Do you recall what that was about?

25 A. No. That was stuff that I did not look

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1 into.

2 Q. Okay. So you knew that based on the fact
3 that there were potential co-defendant's in the
4 case?

5 A. Yes.

6 Q. Did you eventually become aware of the
7 fact that another individual had been arrested?

8 A. I knew that there was -- the fact, as I
9 recall them, is there were three individuals that
10 came into the house. The first individual who came
11 into the house did not wear a mask. That individual
12 was eventually arrested. The other individual who
13 was wearing a mask as far as I knew was never
14 arrested.

15 Q. Okay. Did you know the individual
16 without the mask?

17 A. Uh-huh.

18 Q. Did you know that he was arrested?

19 A. Yes.

20 Q. Okay. Do you recall his name? It's Abud
21 Chaziza or Chaziza or something like that.

22 A. Now that you say that, that sounds
23 vaguely familiar. I knew he had been arrested, I
24 knew the State was proceeding against him
25 separately, obviously in a separate trial than our
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1 case.

2 And I remember discussing it briefly
3 with Ms. Collins about the fact that he had also
4 been charged with sexual assault. And we were just
5 discussing more in the abstract that concept that
6 somebody was charged with sexual assault who
7 hadn't -- it wasn't alleged that they had
8 participated in any way, shape or form in a sexual
9 assault. So we were more discussing, like I said,
10 the abstract.

11 Q. Okay. Once you were aware of the
12 co-defendant's arrest, did you pursue any
13 investigation or conversation with him?

14 A. No.

15 Q. Okay. Even though Mr. Henderson said he
16 wasn't there?

17 A. Yes. I felt that the, the -- since the
18 DNA seemed to be the piece of evidence that was
19 putting him at the scene, that that wasn't the most
20 important thing for us to deal with, regardless of
21 what anybody else may have said.

22 If the, if the witnesses testify
23 that his DNA was at the scene, no matter what we
24 presented to the jury, if we weren't able to poke a
25 hole in the DNA, it wasn't going to do any good.

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1 Q. But you knew from Ms. Rudin's
2 conversations that there were -- there were some
3 problems with the DNA?

4 A. We were able to cross-examine on the DNA,
5 yes.

6 Q. Okay. And even though you knew you would
7 be able to cross-examine on the DNA, and if you were
8 able to punch enough holes in that, if you had had
9 information from a co-defendant that said Mr.
10 Henderson wasn't there, you chose not to pursue that
11 avenue?

12 A. I -- we did not interview the
13 co-defendant, no.

14 Q. Okay. Mr. Reed said that his main
15 responsibility was to attack -- examine, interpret
16 and attack the DNA.

17 Is that your recollection of how the
18 work load was divided?

19 A. When I brought him in at whatever point
20 in the case, yeah. I mean, I, yeah, had decided
21 that he had more experience with DNA than I did so I
22 asked him to take that portion of the case.

23 When I first brought him into the
24 case, it was our belief that we were also going to
25 be creating more of a defense involving the actual

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1 alleged crimes and going after the alleged victims
2 more.

3 And as we got deeper into the case,
4 we decided that that was not going to be a winning
5 strategy so it became much more about the DNA.

6 Q. But going into it, you, you felt that
7 there was a defensible strategy -- you could defense
8 the case on the DNA with the cross-examination.

9 Was that your recollection of the --

10 A. I felt that that was the only defense
11 that we could put on that could -- that -- I felt
12 that was the only defense we could put on that would
13 convince a jury that he did not commit the crime.

14 Q. Okay. Because in fact that's the only
15 thing that tied him --

16 A. Right.

17 Q. -- to the crime scene?

18 A. Absolutely. And the -- if I remember
19 correctly, and I'm talking off the top of my head
20 here, but I believe the DNA was a perfect match. So
21 I mean, but I could be wrong. I could be crossing
22 my cases.

23 So I mean in the end if the, if the
24 jury heard that, like I said, any, any -- anything
25 else we put forward, if it was just gonna be -- the

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1 State would be able to stand up in closing and say
2 yes, but his DNA's there, but his DNA's there.

3 Q. Were you aware that Mr. Henderson had
4 prior felony convictions?

5 A. Yes.

6 Q. Okay. Do you recall what they were for?

7 A. No.

8 Q. Do you recall if any of them were for
9 sexual crimes?

10 A. I'm pretty sure that they were not.

11 Q. Okay.

12 A. Actually if I, I want to say they were
13 drug related but -- or even nonviolent.

14 Q. Okay. But you don't recall any drug or
15 sex convictions?

16 A. No, no, no. Because the conversations
17 about, about potential penalties would have been
18 completely different if he had priors for sex.

19 Q. And is it in your training and experience
20 was defendant's since you are on -- you're on the
21 special victims team now at the --

22 A. Yes.

23 Q. -- at the PD's office?

24 A. I wasn't at the time that I tried this
25 case, but yes, now I am.

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1 and we were like well, is this near your birthday,
2 is this near anybody you know, anything, any point
3 of reference where we could use it as a jumping off
4 point as to where were you. And we weren't able to
5 come up with any specificity as to where he was on
6 that particular date.

7 Q. Did you ask if he had a cell phone?

8 A. No. Not that I recall.

9 Q. Okay. At what point in time in your
10 experience were they able to use the cell phone
11 pinging to locate people?

12 A. I have no idea.

13 Q. Okay. I'm sorry. I --

14 A. I, I've never used that technology now.

15 Q. Okay.

16 A. So.

17 Q. So when it came to the DNA, you -- that
18 was Mr. Reed's primary area on this; is that
19 correct?

20 A. Yes.

21 Q. Okay. What involvement did you have with
22 the DNA since Mr. Reed came in --

23 A. Well, I --

24 Q. -- later into the picture?

25 A. I actually had the case for at least

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1 Q. Is it unusual for someone to start off
2 with a sexual assault when they're in their 30s?

3 A. I couldn't even begin to talk about that.
4 They're all over the place. I mean, I have some
5 clients in their 60s that have never been arrested
6 previously and other people who are 18 when they're
7 arrested.

8 Q. Okay.

9 A. It's all over the place.

10 Q. Okay. So do you -- since Mr. Henderson
11 maintained that he wasn't there, do you, do you
12 recall what investigative efforts were done to
13 establish what his alibi was for the night of the
14 crime?

15 A. That's where it always is problematic. I
16 don't recall how far after the alleged incident he
17 was arrested, but it was several months. Four or
18 five, six months after the alleged incident.

19 I'm sure you can relate that when
20 you go and you say to any client where were you on
21 such and such a day, it's almost, it's almost
22 impossible to say oh, I'm at Tuesday night, six
23 months ago I was here.

24 And that's what I recall happening
25 in this particular case. He, you know, we went back

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1 several months prior to Mr. Reed getting -- me
2 asking Mr. Reed to second chair the case with me.

3 I had already hired Norah Rudin
4 prior to Mr. Reed getting involved in the case. I'd
5 had several conversations with her about the DNA
6 prior to him getting involved in the case.

7 But then as I said, as we were
8 getting closer and closer to trial and it was
9 becoming obvious for whatever reasons, I can't
10 remember if we weren't getting an offer or if Mr.
11 Henderson had made it clear that he wasn't
12 interested in any offers, I'm not really sure which
13 way that went, but it was becoming more and more
14 obvious that we were going to trial in this case
15 that I felt Mr. Reed would be helpful in any number
16 of capacities. One of them being the DNA.

17 And then he also had another case
18 that was coming up for trial right around that time
19 where he had a different DNA expert that we also
20 just ran this information by that person as well and
21 they agreed.

22 Q. When you say "ran this information by,"
23 what exactly did that encompass?

24 A. The expert was in Mr. Reed's office
25 pretrialing on another case and we said -- we were

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1 just going over the direct, the, the direction of
2 our cross with this other DNA expert kind of as a
3 troubleshooting.

4 Q. Okay.

5 A. Yeah, exercise, you know, just make sure
6 that what would, what would your response to this
7 question be, you know, that type of a scenario.

8 To be honest though, I can't
9 remember the name of that expert.

10 Q. And that expert agreed with the
11 cross-examination questions that you had?

12 A. Essentially, yeah.

13 Q. Okay.

14 A. Yes.

15 Q. At some point in time, you filed, Mr.
16 Reed said that you filed a motion to retest DNA.

17 Do you recall doing that?

18 A. I recall we filed the motion to retest
19 the DNA. I don't recall if I did it or if he did
20 it, but one of us did it.

21 Q. And do you know why that there was no
22 retesting done?

23 A. There was no sample left.

24 Q. Okay.

25 A. That's what I recall. We found out that
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1 there was no sample left for whatever reason. And I
2 don't remember the specifics as to why they had used
3 all of the sample, but the sample had been used in
4 its entirety so we couldn't do a retest.

5 And then I think we also filed --
6 when we found that out, then we filed a motion to
7 prevent the testimony from being --

8 THE COURT: Wait. And then you did
9 another motion what?

10 THE WITNESS: I think just basically on
11 lost or destroyed evidence, along that vein that
12 since we weren't able to retest, it caused a problem
13 with the defense.

14 And so we moved to preclude the
15 testimony of the DNA in its entirety if I remember
16 correctly, and Judge Mosley denied that motion.

17 BY MS. KICE:

18 Q. And Judge Mosley denied that motion?

19 A. If I'm remembering correctly, yes.

20 Q. But as you testify today, it's your
21 understanding that all of the samples taken from the
22 crime scene, forensic crime scene -- forensic
23 samples taken from the crime scene have been
24 consumed in their entirety?

25 A. Yes. Which I know the crime lab tries to
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1 avoid doing. So I'm not -- I don't remember if they
2 gave us a reason why. It was entirely used because
3 they, they try not to do that for this exact reason
4 so that if the defense wants to retest, we can.

5 Q. Okay. And had that motion been granted,
6 what would your strategy have been at that point in
7 time?

8 A. Which motion?

9 Q. The motion to retest the DNA.

10 THE COURT: Let me get this straight.

11 Did Judge Mosley actually do that before we're going
12 down this road? Because that's opposite of what
13 Norm Reed just said.

14 MS. KICE: I'm trying to find it, Your
15 Honor.

16 THE COURT: So before we go into if and
17 da-da-da, did Judge Mosley deny a motion? She's
18 saying she remembers it, but that's, you know.

19 THE WITNESS: Well, he couldn't order
20 retesting.

21 MS. KICE: If you can give me just a
22 second, I can pull it.

23 THE COURT: I don't know. I mean,
24 unfortunately we're paperless now. I only have a B
25 file. So I don't know if it's in the A file or I
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1 don't know.

2 MS. CLOWERS: Can I read to you from the
3 Nevada supreme court decision in the case that tells
4 us what happened.

5 THE COURT: Can I see that?

6 MS. CLOWERS: Of course.

7 THE COURT: I'm sure I read it prior to
8 this and I know I did, but this has been set so many
9 times.

10 MS. CLOWERS: It's the second paragraph
11 on the first page where he denied the motion to
12 dismiss.

13 THE COURT: Okay. It says here, and I
14 don't know, I'm not sure, it says that Henderson
15 claims that the district court erred by denying his
16 motion to dismiss the information and alternative
17 motion to preclude the State's DNA evidence based on
18 the State's alleged consumption of all the available
19 DNA material because Henderson's claim that the
20 State did not preserve DNA material from each sample
21 for defense retesting is belied by the record. We
22 conclude that the district court did not abuse its
23 discretion.

24 That makes it sound like there's a
25 sample out there.

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1 MS. KICE: Okay.

2 THE COURT: So I don't want this record
3 to be filled with facts that are just not what
4 happened at trial.

5 MS. KICE: I'm not trying --

6 THE COURT: And I don't know, I wasn't
7 the trial judge. For me, you know, we're paperless.
8 For me to click on -- I mean, it's incredible. If I
9 can just look at the minutes, I could figure it out,
10 but I have to literally click on. I have no idea
11 what happened because each page only has like 10
12 events. So for me to go back to 2006 is like a 20
13 minute ordeal. So maybe --

14 MS. KICE: I understand, Your Honor. I
15 wasn't trying to lay the water. We just got two
16 different answers. That's why I was asking for
17 clarity.

18 THE COURT: You need to go back then.
19 Because she just said that there was no DNA left and
20 that's why she made the -- she made the argument.
21 That's not what, that's not what Mr. Reed said. So
22 you need to go back and clarify this record.

23 MS. KICE: Okay.

24 BY MS. KICE:

25 Q. Would it be -- now that you've heard this
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1 information, is it possible that there are still
2 extractions or samples that are left to test?

3 A. I, I -- my, my recollection is that
4 there, there was nothing left for us to retest.

5 The only reason why we would not
6 have, had there been a sample to retest, the only
7 reason why we would not have retested, there's,
8 there's two reasons. One, there's no sample to
9 retest; or two, because our expert tells us you
10 don't want to retest it, that's not gonna help you
11 at all. Those are the only times we don't retest if
12 there's a sample.

13 If our ex -- if there's a sample
14 there and our expert says go retest it, we go retest
15 it. We, we file a motion on the court and ask to
16 have it retested.

17 Q. Okay. Can I approach, Your Honor?

18 THE COURT: Sure.

19 MS. KICE: I think that this will clear
20 up the record.

21 THE COURT: Sure. Because I'm not clear.
22 I want to see what his order said. What did Judge
23 Mosley say at that time?

24 MS. KICE: Your Honor, I'm gonna show Ms.
25 Radosta.

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1 THE COURT: Sure.

2 BY MS. KICE:

3 Q. At the minutes from a hearing on June
4 17th, 2008, you could read right there.

5 THE COURT: June what?

6 MS. KICE: 17th, 2008, Your Honor.

7 THE WITNESS: Right. And I mean, I'm not
8 sure what Mr. Reed testified to, but I'm reading
9 this again. And what it's saying to me is that we
10 didn't have the ability to retest.

11 BY MS. KICE:

12 Q. Okay. And that's because you couldn't
13 retest extractions?

14 A. That's -- yeah, that there wasn't enough
15 there to retest.

16 Q. Okay.

17 A. That's my understanding that we did not
18 have the option to retest.

19 Q. Okay.

20 A. And I mean, that's my recollection.

21 Q. Okay. And, Your Honor, I've shown this
22 to Ms. Clowers, I'll show it to Your Honor.

23 THE COURT: Sure.

24 MS. KICE: I ask to please excuse the
25 writing on the --

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1 THE COURT: Sure. Can you believe this?
2 I am still trying to -- it's just trying to go into
3 other minutes. It's unbelievable. Hold on. This
4 is useless, Odyssey, seriously. Hold on.

5 MS. CLOWERS: Your Honor, I would like to
6 give you --

7 THE COURT: I'm trying to get the order.
8 I mean, I'm reading something. Let me read this for
9 a second because I'm trying to figure out the
10 chronology of what happened based on -- and let me
11 ask you this: Do you have an order on the denial of
12 the July 17th, '08 transcript that you're making
13 this motion on?

14 Because what I see is that the trial
15 actually begins on July 20 -- or excuse me. June
16 23rd of '08. This motion was brought, it looks
17 like, on the eve perhaps calendar call on June 17th,
18 of '08 to protest.

19 So I was wondering if there was a
20 formal order denying. No? Okay.

21 MS. CLOWERS: I looked through my file,
22 Your Honor. I don't see it. I do have the State's
23 opposition which is a one page, it will tell you,
24 because there was the three samples of DNA that
25 matched to Mr. Henderson and --

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1 THE COURT: Right.

2 MS. CLOWERS: It tells you what was
3 available for each --

4 THE COURT: I'll look at it. Let me just
5 keep reading.

6 MS. CLOWERS: Can I approach?

7 THE COURT: Because what -- I mean, how
8 it's proceeded, since I'm a blank slate up here,
9 it's disjointed. And so if the supreme -- if it's
10 disjointed to me, it'd be disjointed, this record,
11 to the supreme court.

12 So I want it to be clear of the
13 chronology of what actually happened on the
14 retesting since that's his issue.

15 But let me continue to read this, so
16 I get a good chronology. Okay. So let me see.

17 Well, correct me if I'm wrong, Ms.
18 Kice, I've now looked at the testimony and the
19 defense was ready for trial. And what we're talking
20 about on June 17th, there was an issue of retesting.
21 The State's opposition says that there's clearly
22 enough to retest.

23 Now, I know that it's been five more
24 years that Ms. Radosta comes up here cold to start
25 testifying, but it appears here, and now the Nevada

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1 supreme court, that everything I'm seeing, there was
2 enough to retest and that on the eve of trial, you
3 know, originally they wanted to retest it, then we
4 withdrew it, on the eve of trial Mr. Reed brings it
5 up about retesting, and then at the end of the day
6 it appears that Judge Mosley found that there was
7 enough to retest and denied any motion as far as to
8 dismiss for destruction of evidence. And Mr. Norm
9 Reed then said hey, we're ready for trial.

10 I mean, that's how I read it.

11 MS. KICE: Okay.

12 THE COURT: Okay. So the problem is the
13 impression that Ms. Radosta says I don't remember
14 that because apparently they didn't think that there
15 was enough.

16 MS. KICE: Okay.

17 THE COURT: At least at one point.

18 MS. KICE: Correct.

19 THE COURT: But at some point they decide
20 to go forward and --

21 MS. KICE: Without retesting.

22 THE COURT: Without retesting and it
23 appears that the State said that there was enough to
24 retest and the Court found that there was enough to
25 retest.

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1 MS. KICE: Correct. And so my question
2 continued to be why didn't they have the material
3 retested.

4 THE COURT: Well, then that's really a
5 misstatement of the record because it does appear
6 that there was enough to retest it.

7 MS. KICE: Okay. I'll get back. I was
8 just gonna get my paper.

9 THE COURT: Maybe you need Ms. Radosta to
10 relook at this. It -- I mean, the problem is she
11 says she doesn't remember. She believes that there
12 was enough to retest but they made a motion to
13 dismiss.

14 MS. KICE: Right. And Mr. Reed --

15 THE COURT: So then you continue on with
16 the record of Judge Mosley denied it. Everything is
17 belied by the record of what just -- of what just
18 went on here.

19 MS. KICE: Okay.

20 THE COURT: So I don't want this record
21 to be wrong.

22 MS. KICE: Okay. I don't want it to be
23 wrong either.

24 THE COURT: So sometimes attorneys have
25 a -- they don't have a good memory of what happened

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1 because she's partially right, she did make a
2 motion, she's partially right, Mosley did deny it,
3 but she's incorrect because it appears that there
4 was enough to retest and that they just said ready
5 for trial.

6 That's what I'm reading. And
7 correct me if I'm wrong, either side.

8 MS. KICE: I'm not gonna correct Your
9 Honor.

10 THE COURT: Is that correct?

11 MS. KICE: I believe that is correct.

12 THE COURT: Is that correct?

13 MS. CLOWERS: Yes, Your Honor.

14 THE COURT: Is this what the Nevada
15 supreme court says?

16 MS. KICE: Yes, Your Honor.

17 THE COURT: Then let's go with that.

18 Let's go with okay, even if there was enough to
19 retest, which clearly now it shows that there was
20 enough to retest, why didn't you retest. Let's go
21 that route. Because I don't want to go through a
22 route that isn't what happened.

23 MS. KICE: Okay. I don't --

24 THE COURT: Does that make sense?

25 MS. KICE: Absolutely. I don't know that

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1 that's what I was attempting to do.

2 THE COURT: Well, that's what I got. And
3 I mean, this thing is dead by the way, JoAnn, up
4 here. So we need to have the computer rebooted.

5 THE COURT REPORTER: Okay.

6 THE COURT: Well, I don't know how to do
7 it with the battery and whatever, but I'm not
8 following with you at all.

9 But what I heard was completely the
10 wrong line of questioning based on what really
11 happened. So I just want the record to be clear.
12 Because whoever reads this again, no matter what way
13 I go on this case, it's going to the supreme's,
14 they're gonna read a transcript, and I don't want
15 what really happened to be wrong.

16 MS. KICE: And neither do I, Your Honor.

17 THE COURT: Okay. So --

18 MS. KICE: And I'll take Ms. Clowers'
19 order back to --

20 THE COURT: Let's just go with again,
21 there was enough to retest.

22 MS. KICE: Okay.

23 THE COURT: Why didn't she retest it
24 then, what was her reasoning for saying ready for
25 trial.

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1 MS. KICE: Okay.

2 THE COURT: Because that's what I just
3 read. Norm Reed said ready for trial.

4 MS. KICE: Okay. So she didn't give it
5 to me. She kept it.

6 THE COURT: Oh, I'm sorry.

7 MS. CLOWERS: Your Honor, may I --

8 BY MS. KICE:

9 Q. Why wasn't the material retested?

10 THE COURT: Oh, I'm sorry. Is this
11 yours?

12 MS. CLOWERS: Yeah. Do you still need
13 it?

14 THE COURT: No. I mean, we all agree
15 there was enough to retest. So I don't think I need
16 to read anymore.

17 MS. CLOWERS: Thank you, Your Honor.

18 THE WITNESS: From what I recall, there
19 were -- and if, if I'm misremembering the facts of
20 this case, please correct me.

21 THE COURT: And maybe I should just
22 clarify because if, if -- you know, if there's a big
23 difference between ineffective assistance of counsel
24 proceeding on a case in which they should have moved
25 to retest versus there is enough to retest.

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1 MS. KICE: Exactly.

2 THE COURT: And what I just heard Mr.
3 Reed testify to.

4 MS. KICE: Correct.

5 THE COURT: So I just want to make sure
6 we're all on the same page. Okay, go ahead.

7 THE WITNESS: From what I recall on this
8 particular case, there were two samples that came
9 back as a match to my client.

10 There was a sample on the breast and
11 then there was a vaginal swab both which came back
12 as a match. We were able to make a good
13 cross-examination out of the vaginal swab. The
14 breast swab on the other hand, there was no mixture,
15 it was just a match to Mr. Henderson.

16 Based on that breast swab and our
17 conversations with our experts, it was not in his
18 best interest to have the -- either swab retested.
19 Because even if the vaginal swab came back as not
20 him or issues with him, they were still able to rely
21 on the breast swab which was a 100 percent
22 non-mixture match to Mr. Henderson. That's what I
23 recall.

24 And so although he had maintained
25 his innocence the whole way through, sometimes we

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1 have to protect to our clients from themselves. And
2 even if he had insisted on wanting to retest, to
3 retest it and then have our own expert then become a
4 witness for the State because we have to make the
5 motion to the court to have the retest done, they
6 know our witness is retesting it and then they're
7 gonna find out that it potentially comes back as a
8 match, that does not help Mr. Henderson's case at
9 shaw.

10 So we ultimately would have decided
11 that to just use the State's expert against them,
12 use the cross-examination as best we could.

13 BY MS. KICE:

14 Q. So that was your strategy?

15 A. Yes.

16 Q. And that's why the DNA that did exist,
17 whether in pull or extraction, was not retested?

18 A. Yeah. I mean, that's the best to my
19 memory. Because there were the two separate
20 matches, the breast sample, the breast swab and the
21 vaginal swab.

22 Q. Okay. I'm gonna have to look at my -- do
23 you recall when a plea offer was made on this case?

24 A. Last minute.

25 Q. Last minute. How last minute?

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1 A. Very last minute. Like maybe the
2 afternoon before we were picking the jury or even
3 the morning we were picking the jury.

4 Q. Okay. Do you recall the specifics of
5 that plea agreement?

6 A. What I recall about the specific offer is
7 it was 15 to life. 15 years to life were the
8 numbers. I don't recall the charge that was offered
9 off the top of my head. I don't know how we would
10 have gotten to 15. It might have been a sexual.
11 I'm guessing it was a sexual assault offered and
12 some other felony consecutive.

13 And I remember Ms. Collins making a
14 comment to either myself or Mr. Reed the day or two
15 before we were starting trial that Mr. Henderson had
16 made it obvious that he wasn't interested in a
17 negotiation.

18 And we asked her where in the world
19 did she get that idea from because we had never said
20 that to her. I mean, we'd never really discussed
21 offers with him because there hadn't -- one was
22 never really made. We were just continually running
23 into a brick wall with Ms. Collins on offers.

24 And then she finally made that
25 comment, well, he said he didn't want an offer. And

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1 I said, I don't -- you know, I don't know where you
2 got that idea. She said it may have come back as
3 far as like maybe preliminary hearing time, like
4 maybe one of the other public defenders may have
5 made that comment to her. I know I never made that
6 comment to her. He never made that comment -- Mr.
7 Henderson never made that, made that comment to me
8 that he was absolutely 100 percent, you know, shut
9 off to the idea of an offer.

10 I mean, that's -- generally
11 speaking, clients don't say things like that.
12 They're always willing to listen.

13 And so when she realized that, she
14 made us the offer, but it was the morning of that we
15 were discussing the offer with him in the back room
16 of the court -- or I mean, in the room off of the
17 courtroom, the holding cell off the courtroom.
18 That's where we were discussing the offer with him.

19 Q. Okay. And do you know how much time you
20 were able to spend with him on that?

21 A. We were able to spend I would say 45
22 minutes, maybe an hour with him. I mean, we
23 expressed -- we explained to Judge Mosley that this
24 offer had just come through, that it was substantial
25 time and that it wasn't a decision that, you know,

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1 was gonna be quickly made.

2 I don't recall Judge Mosley really
3 breathing down our necks in terms of, you know, come
4 on, come on, come on, we have a jury waiting. I
5 don't recall that. But he wasn't gonna give us all
6 afternoon either.

7 Q. Do you recall, do you recall asking him
8 for more time, Judge Mosley?

9 A. No. Well, I honestly don't recall. I
10 don't recall Mr. Henderson being overly interested
11 in the offer, but at the same time had I had -- had
12 the offer come through two weeks, three weeks
13 earlier, you never know.

14 If you're able to have more than one
15 conversation with a client about an offer, really
16 able to explain the potential benefits, what could
17 happen at trial in contrast to this offer, sometimes
18 they change their mind.

19 When you're talking 15 years to
20 life, very few clients are gonna go yeah, I'll take
21 that in the first time you offer it to them.

22 So I may, I may have asked Judge
23 Mosely for more time, but I may not have just
24 because Judge Mosley was my -- that was my track, I
25 knew how Judge Mosley operated, we had announced

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1 ready for trial.

2 And I, even if I had asked for it, I
3 highly doubt he would have given it to me, but I
4 don't recall if I made a specific request or not.

5 Q. Okay. Are you familiar with Missouri
6 versus Fry and Lafler versus Cooper?

7 A. Not off, not off the top of my -- I mean,
8 yes, I know, I know the cases, but I couldn't quote
9 their holdings.

10 Q. Okay. Well, it deals with effective
11 (sic) assistance of counsel as it relates to the
12 plea agreements. Both of them.

13 A. Uh-huh.

14 Q. Given the time that you --

15 MS. CLOWERS: Judge, if I can just
16 interrupt just quickly and just make an objection.
17 I read through the petition. And maybe I missed the
18 portion where they brought up any of the issues
19 regarding an offer of ineffective assistance
20 regarding the offer.

21 And the reason I'm bringing it up is
22 because as you know, I wasn't trial counsel in this
23 particular case. Ms. Radosta was not the first
24 public defender. There were I think four or five
25 public defenders as well as Mr. Ruggeroli. I would

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1 not be prepared to cross-examine Ms. Radosta on this
2 issue. I don't -- Mr. Turner can't be here because
3 he's in a capital trial down the hall.

4 And so without either trial counsel
5 or more preparation, or the fact that it's just
6 never brought up in the petition, it's just not
7 appropriate for this time, judge.

8 THE COURT: I'm gonna overrule it.
9 Here's the deal on this revenue case: This
10 petition's been hanging out there for probably two
11 years, so I don't think it affects anything because
12 at the end of the day, he, he refused it.

13 And that, the case that she's
14 alluding to, my recollection from Justice Kennedy
15 speaking with us, is that basically, you know, these
16 are attorneys that never conveyed an offer, never
17 conveyed an offer to a client. And had they had the
18 offer conveyed, which was substantially a lot less
19 time, they may have taken it. So they become
20 ineffective because they never conveyed an offer.
21 So here an offer was conveyed and an offer was
22 refused and then the trial occurred.

23 So I'll allow you to continue to
24 explore it only because this petition is so old, but
25 I don't think that's what that case holds. And in

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1 fact, we see much more on post-conviction relief on
2 rush, rush. I hear hundreds of oh, he rushed me
3 into the deal, oh, it was a knowingly,
4 voluntarily -- it's a damned if you do, damned if
5 you don't for the defense attorneys. What's enough
6 time? I don't know.

7 You know, and I don't think the
8 supreme court's gonna tell us based on this, but you
9 know, at the end of the day, I'm hearing offer, I'm
10 hearing refused and I hear trial.

11 So I'm not so sure that that's an
12 issue for this, but I'll allow you to continue to
13 make a record.

14 MS. KICE: Thank you, Your Honor.

15 MS. CLOWERS: Thanks, judge.

16 BY MS. KICE:

17 Q. When you were discussing the offer with
18 Mr. Henderson, did you explain to him that he was
19 facing multiple, potentially multiple life
20 sentences?

21 A. Absolutely.

22 Q. That could be run consecutively with one
23 another?

24 A. Absolutely. We made it very clear that
25 Judge Mosley is not a judge you want to go in trial

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1 in front of on a case like this, not when there's
2 DNA evidence that while we felt -- and we made it
3 very clear to Mr. Henderson that we could make a lot
4 of noise about the DNA evidence. But if the
5 prosecutor saw through our noise on the vaginal swab
6 and was able to point to the breast swab, there was
7 no getting around a potential conviction on this
8 case.

9 We felt that we made that clear to
10 him. And we made that clear to him when this 15 to
11 life offer came through the morning of, of jury
12 selection. I mean, we advised him to take it and we
13 absolutely acknowledged that it was still a lot of
14 time, but I didn't see it ending up any differently
15 than that if we went to trial.

16 MS. KICE: Okay. I don't have any
17 further questions, Your Honor.

18 THE COURT: And just for the record, he
19 refused to take that offer; is that correct?

20 THE WITNESS: Yes.

21 THE COURT: And he wanted to go to trial
22 even after despite the fact that you gave him the
23 offer?

24 THE WITNESS: Yes.

25 THE COURT: All right. Cross.

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CROSS-EXAMINATION

2 BY MS. CLOWERS:

3 Q. Did he know about how much time he was
4 facing from at least when you got on the case?

5 A. Absolutely, yes. I mean, I have that
6 conversation with all my client multiple times. I
7 usually tell them you're gonna get sick and tired of
8 me telling you the potential penalties because I
9 don't want to hear back from you, you didn't tell me
10 the offer -- or I mean, you didn't tell me the
11 potential penalties, particularly when you're
12 talking about sex assault cases and murder cases.

13 When life sentences are on the
14 table, I tell my clients probably almost every time
15 I visit them that they're facing those types of
16 sentences.

17 Q. Would you remember if Mr. Henderson asked
18 you if there was an offer?

19 A. He -- my guess would be he had asked
20 about offers which is why we started asking Ms.
21 Collins why she wasn't giving us an offer.

22 If I don't have any indication from
23 my client that he's in any way interested in an
24 offer in the few days prior to trial, I'm not gonna
25 waste my time trying to get an offer from the DA. I

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1 have better ways to spend my time.

2 Q. And did you get that same impression from
3 the DA, that she felt he didn't want to negotiate
4 and that's why an offer hadn't been related?

5 A. That's what she eventually told us, but I
6 didn't know where she -- I remember being confused
7 by that response from Ms. Collins because --

8 Q. If --

9 THE COURT REPORTER: Wait, wait, wait.

10 THE WITNESS: Sorry. I had never told
11 her that he wasn't interested in an offer. She said
12 that was her impression, she didn't remember where
13 she got it from. We started asking if maybe it came
14 from one of the other public defenders.

15 And just to clarify the record, Mr.
16 Ruggeroli was a public defender when he was on this
17 case. He was --

18 BY MS. CLOWERS:

19 Q. Okay.

20 A. He was with the PD's office. He was one
21 of the public defenders that was on the case.

22 Q. And to your knowledge, there were
23 multiple public defenders who had Mr. Henderson's
24 case?

25 A. The one that I recall, there was two.

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1 Mr. Ruggeroli was lead counsel at one point and Mr.
2 Avants was lead counsel at one point. Both of whom
3 were assigned to that track prior to me being
4 assigned to that track.

5 Q. And when you tried this case, it was in
6 June of 2008; is that correct?

7 A. Yes.

8 Q. And you'd been in office for about 10
9 years by that time?

10 A. Yes.

11 Q. And earlier you said you'd done maybe 10
12 to 12 cases that went to trial that had to deal with
13 DNA; is that right?

14 A. Yes.

15 Q. How many cases have you dealt with just
16 in general that have had DNA?

17 A. Actually not that many more than that.
18 There are -- the -- I don't do murder cases
19 generally speaking. So I don't, the only cases that
20 we really see DNA on are sex cases or murder cases
21 generally speaking.

22 So the cases that I had dealt with
23 were generally the sex cases which at that point
24 were, you know, in that ballpark; 8, 10, 12.

25 Q. Is that why you asked for Mr. Reed to

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1 come on the case with you then?

2 A. Absolutely. I always feel like, like I
3 said earlier, two heads are better than one. And
4 what's the point of bringing somebody on a case like
5 this that doesn't understand DNA when the whole case
6 is about DNA.

7 Q. Fair to say that you were being extra
8 cautious?

9 A. Yes.

10 Q. And earlier you were asked about the
11 defendant maintaining his innocence and you
12 hesitated a bit. There were times during your
13 discussions with him with Mr. Reed present where he
14 doesn't deny being at that location; is that
15 correct?

16 A. There was one conversation that we had
17 where he gave us a different defense that helped, in
18 his opinion, explain why his DNA would have been
19 there.

20 Q. Okay.

21 THE COURT: And just for the record, Ms.
22 Radosta, he waived attorney/client privilege with
23 Mr. Reed so.

24 THE WITNESS: It just makes me un -- it
25 just makes me uncomfortable to --

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1 THE COURT: I understand.

2 THE WITNESS: You know.

3 THE COURT: He did waive it in open
4 court --

5 THE WITNESS: Okay.

6 THE COURT: -- with Mr. Reed.

7 THE WITNESS: Thank you.

8 BY MS. CLOWERS:

9 Q. I'm gonna move on a little bit. Do you
10 remember during this case that he also had an open
11 and gross lewdness case pending?

12 A. No. It wasn't assigned -- wait a minute.
13 It may, it may have been trailing behind this, but I
14 don't think it was in Judge Mosley's courtroom.

15 Q. No, that is correct, it wasn't in Judge
16 Mosley's courtroom.

17 A. So I, I think, now that you mention it,
18 it vaguely rings a bell, but it wasn't anything,
19 anything even close to similar to this.

20 If I recall, it was -- actually I
21 don't recall the facts, but I remember not being
22 overly concerned with it.

23 In the end if we would have been
24 able to get a not guilty verdict on this case, then
25 I would have become much more concerned with the

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1 open and gross lewdness because it's a potential sex
2 offense.

3 Q. So this was much more important?

4 A. Absolutely, yes. I'm assuming that open
5 and gross lewdness was a gross misdemeanor?

6 Q. Yes.

7 A. But just the potential penalty alone.

8 Q. I want to talk to you a little bit about
9 the DNA evidence in this case. And you didn't have
10 your file to review before testifying today; is that
11 fair to say?

12 A. I review, reviewed it prior to other
13 dates that we had this set, but I did not review it
14 prior to today.

15 Q. I just want to direct your attention. Do
16 you remember there actually being three places where
17 his DNA was found?

18 A. I -- no, I remember the vaginal swab and
19 the breast swab.

20 Q. Well, and factually what the victim told
21 the police was that when the people entered in, the
22 suspect that's later determined to be Mr. Henderson,
23 licked her breasts downstairs; is that correct?

24 A. Yes.

25 Q. Okay. And then she's moved upstairs by
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1 him where he then sexually assaults her vaginally;
2 is that correct?

3 A. Actually I recall that there were two
4 separate sexual assaults. One downstairs in the
5 living room and then a second sexual assault
6 upstairs in the master.

7 Q. And I apologize. And just to be clear,
8 what I was really indicating was the licking of the
9 breast took place downstairs; is that correct?

10 A. That's what I recall from, from the
11 victim's testimony, yes.

12 Q. And you remember, obviously from your
13 earlier testimony, that the DNA results on the
14 breast came back at identity presumed one in 600
15 billion that it was Mr. Henderson?

16 A. Yeah, it wasn't a mixture sentence unlike
17 the vaginal swab. And that's why we had such a hard
18 time defending against that, that particular part of
19 the case.

20 Q. Do you remember also that there was a
21 swab taken from the bed sheets upstairs that came
22 back as his identity being assumed on it as well?

23 A. No, I don't recall that.

24 MS. CLOWERS: May I approach, Your Honor?

25 THE COURT: Yes.

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1 BY MS. CLOWERS:

2 Q. I'm gonna, if you don't mind, showing you
3 a Metro lab report dated July 25th of 2005, prepared
4 by Cathy Guenther.

5 And if you could just look in this
6 section here.

7 A. Uh-huh.

8 Q. And I'm referring to KMG 4.

9 A. Uh-huh. I honestly don't remember
10 discussing the bed sheet much with our expert. And
11 possibly that's because when you look at the
12 forensic laboratory, the breakdown sheet, it's not
13 really mentioned on there. The bed sheet is not
14 mentioned on this.

15 The vaginal swab from Ms. Kim as
16 well as from her breast are what we seem to focus on
17 more than the bed sheet.

18 Q. Those are the ones you felt were more
19 defensible?

20 A. Well, those were the ones that the lab,
21 that the DNA, the crime, Metro crime lab, sorry,
22 LVMPD crime lab seemed to focus in on, and it seemed
23 like they were going to be testifying more about
24 those than the bed sheet.

25 Q. Does it refresh your memory though that
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1 there was his DNA found on that bed sheet which was
2 listed as KMG 4?

3 A. In looking at the report, yes.

4 Q. Just a couple quick questions. During
5 your investigation, did you ever find a link between
6 the victim and the defendant?

7 A. No, we did not find a link between the
8 victim and the defendant. He, he told us at one
9 point that there was a link between them, but he
10 told us that at the last moment when we weren't able
11 to investigate it.

12 And additionally, the way he
13 explained the link between them I didn't feel would
14 be helpful defense at trial.

15 Q. But it was investigated and at the end of
16 the day you didn't feel that it would help him?

17 A. He told us about the link between himself
18 and the victim the morning trial started. So it was
19 not investigated.

20 Q. I apologize. I apologize. I meant to
21 say you investigated it earlier.

22 A. That was the first we had heard about a
23 link between my client and Ms. Kim.

24 Q. Okay.

25 A. So.

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1 THE COURT: What did he say the link was?

2 THE WITNESS: He told us, when we had
3 explained, once again, this was the conversation
4 regarding the plea, he told us that he knew her,
5 that she had bought drugs from him, that he knew
6 that there was, through her money and other drugs in
7 the house, that the way she paid for her drugs was
8 to have sex with him. That's why his DNA was there.
9 He was having consensual sex with her in the house
10 that night, but that he was there with his friends
11 to rob the money and the drugs.

12 Our response back to him was the
13 defense you're presenting to us right now is a
14 defense of the sexual assault charge only, not a
15 defense of all of the other felony charges that
16 you're charged with. And we didn't feel it would be
17 a successful defense to defend on the sexual assault
18 charge.

19 BY MS. CLOWERS:

20 Q. Was --

21 A. In the manner that he had just told us.

22 Q. And was there any indication during the
23 pendency of this trial that that information was
24 true?

25 I realize you learned it at the end
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1 of the day, but was there anything that verified
2 that information?

3 A. No, there was nothing that verified that
4 information except just the overall oddness of the
5 case. There was something, as I said earlier, there
6 was something about the case that was not fully
7 explained.

8 Q. You mean the connection between the
9 people?

10 A. Yes.

11 Q. Okay.

12 A. So other than just the oddness of that,
13 but beyond, there was, there was no evidence that
14 Miss -- that the victim had been using drugs or
15 anything like that, that we felt we could confirm
16 that.

17 THE COURT: Let me go back. Because are
18 you telling me he said that for the first time close
19 to trial that it was him and that it was consensual
20 sex?

21 THE WITNESS: Yes.

22 THE COURT: Okay.

23 THE WITNESS: That was -- yes.

24 THE COURT: So that would have had to
25 change your entire defense, that being against the

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1 DNA?

2 THE WITNESS: Yes.

3 THE COURT: All right.

4 THE WITNESS: Because we explained to him
5 that the DNA was such a huge part of the case.

6 BY MS. CLOSERS:

7 Q. So it would have explained away the DNA?

8 A. It would have explained the DNA.

9 Q. And that was learned right after the
10 motion to dismiss was denied; is that correct?

11 A. No, I don't know if it was right after.
12 It was prior to trial starting. So the motion was
13 denied, on what, the 17th, and we started trial the
14 23rd.

15 Q. Yes.

16 A. I recall that information being given to
17 us by Mr. Henderson the day we gave him the offer.

18 Q. Okay. And do you remember -- well, would
19 it refresh your memory that he was arrested or that
20 at least a criminal complaint was placed out there
21 on March 23rd of 2005?

22 A. I believe, yeah, that the incident had
23 occurred four or five months prior to that and the,
24 the CODIS match came in some time in early 2005.

25 Q. Do you remember that it was March 2005
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1 when the defendant was first held in CCDC in this
2 case?

3 A. That sounds about right.

4 Q. Okay. And so it was about,
5 mathematically I don't know if I'm gonna do this
6 right, three-and-a-half years from the time he was
7 arrested until he went to trial, or three, three
8 years and three months or so?

9 A. Yes.

10 Q. And that was the first time that
11 information was relayed?

12 A. To me.

13 Q. And so at the end of the day with this
14 case, you guys didn't hire a DNA expert but you
15 consulted one?

16 A. Yes.

17 Q. And you determined that strategically had
18 you tested that DNA it would have played against you
19 at trial, the State would have been able to use
20 that?

21 A. That, yes.

22 Q. Do you remember a PSI being done in this
23 case?

24 A. Yes.

25 Q. Okay. Do you remember there was a
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1 supplemental PSI too as well?

2 A. No.

3 Q. Okay. May I approach the witness, Your
4 Honor?

5 THE COURT: Yes.

6 BY MS. CLOWERS:

7 Q. I'm gonna show you the presentence
8 investigation report and the supplemental
9 presentence investigation report if I may.

10 They're both for this same case, is
11 that correct, 212968?

12 A. Yes.

13 Q. And at the time of sentencing, did you
14 review the PSI with Mr. Henderson?

15 A. I don't have a specific recollection of
16 reviewing it with him. Generally speaking, my
17 policy now is to review the PSIs with my clients.

18 At that point in time the new
19 standards were just coming into practice more -- the
20 new -- the Nevada supreme court standards were just
21 coming into more use.

22 I don't recall specifically going
23 over this with him, but given the amount of time
24 that he was facing, I would be surprised if I handed
25 it to him in court and said let's go get

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1 this case, since I tried this case. Inaccuracies in
2 PSIs we used to bring them up on the record all the
3 time.

4 Q. Now of course there's the Stockmeier
5 case --

6 A. Right.

7 Q. -- and it changed things?

8 A. Absolutely, yes.

9 Q. So previously it was more though we just
10 made a record of what the errors were?

11 A. Right.

12 Q. And had there been errors in this
13 particular case, looking at how much he was facing,
14 would you have brought this up to Judge Mosley?

15 A. If they were substantive, yes. And we're
16 talking about like five felonies that weren't his,
17 you know, things like that, yes, I would have
18 brought those up to the judge.

19 Q. But you don't have any independent
20 recollection of him bringing anything up to you that
21 was incorrect in those PSIs?

22 A. No.

23 Q. Okay. Do you recall why there was a
24 supplemental one issued?

25 A. No. And they're, they're prepared on the
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1 sentenced --

2 Q. Okay.

3 A. -- that day. But Judge Mosley had a
4 policy that if you did not call him the day before
5 and tell him to not prepare a sentencing, if he
6 prepared it, you were probably going forward with
7 sentencing.

8 That said, on a case with this much
9 time, he might have -- even if I'd asked that
10 morning for a continuance, if I needed one, he might
11 have given me one given the amount of time Mr.
12 Henderson was looking at because Judge Mosley would
13 have wanted to make sure that there weren't any
14 potential issues on his part.

15 Q. Okay. But you have no independent
16 recollection of actually reviewing it with him?

17 A. No, I do not.

18 Q. Okay. If he had pointed out something to
19 you in that PSI that was incorrect and it was of
20 material value, would you have had it corrected or
21 bring that information up to the court?

22 A. I would have brought it up to the court.
23 It wasn't my policy at that time to have PSIs
24 corrected. It is now because once again, it's
25 become much more of an issue in the time that since

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1 same date. So that seemed really odd.

2 MS. CLOWERS: May I approach and grab
3 those, Your Honor?

4 THE COURT: Yes.

5 MS. CLOWERS: I have no further
6 questions, Your Honor.

7 MS. KICE: And, Your Honor --

8 THE COURT: Is there a redirect?

9 MS. KICE: No. I need to make a
10 clarification for the record. In the writ that I
11 filed, there is an issue about the not being
12 affidavit of search warrant.

13 I've been so focused on the DNA I
14 forgot that there is actually an affidavit included
15 in the material I received after I drafted this. So
16 I withdraw that portion of the writ and I apologize.

17 THE COURT: All right. The record will
18 reflect that the defense is withdrawing the portion
19 of the writ in which they claim error on the part of
20 defense counsel for not getting the affidavit to the
21 buccal swab for the search warrant.

22 And since that time from the initial
23 filing there's been sometime throughout this process
24 that the case has been supplemented, continued, et
25 cetera, that Ms. Kice has in fact received the

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1 affidavit.

2 MS. KICE: Yes. And I apologize.

3 THE COURT: So that part will be
4 withdrawn from this proceeding.

5 MS. KICE: And I apologize for the error.

6 THE COURT: That's fine.

7 MS. CLOWERS: Your Honor, if I may just
8 approach Ms. Radosta?

9 THE COURT: Sure. As an aside, I think
10 that's really a nonissue anyway because CODIS is
11 just giving the State PC anyway to take the blood.
12 And so inevitably they would have gotten a blood
13 with or without that affidavit, wherever it was.

14 MS. KICE: Certainly, Your Honor, but I
15 don't want there to be a misrepresentation on my
16 part.

17 THE COURT: That's fine.

18 BY MS. CLOWERS:

19 Q. I'm gonna approach and show the two PSIs
20 again to Ms. Radosta. I'm just gonna direct your
21 attention to page two.

22 Does it appear to you where it talks
23 about offenses four and five --

24 A. Uh-huh.

25 Q. -- you're holding the regular one and
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1 then the supplemental one, that the penalties may
2 have been incorrect on the first one and perhaps
3 they changed it?

4 A. What's the first one? Yeah, I think what
5 ended up happening is, and actually I think they did
6 it on every -- now I'm looking at each of the
7 felonies. On the first presentence report, they did
8 the consecutive with use of a deadly weapon under
9 the 1 to 20, the new, the new law that went into
10 effect in the interim between when this, when this
11 crime was charged and when he was convicted, the law
12 for with use of a deadly weapon changed, the
13 potential penalty.

14 So the first PSI shows 1 to 20, the
15 supplemental shows equal and consecutive, which is
16 what the law was at the time when the crime was
17 allegedly committed.

18 MS. CLOWERS: Thank you. May I approach
19 and grab those?

20 THE COURT: Yes.

21 MS. CLOWERS: Thank you. I have nothing
22 further, Your Honor.

23 THE COURT: Is there anything further?

24 MS. KICE: No, Your Honor.

25 THE COURT: Can this witness now be
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1 excused from both sides?

2 MS. KICE: Yes.

3 MS. CLOWERS: On behalf of the State.

4 THE COURT: All right, thank you. Thank
5 you again, Ms. Radosta.

6 THE WITNESS: Thank you, judge.

7 THE COURT: All right. At this time I'll
8 hear arguments from both sides and we'll allow Ms.
9 Radosta to leave the courtroom.

10 MS. KICE: Your Honor, could you please
11 explain to Mr. Henderson why he can't testify?

12 THE COURT: Well, I think he can if he
13 wants to.

14 THE DEFENDANT: Yes, I want to.

15 MS. KICE: He wants to testify.

16 THE COURT: Yeah. Why can't he? I think
17 he can --

18 MS. KICE: Okay.

19 THE COURT: -- for ineffective. He can
20 rebut whatever they said, but I'd like him just to
21 stand there and do that.

22 MS. KICE: You want him --

23 THE COURT: Well, maybe you want to stay
24 outside, Ms. Radosta, just in case you're recalled
25 as a witness. You should have ran.

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1 THE CLERK: Raise your right hand.
2 (Whereupon, the Defendant, Joseph
3 Alexander Henderson, was duly sworn to
4 tell the truth, the whole truth and
5 nothing but the truth.)

6 THE CLERK: State your name for the
7 record.

8 THE DEFENDANT: Joseph Alexander
9 Henderson.

10 THE CLERK: You can be seated.

11 THE COURT: All right. Did you want to
12 question him, Ms. Kice, or --

13 MS. KICE: No, Your Honor.

14 THE COURT: All right. Have you advised
15 him not to?

16 MS. KICE: Yes. I specifically told him
17 not to.

18 THE COURT: All right. Mr. Henderson,
19 what did you want to say?

20 THE DEFENDANT: I want to say --

21 MS. CLOWERS: Your Honor, if I may
22 just -- I don't mean to interrupt Mr. Henderson. I
23 don't know if we should make a record that whatever
24 he says here and say this is reversed --

25 THE COURT: What? Say again. Whatever
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1 he says what?

2 MS. CLOWERS: Whatever he testifies here
3 today and perhaps if this gets reversed somehow or
4 gets a new trial, that the State could use this if
5 he decided to ever take the stand or for other
6 purposes as well, judge.

7 THE COURT: Well, he certainly knows that
8 at this point, okay. His 5th Amendment right's
9 nonincriminating. He's convicted.

10 MS. CLOWERS: I understand.

11 THE COURT: So here he is, Ms. Kice has
12 told him not to testify and he wants to testify. So
13 I think he has the right to testify and I'm gonna
14 allow him to and he can do it at his own peril.

15 MS. CLOWERS: And I didn't want him to
16 be --

17 THE COURT: It's not as if he has a 5th
18 Amendment right. That kind of went by the wayside
19 at his conviction. So I don't think he has a 5th
20 Amendment right, but --

21 MS. KICE: I don't know if --

22 THE COURT: You're aware that it's in the
23 realm of possibilities this was ever to get
24 reversed, anything you say in a courtroom can be
25 used against you and you understand that?

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1 THE DEFENDANT: Yes, ma'am.

2 THE COURT: All right, sir. Go ahead.

3 THE DEFENDANT: What I want to say is
4 that both of the judge -- I mean, both of the
5 lawyers, they just got on the stand and, and
6 straight purely lied. We never discussed nothing
7 about a deal until like 10 minutes before trial was
8 about to start and Mosley told them to come on down.
9 Ms. Collins was saying come on, come on, come on.

10 I was in jail three-and-a-half
11 years. They offered me -- they came to me -- at
12 first they say would you like to take a lie detector
13 test. I said yes, I would like to take a lie
14 detector test. They pushed it out the way. I've
15 been trying to show that I've been innocent the
16 whole time.

17 This is the problem that I've having
18 right here. I went to prison here in, in the year
19 2 -- 2000. This case happened in 2005. I don't
20 know how they was able to get the evidence upload
21 into the Nevada database, not get a match. I'm in
22 there and, and Nevada uploaded me into the CODIS,
23 too, also.

24 Now, this is the problem I'm having.
25 If California gave them my name, why wasn't I able

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1 to see one document from California matching me to
2 anything? They never sit there and told me, oh,
3 well, well, that wasn't the way it was gonna go
4 because we didn't want to mention your prior
5 history.

6 I would have told them go ahead and
7 mention my prior history because I wanted to see
8 them documents. Them is the most important
9 documents, Ms. Silver, to, to everything.

10 If California match me to something,
11 I just don't see Ms. Collins not calling them to
12 actual trial to testify against me. Still yet I
13 have one document from California or CODIS matching
14 me to anything.

15 Now, this is the problem I'm having
16 right here. Ms. Everett was the actual sexual
17 assault nurse. She's here, she did a toluidine blue
18 dye test on the victim. And she said she didn't see
19 anything. She said she did a microscopic test, she
20 said she didn't see anything. But yet once Ms.
21 Guenther got the evidence, she was able to say that
22 she retested it.

23 Now, now, I don't know why my lawyer
24 did not bring that actual e-mail. That's why I,
25 that's why I didn't want to send it to her. I

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1 wanted to come show it to you personally. This is
2 what the e-mail exactly has said. It said that she
3 was able to go behind Mr. Welch's work and she says
4 she seen minor peaks of Henderson in his data.

5 Once she swabbed my mouth, Your
6 Honor, she was able to come back and match me one in
7 500 billion to all of the evidence. That's a major
8 problem right there.

9 And so, and then so I'm telling
10 these lawyers the whole time, I said how is this,
11 how is this happening to me. Where is the people
12 from California. I want to be able to test -- I
13 want to be able to cross-examine. They say we're
14 gonna have them here, we gonna have them here.

15 Yet still today I have one paper and
16 she can't produce one paper from California matching
17 me to anything. It's all hearsay.

18 This is what the, the actual DA say,
19 well yes, you know, we have the paperwork from
20 California matching Mr. Henderson to everything, but
21 how come it wasn't in the, in the discovery. I
22 still have not been able to cross-examine anybody
23 that matched me to anything.

24 This is what happened. Okay. Mr.,
25 Mr. Welch said that, he said that the, Mr. Jeffries,

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1 which, which is the detective in the case -- this is
2 what I'm reading in this case. It says that once
3 Jeffries notified him and asked him hey, would you
4 go and do a DNA test on this, on this sexual assault
5 kit, he said okay.

6 Once he went over to the vault, he
7 said that well, that certain number, I guess it was
8 152, because there's two event numbers, 152 and 158
9 which is all of the evidence. One evidence from the
10 house, one evidence from somebody's job. I guess
11 it's from Mr. Bernzweig's job. He said well, since
12 it wasn't that, I mixed both event numbers together.
13 So that mean he had both evidence.

14 Now, he never mentioned anything
15 about no sheets or anything. And this is the
16 problem. I'm like okay, well, he -- then he named
17 them all of the evidence that he had. Never was no
18 sheets.

19 Once they came and swabbed my mouth,
20 after that, after she said, after she tested
21 twice -- Ms. Guenther did two tests. She retested
22 Welch's paperwork and everything, which that, that's
23 why the e-mail was gonna be so important I wanted
24 you to see. She said I did see minor peaks of Mr.
25 Henderson in here. How can you go from minor peaks

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1 and then turn around and match me one in 500
2 billion.

3 Because Ms. Collins had told her,
4 she said, hey, they want to get all the paperwork
5 from California and CODIS. She said well, I'm gonna
6 need a search warrant for that.

7 And I was like why would you need a
8 search warrant for that if CODIS matched me to
9 some -- or California, or California, all due
10 respect, it would have been some type of paperwork
11 generated. Something. Still I have not been able
12 to cross-examine CODIS or California.

13 Then Ms. Guenther decided to just
14 come out the blue with these sheets.

15 Now, if you look at the, at the
16 actual paperwork, you will see Ms. Don is the one
17 who was the, who was the crime lab -- she the one --
18 she's the CSI lady. She said she didn't see nothing
19 on the, on the sheets.

20 I got numerous paperwork that I'm
21 reading right where -- right here I can show you,
22 right here this is documents from the first officer
23 who talked to the victim. Clearly said that she
24 asked him hey, well did the guy ejaculate. She said
25 no, no. All of a sudden it didn't come with the

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1 ejac -- ejaculation until after Mr. Welch got the
2 report which they say California matched me to the
3 actual crime scene. Then once that happened,
4 everything just exploded.

5 I was never able to see one document
6 from California matching me to anything. And you
7 know the same what I know. Regardless of the fact,
8 I don't have any sex crimes. What sense does it,
9 does it actually make in order for them to sit there
10 and say, well, we didn't feel it was necessary for
11 us to bring CODIS because it was the only match to
12 Henderson.

13 I need to see that paperwork by, by
14 right. I have a right to, to confront everybody
15 that's, that's against me, right? I have a right to
16 confront everybody against me. I never was given
17 that opportunity.

18 In my whole discovery, Ms. Silver,
19 not one paperwork come from, from CODIS or from
20 California. The only thing I see in this paperwork
21 is this says well, Ms. Guenther, because they saying
22 that Welch, once he ran it through the Nevada
23 system, which I know I'm in there, I know -- since
24 I'm in here, I went to prison here in 2000. He said
25 that once he ran it against the local, it was no, no

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1 match. Then it was uploaded into CODIS.

2 Now after that, there was no
3 paperwork generated. No nothing. So are you saying
4 that I wasn't able to actually cross-examine these
5 people from California.

6 I've been to prison in California,
7 and I'm pretty sure you have dealt with the
8 California officials before. If California would
9 have felt I did something this serious of nature,
10 you know California would have been here to testify.
11 And Ms., and Ms. Collins definitely would have had
12 them at least on her sheet to have them come and
13 testify. She never even put them on her witness
14 list sheet. That's why I was like well, where's the
15 California people.

16 The whole time Ms., Ms. Radosta and,
17 and the other guy was telling me don't worry,
18 they're gonna be here, they're gonna be here. So
19 I'm like okay, so I'm the whole time they telling me
20 I wanted to get on the stand. And they was like no,
21 we don't want you to get on the stand.

22 So I was never able to cross-examine
23 nothing to do with the DNA. The only thing I know
24 is that they swabbed my mouth. If they have my DNA
25 on file here, they swabbed my mouth.

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1 She said she went back and retested
2 the actual evidence that Welch already tested. If
3 Welch already tested it, now you go back and
4 retested it and you said you seen minor peaks and
5 you got me in one in 500 billion and then all of a
6 sudden the sheets pop up, oh, yeah, I was able to
7 match Mr. Henderson to the, to the sheets.

8 Now, now, this is the problem. Just
9 like on the little issue what they were saying about
10 the evidence where it wasn't nothing to be tested,
11 it wasn't -- this, this is what I was told, Your
12 Honor. I was told this: Well, Mr. Henderson, I can
13 show you right here in the report which is, which is
14 the documents that you had that, that she brought up
15 there to you, this was the problem, once -- because
16 Ms. Radosta, she didn't know nothing about this DNA.
17 She clearly told me that. So that's, that's when
18 she brought Reed aboard.

19 Reed clearly said, he said
20 Henderson, there's no evidence to be tested. I'm
21 like, what you mean. I want it retested. Why
22 wouldn't I want it retested. He said no, this is
23 the problem that we're having, we can't retest it
24 because there's only extractions and we're not going
25 to actually retest extractions because it will be --

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1 if we retest extractions, that it's not good because
2 it's not original evidence. That was, that was,
3 that was my understanding of what was going on.

4 That's the reason why he put the
5 motion in to try to get it kicked out because he's
6 saying that they were aware that we wanted to retest
7 all of the evidence. But then they kept on using up
8 all of the evidence and not leaving us none. And
9 this is how I can prove it. Because we pressured
10 them, we want to, we want to retest, we want to
11 retest.

12 Once she came up with the sheets, we
13 clearly told her we would like to retest some parts
14 of the sheets. She said she had two parts of semen
15 on the sheets. Why did she have to use both parts
16 of the sheets.

17 This is what's happening. I'm not
18 being able to get no evidence that I can retest
19 except extractions when they had all this evidence.

20 Now, this is my understanding of
21 what happened: That the feds and somehow CODIS came
22 and retrieved all the evidence. This is what my
23 first -- Joseph Ruggeroli, he did a motion. We went
24 into court.

25 I am so confused. And I'm so

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1 confused right now, but I'm trying to just pull part
2 out to you. He went in there and he said hey, how
3 did y'all release the evidence to the feds without
4 notifying us and Henderson has counsel. They said,
5 hey, we don't know, they just came and took the
6 evidence.

7 So after that, that's when all the
8 extractions start, start coming. And Ms. Collins
9 clearly said no, no, no, no, I took pictures of
10 all -- I have pictures of all of the evidence and
11 you just have that, that actual motion what she said
12 she had pictures of all of the evidence.

13 So evidently if the feds came and
14 took it, where is the paperwork to what the feds
15 came and took. It wasn't nothing there but
16 extractions they said to the breast swab, extraction
17 to the vaginal swab.

18 What did they have -- what did they
19 come and take? It was never no original evidence.
20 So, so the only thing that they could come and take
21 is the extractions, but yet nobody wants to look at
22 that.

23 And I, and I also raised the issues,
24 I'm trying to find out what is going on. I even
25 told, told my lawyer, I told her thousands and

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1 thousands of times this is, this is what I want to
2 do, this is what I want to focus on.

3 If the SANE nurse did a blue
4 toluidine test on, on the victim, with all respect
5 on the victim and did not see anything on her -- I'm
6 pretty sure the court know what a blue toluidine
7 test is. That mean it showed if it was --

8 THE COURT: Yeah, I know what it was,
9 alright. I know what it is. Thanks.

10 THE DEFENDANT: A microscopic test and --

11 THE COURT: I know what it is.

12 THE DEFENDANT: They didn't see anything.

13 THE COURT: I know what a nurse --

14 THE DEFENDANT: And then, and then she
15 clearly --

16 THE COURT: A nurse who didn't see
17 anything.

18 THE DEFENDANT: Uh-huh.

19 THE COURT: Okay. Versus a DNA expert.

20 THE DEFENDANT: Uh-huh.

21 THE COURT: Who in three different
22 parts --

23 THE DEFENDANT: Uh-huh.

24 THE COURT: -- of three different pieces
25 of evidence found that you're the source of the DNA.

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1 Little different.

2 THE DEFENDANT: See, I now -- see, now
3 this is -- she was the first one --

4 THE COURT: So tell me -- why don't you
5 wrap it up. I know you don't agree with the DNA
6 evidence. Wrap it up. I already got it.

7 Now you're repeating yourself, and
8 you're talking about things that are nonissues in
9 this case.

10 So this is about ineffective
11 assistance of counsel.

12 THE DEFENDANT: Yeah.

13 THE COURT: Is there anything else you
14 want to add to what you've already told me now? And
15 I've let you repeat yourself like three times.

16 THE DEFENDANT: Yes, ma'am. There is
17 something else that I would like to say.

18 THE COURT: Then go to it.

19 THE DEFENDANT: I have -- I specifically
20 told them once I got the paperwork and we went over
21 it, they said it was a cigar tip, the victim said
22 somebody had smoked a cigarette. They said, they
23 said that he had hair that was never tested. I
24 asked them would you please make sure that it was
25 tested. And they said that it would, but it never

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1 happened.

2 That right there, and then also
3 Birch Henry which is, which is the specialist
4 manager over at the crime, the crime lab, after,
5 after, after Welch did his paperwork, his data on
6 everything, his boss signed off asking please,
7 saying that, that everything was correct.

8 Then once Ms. Guenther did it, he
9 signed off on that as complete, yet my lawyers, I
10 told them, I said hey, don't you think you, you need
11 to call that, that person there which is their boss,
12 if you got one evidence, regardless of how many
13 different evidence they say, they say they got one
14 evidence and two specialists come back with two
15 different findings, wasn't that, wasn't -- wouldn't
16 that be a reason for us to cross-examine them.

17 I specifically asked them to call
18 him to cross-examine him and they said that they
19 would, but they didn't.

20 And, Your Honor, the only thing I
21 want to say -- I mean, it looks bad. I just, just
22 by the way it sounds.

23 But when this, this woman gets up
24 here and they blatantly lying and said I did it,
25 I've never seen Ms. Kim before ever in my, my life.

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1 I've never seen these people before in my life.

2 And there's no way that I would sit
3 there and tell these people oh, yeah, I gave her
4 some drugs for sex. I don't know where this come
5 from. There is nothing in the record that will,
6 that would show that.

7 And, and now I'm just stuck in a
8 position where, where just DNA. I know for a fact
9 this is a problem that I'm having also with the,
10 this guy Chaziza, he could have cleared me. If me
11 and him have the same case, if me and him, if I was
12 supposed to be with him and we supposed to be the
13 guys who knocked on the door, why wasn't we
14 convicted together? Why wasn't we together?

15 Because I told my lawyer, I said
16 hey, go and investigate him because he can clear me.
17 Once he say that it wasn't me, then it's gonna put a
18 real big discrepancy in anything. But nobody choose
19 to do nothing about it.

20 So now I couldn't even use him to
21 come in here and say that it wasn't me. And I'm
22 just stuck. And it seem like they want to beat
23 around the bush when they saying, well, yeah, I did
24 it because you have felonies, that's the reason why.

25 Is that the reason why that, that I

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1 don't get a chance to get no paperwork from
2 California or from CODIS matching me to anything?
3 Is that the reason why?

4 And after, and after, and then after
5 that I rest.

6 THE COURT: All right. Is there any
7 cross-examination by the State?

8 MS. CLOWERS: No, Your Honor.

9 THE COURT: All right. Then do you rest
10 your case-in-chief then?

11 MS. KICE: Yes, Your Honor.

12 THE COURT: All right. Is there anything
13 in opposition or rebuttal?

14 MS. CLOWERS: No, Your Honor.

15 THE COURT: All right. Does defense have
16 argument at this time, Ms. Kice?

17 MS. KICE: Just a couple things, Your
18 Honor.

19 There are some disturbing things
20 about this case. He was never matched in Nevada
21 database. There was a five-year gap between when he
22 first went to prison in Nevada, when he should have
23 been swabbed, when that profile should have been
24 added to the Nevada database.

25 Without clear -- I don't have access

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1 to that information. I don't know why he wasn't --
 2 if he wasn't in the database, it calls into question
 3 the procedures of the lab. If he didn't match then,
 4 his DNA didn't change between California and Nevada.

5 I'm concerned about the trial
 6 strategy of not interviewing Ms. Chaziza who is the
 7 other individual who's been convicted for this
 8 crime, especially given the fact that they were --
 9 they knew from the outside that they were going to
 10 be able to or attempt to poke holes in the DNA.

11 Mr. Henderson has always maintained
 12 his innocence to me. And had Mr. Chaziza been
 13 questioned as to Mr. Henderson's identity, it's
 14 possible this could have had a different outcome.

15 I'm troubled by the fact that an
 16 investigator wasn't hired, wasn't -- neither Mr.
 17 Reed nor Ms. Radosta can speak intelligently about
 18 any investigation that was done in this case to
 19 provide Mr. Henderson with an alibi or to verify his
 20 whereabouts on that day.

21 And I think if you take things
 22 accumulatively, Your Honor, there was ineffective
 23 assistance of counsel enough to warrant a new trial.
 24 Thank you.

25 THE COURT: Thank you, Ms. Kice. Ms.
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1 Clowers in response.

2 MS. CLOWERS: My response is that, Your
 3 Honor, I think that Mr. Henderson received an
 4 amazing defense.

5 The fact that they bring Norm Reed
 6 in from the murder team just to attack the DNA,
 7 which was the evidence in this case, is more than
 8 what a lot of defendant's get.

9 The fact that he wasn't in the
 10 Nevada database under Strickland wouldn't change
 11 anything. Even if he was, that just means we would
 12 have got the warrant and the buccal faster, but
 13 instead we had to wait until we got it from
 14 California to get the buccal. So that would change
 15 nothing. The outcome would not be different.

16 The fact they didn't interview
 17 Chaziza, well, Mr. Chaziza was pointed out was never
 18 accused of being the rapist in this case and he pled
 19 guilty to doing this and committing these crimes
 20 with Mr. Henderson.

21 If they interviewed Mr. Chaziza, it
 22 wouldn't changed the outcome of this trial. He
 23 still would have been found guilty of all these
 24 charges. And even though he's maintaining his
 25 innocence --

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1 THE COURT: Let me get this correct.
 2 CODIS wasn't even entered in at trial, right? I
 3 mean, they couldn't have entered that in because
 4 that would have been -- right?

5 MS. CLOWERS: Say again.

6 MS. KICE: No.

7 THE COURT: CODIS wasn't even entered in
 8 at trial. I mean, he's complaining about CODIS.

9 MS. CLOWERS: Correct.

10 THE COURT: It wasn't even entered at
 11 trial.

12 MS. CLOWERS: Correct. I'm sorry.

13 THE COURT: The jury knew nothing about
 14 CODIS.

15 MS. CLOWERS: I thought you were talking
 16 about Chaziza.

17 THE COURT: No, I mean, let me get this
 18 straight. CODIS has nothing to do with anything.
 19 It wasn't even entered in at trial.

20 MS. CLOWERS: No, you are absolutely
 21 correct. There was a strategy --

22 THE COURT: Just the probable cause in
 23 order to get his buccal swab.

24 MS. CLOWERS: And I, I've never
 25 personally presented a case where I used CODIS at a
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1 trial level or even at grand jury or preliminary
 2 hearing level.

3 What we do is we take the test
 4 that's done from a buccal and that way we have no
 5 chain of custody issues. If you bring in CODIS,
 6 you're gonna have chain of custody issues. So it's
 7 great for probable cause, but -- and not problems
 8 with chain of custody. You're gonna have six people
 9 who have to testify to a CODIS hit where as with
 10 buccal you have the detective who took it.

11 THE COURT: Well, you have to explain to
 12 a jury why is there evidence -- why is there
 13 evidence in a state wide database.

14 MS. CLOWERS: Yes.

15 THE COURT: Which is more problematic and
 16 more prejudicial than anything.

17 MS. CLOWERS: And in addition, what you
 18 heard Norm Reed say was that it would have only
 19 helped the State's case had you had two people come
 20 in and say that that DNA affirmatively belonged to
 21 the defendant.

22 No investigator, go get an outside.
 23 Well, investigators shouldn't go out and fetch
 24 alibis. The defendant should be able to provide
 25 enough information that they can locate him if in

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1 fact he wasn't at the scene of his crime.

2 And what you heard from his
3 attorneys today was he didn't actually ever
4 continuously maintain innocence.

5 At one point he concocted a story so
6 that he can explain his DNA by disparaging the
7 victim being a drug abuser and basically a
8 prostitute, exchanging sex for money. And it wasn't
9 until the motion to dismiss was denied he came up
10 with that defense.

11 I think you had two seasoned
12 attorneys on that case, Your Honor, that would have
13 never presented that defense because they would have
14 known for a fact it wouldn't have been ethical to do
15 such.

16 Quickly, Your Honor, I didn't hear
17 any -- just going back to the petition, there was
18 nothing about the PSI in the petition that indicated
19 what needed to be different. There were no errors
20 pointed out or anything like that. So the result
21 wouldn't have been different that either.

22 With the search warrant, again going
23 back to CODIS, it's a probable cause. Norm Reed
24 said he wouldn't challenge it. With all the
25 experience he has, he wouldn't challenge it. I

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1 don't think Your Honor would grant it challenging a
2 search warrant based upon CODIS. That's one of the
3 stronger PCs we can come up with.

4 The DNA expert I've mentioned was
5 not necessarily hired but was consulted and they
6 used the appropriate strategy.

7 THE COURT: Well, they are hired, they're
8 paid --

9 MS. CLOWERS: I guess --

10 THE COURT: -- from the public defenders
11 office.

12 MS. CLOWERS: I was thinking they weren't
13 hired to come in to testify at trial, Your Honor,
14 but yes, they were hired and consulted.

15 They got the answer that probably
16 they didn't want to hear, but they used it to their
17 best advantage by her giving them cross-examination
18 questions which they utilized.

19 And again, judge, even though the
20 bench conferences aren't recorded, it would not have
21 changed the outcome of this case. Norm Reed
22 specifically stated that he states and puts the
23 important things on the record at any given moment
24 that he can in front of Judge Mosley.

25 And so with that, judge, I don't

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1 believe that the outcome of this would have been any
2 different.

3 I don't think they've met the
4 standard on Strickland and I think you should deny
5 the petition, Your Honor.

6 THE COURT: Is there anything in
7 response?

8 MS. KICE: No, Your Honor. Other than I
9 withdraw the issue of the search warrant.

10 MS. CLOWERS: Oh, I forgot. I'm sorry.

11 THE COURT: That's okay. All right. So
12 now both sides have now submitted it to the court.
13 It's now submitted to the court for decision.

14 All right. This is a petition for
15 writ of habeas corpus based on post-conviction
16 relief based on various claims of ineffective
17 assistance of counsel.

18 The court will do a detailed order
19 denying the defendant's petition for a myriad of
20 reasons which have come up at this particular
21 evidentiary hearing.

22 Under Strickland and its progeny,
23 the Court had listened to the testimony of both Ms.
24 Radosta and Mr. Reed, two of the more veteran public
25 defenders, both of which have -- I mean, they're

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1 probably two of the most seasoned public defenders
2 at the PD's office. Norm Reed specializing in
3 murders and Violet Radosta specializing in sexual
4 assault cases.

5 Ms. Radosta even brought Mr. Reed in
6 because this was a case in which DNA had been
7 questioned, and which clearly up until it sounds
8 like the day of trial the defendant had maintained
9 his innocence and said he was not the perpetrator,
10 based on what I heard, at least up until the day of
11 trial.

12 The claims of ineffectiveness are
13 belied by the record. First of all, unlike what the
14 petition alleges, Mr. Reed and Ms. Radosta had in
15 fact contacted a DNA expert, that being Norah Rudin
16 who is one of the nation's renowned DNA experts out
17 of Los Angeles. The public defender's office uses
18 her quite a bit as far as consultations from all of
19 these hearings that come before me.

20 But all of the DNA was reviewed in
21 this case and the testimony from Norm Reed was that
22 the bed sheet, the vaginal swabs, the breast swabs
23 were all reviewed by a separate independent expert,
24 and that although there were some differences on how
25 they would come about the result, the result at the

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1 end of the day, even from an independent defense
2 expert, was that this defendant was in fact the
3 source of the DNA identity presumed.

4 You know, one in so many billion
5 that it's like five times the population of the
6 earth. And he could be the only source of that DNA,
7 that the breast swab alone, there was only a single
8 source and that there was no real way to attack that
9 particular DNA sample.

10 Clearly the record, after I reviewed
11 the record again, shows that there was enough to
12 retest and that strategically both counsel decided
13 not to retest because as Ms. Radosta said, Mr. Norm
14 kind of -- Reed shied away from it. But had they
15 retested it, there is an obligation to give it to
16 the State, the result of that test.

17 And they knew that CODIS had already
18 hit on it which -- and they did. In fact, Ms. Rudin
19 did review the California DNA results. She
20 concurred with those. They didn't want to bring in
21 the California or CODIS hit because it just would
22 have showed yet another independent lab had found
23 that it was the defendant's DNA.

24 So you have a California lab finding
25 it's the defendant's DNA, a buccal swab done, based

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1 on the probable cause of CODIS hit and based on
2 Metro's DNA testing that that found that the
3 defendant was a source of the DNA.

4 And then you have the third
5 consultation by Norah Rudin, Dr. Rudin, that says
6 yes, that's exactly the defendant's DNA
7 conclusively.

8 So three different DNA experts found
9 it was the defendant's DNA.

10 Based on that, Mr. Reed and Ms.
11 Radosta felt like the best defense or the only
12 defense, since he was wearing a mask and could not
13 be identified by the defendant, and this was a who
14 did it kind of case, that the best trial strategy
15 would be to keep out the CODIS because that's just
16 one more lab identifying the defendant, plus the
17 fact that it would have raised questions as to why
18 the defendant's DNA was on file with California,
19 which would have been obviously prejudicial, but
20 strategically they kept that out. Strategically
21 they didn't want it retested because they would have
22 had to turn it over to the State.

23 And the best way for them to try to
24 put holes in the State's case was to only be faced
25 at trial with Metro's lab where they could try to

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1 cross-examine the DNA expert regarding testing
2 procedures such that it may raise doubt to the jury
3 that this defendant was the source of the DNA. And
4 that is what they did.

5 In fact, they had mock trials and
6 they had -- it sounded to me like they practiced
7 their cross-examination with the help of Norah Rudin
8 assisting them and formulating their questions to
9 the DNA expert as to how they should proceed with
10 cross-examination in an effort to defend this
11 defendant.

12 As an aside now at the evidentiary
13 hearing, the Court would note that all of their
14 efforts may very well have been futile because the
15 Court was able to listen to the credibility of both
16 Norm Reed and Violet Radosta, as well as this
17 defendant now here before the court and making
18 credibility determinations.

19 Both counsel stated that just prior
20 to trial, basically the eve of trial, and perhaps in
21 an effort to explain away the DNA in this case
22 putting him at the scene of the crime as the
23 perpetrator, both counsel testified that this
24 defendant then admitted to being at the premises
25 when this crime was committed.

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1 Mr. Reed didn't go into it as much,
2 but Ms. Radosta clearly testified after the
3 defendant had waived his privilege that in fact this
4 was consensual sex and he actually put himself there
5 in this hearing based on the evidence, that he
6 wanted to change his defense, that he was the source
7 of the DNA because it was consensual sex, that he
8 knew the victims in this case and that the victim of
9 the sexual assault was actually consenting to sex,
10 that he sold her drugs before and apparently wanted
11 to change the defense.

12 Ms. Radosta explained that although
13 that was a defense to the sexual assault charge,
14 there were multiple other charges in this case and
15 that his version would not have exculpated him, this
16 defendant, from all of the other charges that were
17 contained in the Information, including all the
18 crimes against the other victim in this case.

19 And so for those reasons, they
20 strategically continued to defend the defendant
21 against the evidence regarding the DNA results.

22 As far as the defense bringing up
23 the Nevada database didn't hit on this defendant,
24 the Court feels that's a nonissue, that the CODIS
25 hitting on the defendant's DNA is just probable

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1 cause, that it's irrelevant.

2 And as Mr. Reed stated, it's of no
3 consequence at all that Nevada did not hit on the
4 defendant's DNA sample.

5 As far as the, now being brought up
6 I think for the first time really at the evidentiary
7 hearing that there was a co-defendant being tried at
8 the same time, this defendant admitted that he was
9 there at the scene pursuant to both counsel. And so
10 really as far as strategy, it's of no consequence to
11 this Court either that defendant was concerned or
12 wanted to know why the co-defendant wasn't
13 interviewed.

14 The Court does not find that any
15 investigation regarding alibi fell below the
16 standard. Ms. Radosta explained that the defendant
17 simply could not explain where he was six months
18 before based on lack of memory. And so they did not
19 fall below the standard of investigation for an
20 alibi defense.

21 The defendant and the defense have
22 never proffered what errors were in the PSI that
23 should have been corrected. And any errors anyway
24 were belied by the record that counsel stated that
25 it's their habit, routine and practice to go over

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1 that and they believed that they had gone over it
2 with the defendant and that he wasn't sentenced
3 based on any errors.

4 Mr. Reed testified that although
5 Judge Mosley does not record his bench conferences
6 that he was not prevented in any way from making a
7 record on anything that was said at a bench
8 conference.

9 And in fact, the defendant has not
10 proffered anything that was not on the record that
11 should have been somehow put on the record and how
12 that could have been error for ineffective
13 assistance of counsel.

14 And I know since the time of the
15 original petition, the entire public defender's file
16 has been turned over, including all the DNA
17 analysis.

18 And so the fact with another note of
19 research in the file which has been belied by the
20 record and by the evidentiary hearing, for all those
21 reasons and the reasons set forth in the opposition
22 and the State's oppositions and moving papers and
23 what has been presented at the evidentiary hearing,
24 for all those reasons, the Court is gonna deny the
25 defendant's request for post-conviction relief.

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1 I'm gonna ask the State to prepare
2 the appropriate order.

3 I'm gonna ask my court reporter to
4 make a copy of the transcript. You don't have to do
5 it expedited, but if you could get it over to the DA
6 in the next 15 days or so, the DA can supplement the
7 order.

8 If you would please put -- send it
9 Ms. Kice for her to look at and then I'll take a
10 look at that order as well.

11 And I'll enter a formal written
12 order by which the defendant is free to appeal and
13 do whatever he'd like to do at that time. We're
14 gonna put it on for 30 days from now for status
15 check the Court's written formal order denying the
16 defendant's post conviction petition for
17 post-conviction relief.

18 So thank you, ladies and gentlemen.
19 And that will conclude today's proceeding.

20 THE CLERK: Do you want to put it on a
21 Tuesday, a regular hearing day?

22 THE COURT: Yeah, just put it on a
23 regular hearing day. I just want to make sure I
24 sign the order.

25 MS. CLOWERS: Are we having the defendant
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1 transported?

2 THE COURT: No. It's just for me to sign
3 the order. All it is is for me to remember to sign
4 the order so it doesn't get lost somewhere. So I
5 put it over 30 days.

6 If I haven't signed it yet because
7 you all haven't had it done, all that happens is
8 I'll continue it another 30 days.

9 And I'll make sure that something
10 happens within that time period. It's just a way
11 for me to keep track of an order so I don't not
12 enter a written order by which he can appeal.

13 MS. KICE: Correct.

14 THE COURT: Because until I do a written
15 order, he really can't appeal me based on what I
16 just said today. So he has to have a written order.
17 And so I'm sure he will, and so that's fine, but I
18 have to do a written order. This keeps everybody on
19 track as to when this is gonna be.

20 THE CLERK: November 20th.

21 THE COURT: And, counsel, neither side
22 needs to be here either. It just needs -- I need to
23 make sure I sign off on it.

24 MS. CLOWERS: Okay.

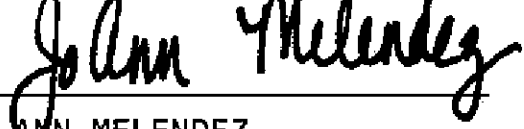
25 THE COURT: It's just really for me.

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1 MS. CLOWERS: Okay, thank you.
2 THE CLERK: That will be at 9 a.m.
3 THE COURT: That will conclude the
4 proceedings.

5 MS. CLOWERS: Thank you.

6 ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF THE
PROCEEDINGS.

7 
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JO ANN MELENDEZ

CCR NO. 370

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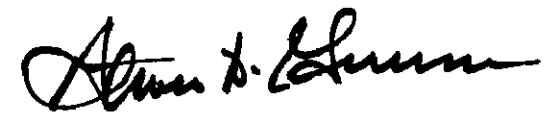
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ORDR
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JOSEPH HENDERSON,
#1502730

Defendant.

CASE NO: **05C212968**

DEPT NO: **XV**

FINDINGS OF FACT, CONCLUSIONS OF

LAW AND ORDER

DATE OF HEARING: OCTOBER 22, 2012
TIME OF HEARING: 1:00 PM

THIS CAUSE having come on for hearing before the Honorable ABBI SILVER, District Judge, on the 22nd day of October, 2012; the Petitioner being present, represented by STEPHANIE B. KICE, ESQ.; Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through SHANON CLOWERS, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, the testimony of Defendant's former attorneys, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT

1. On July 11, 2005, Joseph Henderson, hereinafter "Defendant," was charged by way of Information with Count 1 - Conspiracy to Commit Burglary, Count 2- Burglary While in Possession of a Firearm, Count 3 - Conspiracy to Commit First Degree Kidnapping, Counts 4 and 5 - First Degree Kidnapping With Use of a Deadly Weapon, Count 6 - Conspiracy to Commit Sexual Assault, Counts 7, 8, and 9 - Sexual Assault With Use of a Deadly Weapon, Count 10 - Conspiracy to Commit Robbery, Counts 11 and 12 - Robbery With Use of a Deadly Weapon, Count 13 - Open or Gross Lewdness, and Count 14 - Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm.
2. On June 27, 2008, Defendant was found guilty by a jury of all counts.
3. On August 28, 2008, Defendant was sentenced as follows: As to Count 1 – to Twelve (12) Months in the Clark County Detention Center; As to Count 2 – to a Maximum of One Hundred Fifty-Six (156) Months with a Minimum Parole Eligibility of Sixty-Two (62) Months, to run Concurrent with Count 1; As to Count 3 – to a Maximum of Sixty (60) Months with a Minimum Parole Eligibility of Twenty-Four (24) Months, to run Consecutive to Count 2; As to Count 4 – to Life with a Minimum Parole Eligibility after Sixty (60) Months, plus an Equal and Consecutive term of Life with a Minimum Parole Eligibility after Sixty (60) Months for the Use of a Deadly Weapon, to run Consecutive to Count 3; As to Count 5 – to Life with a Minimum Parole Eligibility after Sixty (60) Months, plus an Equal and Consecutive term of Life with a Minimum Parole Eligibility after Sixty (60) Months for the Use of a Deadly Weapon, to run Consecutive to Count 4; As to Count 6 – to a Maximum of Sixty (60) Months with a Minimum Parole Eligibility of Twenty-Four (24) Months, to run Consecutive to Count 5; As to Count 7 - to Life with a Minimum Parole Eligibility of One Hundred Twenty (120) Months, plus an Equal and Consecutive term of Life with a Minimum Parole Eligibility of One Hundred Twenty (120) Months for the Use of a Deadly Weapon, to run Concurrent with Count 6; As to Count 8 - to Life with a

1 Minimum Parole Eligibility of One Hundred Twenty (120) Months, plus an Equal and
2 Consecutive term of Life with a Minimum Parole Eligibility of One Hundred Twenty
3 (120) Months for the Use of a Deadly Weapon, to run Consecutive to Count 7; As to
4 Count 9 – to Life with a Minimum Parole Eligibility of One Hundred Twenty (120)
5 Months, plus an Equal and Consecutive term of Life with a Minimum Parole
6 Eligibility of One Hundred Twenty (120) Months for the Use of a Deadly Weapon, to
7 run Consecutive to Count 8; As to Count 10 – to a Maximum of Sixty (60) Months
8 with a Minimum Parole Eligibility of Twenty-Four (24) Months, to run Consecutive
9 to Count 9; As to Count 11 – a Maximum of One Hundred Eighty (180) Months with
10 a Minimum Parole Eligibility of Seventy-Two (72) Months, plus an Equal and
11 Consecutive term of Maximum of One Hundred Eighty (180) Months with a
12 Minimum Parole Eligibility of Seventy-Two (72) Months for the Use of a Deadly
13 Weapon, to run Concurrent with Count 10; As to Count 12 – to a Maximum of One
14 Hundred Eighty (180) Months with a Minimum Parole Eligibility of Seventy-Two
15 (72) Months, plus an Equal and Consecutive term of Maximum of One Hundred
16 Eighty (180) Months with a Minimum Parole Eligibility of Seventy-Two (72) Months
17 for the Use of a Deadly Weapon, to run Consecutive to Count 11; As to Count 13 – to
18 Twelve (12) Months in the Clark County Detention Center, to run Concurrent with
19 Count 12; As to Count 14 – a Maximum of One Hundred Fifty-Six (156) Months with
20 a Minimum Parole Eligibility of Sixty-Two (62) Months, to run Consecutive to Count
21 13; with One Two Hundred Fifty-One (1,251) Days credit for time served. Further
22 Ordered, a Special Sentence of Lifetime Supervision is imposed to commence upon
23 release from any term of imprisonment, probation or parole.

- 24 4. Defendant's Judgment of Conviction (Jury Trial) was filed on September 24, 2008.
25 5. Defendant filed a Notice of Appeal on October 9, 2008. The Nevada Supreme Court
26 affirmed Defendant's conviction on February 3, 2010 (case no. 52573). Remittitur
27 issued on March 2, 2010.

28 //

- 1 6. Defendant filed his pro per Petition for Writ of Habeas Corpus (Post-Conviction) on
2 January 11, 2011. The State's response was filed on March 29, 2011.
- 3 7. On March 15, 2011, the court granted Defendant's Motion for the Appointment of
4 Counsel. Stephanie B. Kice confirmed as counsel on March 17, 2022.
- 5 8. On August 26, 2011, through counsel, Defendant filed a Supplemental Petition for
6 Writ of Habeas Corpus (Post-Conviction) (hereinafter "Supp. Pet." or "Supplemental
7 Petition"). The State responded to the Supplement on September 30, 2011.
- 8 9. On December 1, 2011, the matter was set for an evidentiary hearing to expand the
9 record. Following continuances, the court held an evidentiary hearing on October 22,
10 2012, during which Norm Reed and Violet Radosta, Esqs., were sworn and testified
11 regarding Defendant's claims of ineffective assistance of counsel. Defendant was
12 present with counsel.
- 13 10. In Grounds 1, 5, and 6 of the Petition, Defendant claims (1) the State deprived him of
14 his confrontation rights when it "failed to provide [him] the evidence submitted to the
15 [DNA lab], (2) the State consumed all available material for DNA testing, and (3) the
16 district court erred in failing to dismiss the information due to the State's alleged
17 consumption of all available DNA material. Pet. at 5g-i, 5s-t. Defendant raised claims
18 regarding the State's handling of the DNA evidence and the district court's denial of
19 his motion to dismiss on direct appeal. The Nevada Supreme Court held, "Because
20 [Defendant's] claim that the State did not preserve DNA material from each sample
21 for defense retesting is belied by the record, we conclude that the district court did not
22 abuse its discretion." 02-03-2010 Order Affirming at 1. Grounds 1, 5, and 6 are
23 therefore barred by the doctrine of law of the case.
- 24 11. In Ground 7 of the Petition, Defendant argues that the State should have been
25 prevented from identifying him as the perpetrator through the use of the DNA
26 evidence. Pet. at 5t-x. Defendant claimed on direct appeal that the district court had
27 erred by denying a pretrial motion to preclude the improper use of DNA evidence.
28 The Nevada Supreme Court found this claim to be without merit. 02-03-2010 Order

1 Affirming at 2. Ground 7 of the Petition is therefore barred by the doctrine of law of
2 the case.

3 12. In Ground 8 of the Petition, Defendant claims the district court erred in denying his
4 motion for a mistrial. Pet. at 5x-y. Defendant also raised this same claim in his direct
5 appeal. The Nevada Supreme Court found that “the district court did not clearly abuse
6 its discretion when it denied the motion....” 02-03-2010 Order Affirming at 2. As
7 such, Ground 8 claim is barred as the law of the case.

8 13. In Grounds 2 and 3 of the Petition, Defendant claims that the State elicited perjured
9 testimony and that it did not prove each element of the crime beyond a reasonable
10 doubt. Pet. at 5j-p. In Ground 2 of the Supplemental Petition, Defendant alleges that
11 the State committed a violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194
12 (1963). Defendant did not raise these claims on direct appeal and, as such, they are
13 waived per NRS 34.810.

14 14. Defendant alleges that the victim pressed herself onto her injured fiancé’s bloody
15 body and knelt in a pool of his blood, and this may have contaminated the DNA
16 evidence. Pet. at 5r. Defendant fails to support this assertion with specific factual
17 allegations and the claim is therefore dismissed. Moreover, there is no evidence in the
18 record that supports Defendant’s contention that the victim “pressed herself” on to
19 Mr. Bernzweig’s body or “kneeled” in the pool of blood. See 6/24/08 TT p. 149-150;
20 6/25/08 TT p. 35. Defendant fails to explain how coming into contact with Mr.
21 Bernzweig’s blood in any way makes the DNA test results identifying him as the
22 perpetrator unreliable. Defendant’s DNA was not rendered undetectable, and DNA
23 profiles of individuals can be discerned from mixed profiles. As such, Defendant fails
24 to demonstrate that counsel was deficient or that he was prejudiced.

25 15. Defendant claims his attorney was ineffective for failing to “call into question and
26 have tested the evidence of California authorities’ lab work matching petitioner to
27 Nevada’s profile.” Pet. at 5q. Defendant was identified as a suspect by witness Kathy
28 Gunther, who matched the unknown DNA profile to Defendant with the assistance of

1 outside agencies. 6/26/08 TT p.109. Defendant claims that his attorney should have
2 challenged the DNA profile generated by the outside agency which identified him as
3 the unknown perpetrator. However, such an action by trial counsel would have been
4 useless since Ms. Gunther matched the DNA profile of the unknown perpetrator to a
5 buccal swab obtained from Defendant in a confirmatory match. Id. As such,
6 Defendant does not demonstrate that counsel was ineffective or that he was
7 prejudiced, since counsel cannot be deemed ineffective for failing to make futile
8 objections or motions.

9 16. Defendant argues that his counsel was ineffective for failing to challenge Ms.
10 Gunther's testimony that she detected spermatozoa sufficient to obtain a genetic
11 profile. Pet. at 5r. Defendant failed to demonstrate that such an attempt by counsel
12 would have achieved favorable testimony. Moreover, Defendant's DNA was also
13 detected on the breast swab taken from the victim. 6/26/08 TT 115. As such,
14 Defendant fails to demonstrate prejudice.

15 17. In the Supplemental Petition, Defendant claims his attorney was ineffective for failing
16 to retain his own DNA expert to either retest or make an independent evaluation of
17 the DNA report. Supp. Pet. at 8-9. The mere failure to retain an expert does not render
18 counsel per se ineffective. Further, Defendant's bare allegations that mistakes "may
19 have been made" during testing are insufficient to demonstrate prejudice under
20 Strickland.

21 18. Mr. Norm Reed's and Ms. Violet Radosta's testimony at the evidentiary hearing was
22 credible.

23 19. Defendant waived his attorney client privilege at the evidentiary hearing. 10-22-2012
24 Evidentiary Hearing at 12.

25 20. At the evidentiary hearing, Ms. Violet Radosta testified that she brought Mr. Norm
26 Reed in because the DNA evidence in the case had been questioned. 10-22-2012
27 Evidentiary Hearing at 82. Mr. Reed was second chair on the case, and his job was to
28 examine, interpret, and attack the DNA evidence. 10-22-2012 Evidentiary Hearing at

1 10. Defendant's allegation that defense counsel failed to consult with a DNA expert is
2 belied by the record. Mr. Reed and Ms. Radosta consulted with a DNA expert, Norah
3 Rudin, one of the nation's renowned DNA experts. 10-22-2012 Evidentiary Hearing
4 at 26-27, 53, 128. Ms. Rudin reviewed the DNA evidence – the entire forensic file –
5 including the bed sheet, the vaginal swabs, the breast swabs, and the California DNA
6 results. Id. Reviewing the entire file allows her to make her own interpretation of it.
7 Id. at 29. Mr. Reed consulted with Ms. Rudin regarding her findings. Id. at 27. Ms.
8 Rudin concluded, first, that the testing procedures were done correctly. Id. at 29. Ms.
9 Rudin further concluded that, although there were some differences in how she would
10 arrive at the result, at the end of the day, Defendant was the source of the DNA. Id. at
11 29-30, 53. Defendant was the single-source contributor of the DNA on the sheets. Id.
12 at 55. Defendant was the single-source contributor of the DNA on the vaginal swab of
13 the victim taken pursuant to the sexual assault kit. Id. at 55-56, 107. Defendant was
14 the single-source contributor of the DNA on the victim's breast area. Id. at 57, 107.

15 21. Defense counsel made the strategic decision not to put Ms. Rudin on the stand
16 because, although she disagreed with some points of interpretation, she agreed with
17 the overall results reached by Metro, which were that Defendant's DNA was present
18 at the scene. 10-22-2012 Evidentiary Hearing at 30-31.

19 22. There was enough DNA to retest, but defense counsel made the strategic choice not to
20 do so because they would have been obligated to turn the results over to the State. 10-
21 22-2012 Evidentiary Hearing at 40, 101-104, 106, 108. Ms. Rudin advised against
22 having the DNA retested. Id. at 39-40. Retesting would in effect turn the defense
23 expert into a witness for the State. Id. at 108. Had counsel brought in the California or
24 CODIS match, it would have simply illuminated that yet another independent lab
25 found that Defendant's DNA was on the victim. In total, three different DNA experts
26 found that the DNA was Defendant's: (1) the California lab, (2) the buccal swab done
27 based on the probable cause of the CODIS match, and (3) Metro's DNA testing. 10-
28 22-2012 Evidentiary Hearing at 36, 52. Bringing in the CODIS or California match

1 would also raise questions about why Defendant's DNA was on file with California
2 and lead to the inference that he was a felon. 10-22-2012 Evidentiary Hearing at 52.

3 23. Based on the number of independent labs confirming Defendant's DNA at the scene,
4 Mr. Reed and Ms. Radosta made the reasonable strategic decision to proceed only
5 with Metro's lab results, so they could try to cross-examine the DNA expert regarding
6 testing procedures such that it may raise doubt to the jury that this Defendant was the
7 source of the DNA. 10-22-2012 Evidentiary Hearing at 88-89. To advance this trial
8 tactic, Mr. Reed and Ms. Radosta held mock trials and practiced their cross-
9 examination with the help of Norah Rudin. Ms. Rudin prepared a list of potential
10 cross-examination questions for counsels. 10-22-2012 Evidentiary Hearing at 31.

11 24. On the eve of trial, Defendant sought to change his defense to an argument that his
12 DNA was present on the victim because the sex with the victim was consensual. 10-
13 22-2012 Evidentiary Hearing at 119-20, 124-27. Ms. Radosta explained to Defendant
14 that although this would be a defense to sexual assault, it was not a defense to the
15 other charges. Id. at 125. Given this, defense counsel chose to continue with their
16 strategy of attacking the DNA results.

17 25. It is irrelevant that the Nevada database did not have a match for Defendant. 10-22-
18 2012 Evidentiary Hearing at 60. Mr. Reed testified that it was unusual that the CODIS
19 hit did not come from Nevada because Defendant had a previous conviction in
20 Nevada, but the CODIS hit only provides a probable cause determination. 10-22-2012
21 Evidentiary Hearing at 34. Following the hit, the State performs an independent exam
22 of the evidence and a manual comparison. Id. at 34-35, 51-52. Because both
23 California got the match right and Metro's manual comparison was right according to
24 the defense expert, defense counsel could only have emphasized that Defendant
25 should have been in the Nevada system because of his prior conviction by
26 investigating why the CODIS hit did not come from Nevada. Id. at 59-61.

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1 26. As to Defendant's allegations that defense counsel failed to investigate a potential
2 alibi, raised for the first time at the evidentiary hearing, his arguments lack merit. It is
3 of no consequence that a co-defendant admitted he was at the scene. 10-22-2012
4 Evidentiary Hearing at 45-48. Further, Ms. Radosta testified that Defendant could not
5 explain where he was at the time of the crime based on lack of memory. Id. at 85-88,
6 90-91. Defense counsel did not fall below the standard of investigation for an alibi
7 defense.

8 27. In the Supplemental Petition, Defendant argues his counsel should have challenged
9 the validity of the search warrant. Supp. Pet. at 9-10. Defendant's bare allegation that
10 the search warrant "may" have been based upon false statements is insufficient to
11 demonstrate ineffective assistance. Further, simply stating the evidence "may very
12 well have been suppressed" does not show a reasonable probability the outcome
13 would have been different, so Defendant fails to demonstrate prejudice. Defense
14 counsel testified that he saw no issue with the search warrant in this case. 10-22-2012
15 Evidentiary Hearing at 70-71, 73-74. In any case, appellate counsel withdrew the
16 issue of the search warrant affidavit at the October 22, 2012 evidentiary hearing. 10-
17 22-2012 Transcript at 132, 159.

18 28. In the Supplemental Petition, Defendant claims that he was not allowed to review his
19 presentence investigation report ("PSI"), and his counsel was ineffective for failing to
20 allow him to do so. Supp. Pet. at 10-11. However, Defendant fails to specifically state
21 what errors his PSI allegedly contains and thus fails to demonstrate any prejudice
22 under Strickland. Further, defense counsels testified at the evidentiary hearing that it
23 is their habit, routine, and practice to over the PSI and that they believed they had
24 gone over Defendant's PSI with him. 10-22-2012 Evidentiary Hearing at 68-69, 129.
25 Had there been substantive errors in the PSI, defense counsel would have raised the
26 issue with the sentencing judge. Id. at 131.

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1 29. In the Supplemental Petition, Defendant claims that trial counsel failed to make an
2 adequate record by recording bench conferences. Supp. Pet. at 11. Defendant's
3 general allegations of unrecorded bench conferences fail to explain which judicial
4 actions should have been preserved, how such actions did or did not have merit, or a
5 reasonable probability that their preservation would have alter the outcome of his trial
6 or appeal. Defendant's allegations are too vague to warrant relief per Hargrove and
7 NRS 34.735(6). Further, Mr. Reed testified at the evidentiary hearing that he was not
8 prevented in any way from making a record on anything that was said at a bench
9 conference. 10-22-2012 Evidentiary Hearing at 66. The trial judge always gave
10 defense counsel the opportunity to put material off-record discussions on the record at
11 a later time. Id. Mr. Reed testified that nothing in the unrecorded bench conferences
12 would have changed the outcome of the trial. Id. at 72.

13 30. In the Supplemental Petition, Defendant alleges trial counsel was ineffective for
14 failure to keep necessary notes, conduct research, or properly document the file. Supp.
15 Pet. at 11-12. Defendant does not cite, nor has this Court been able to locate, any case
16 holding an attorney ineffective for such reasons. Post-conviction counsel's opinion
17 that trial counsel's note taking abilities are inadequate does not render him
18 incompetent or ineffective. Trial counsel does not need to take every conceivable
19 action in order to protect himself against allegations of inadequacy. Counsel is not
20 required to document every step during litigation in his personal file for the purpose
21 of making post-conviction counsel's attempt at alleging him ineffective easier.
22 Defendant's bare allegation is insufficient for relief, and Defendant fails to
23 demonstrate how the outcome of his trial would have been different had counsel done
24 a better job at taking notes. He is not entitled to relief under Strickland.

25 31. Although appellate counsel raised for the first time at the evidentiary hearing the late
26 timing of the State's plea offer, Ms. Radosta testified that defense counsel was able to
27 discuss the offer with him for about forty-five minutes to an hour. 10-22-2012
28 Evidentiary Hearing at 110-11. Over counsels' advice to the contrary, Defendant

1 refused the plea offer. 10-22-2012 Evidentiary Hearing at 114-15. Because defense
2 counsel communicated the plea offer to Defendant, they were not ineffective for
3 failure to communicate a plea offer.

4 32. Defendant received effective assistance of counsel.

5 CONCLUSIONS OF LAW

6 1. "The law of a first appeal is law of the case on all subsequent appeals in which the
7 facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798
8 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The
9 doctrine of the law of the case cannot be avoided by a more detailed and precisely
10 focused argument subsequently made after reflection upon the previous proceedings."
11 Hall, 91 Nev. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues
12 previously decided on direct appeal may not be reargued in a habeas petition.
13 Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (citing McNelson v. State, 115
14 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)).

15 2. NRS 34.810 states in relevant part:

16 1. The court shall dismiss a petition if the court determines that:

17 (b) The petitioner's conviction was the result of a trial and the
18 grounds for the petition could have been:

19 (2) Raised in a direct appeal or a prior petition for a writ of
20 habeas corpus or postconviction relief...

21 3. In order to assert a claim for ineffective assistance of counsel a defendant must prove
22 that he was denied "reasonably effective assistance" of counsel by satisfying the two-
23 prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-
24 64 (1984):

25 First, the defendant must show that counsel's performance was
26 deficient. This requires showing that counsel made errors so serious
27 that counsel was not functioning as the 'counsel' guaranteed the
28 defendant by the Sixth Amendment. Second, the defendant must
show that the deficient performance prejudiced the defense. This
requires showing that counsel's errors were so serious as to deprive
the defendant of a fair trial, a trial whose result is reliable. Unless a

1 defendant makes both showings, it cannot be said that the conviction
2 or death sentence resulted from a breakdown in the adversary
process that renders the result unreliable.

3 Id. at 687, 2064; see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
4 (1993); Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505
5 (1984) (adopting Strickland two-part test in Nevada). “Effective counsel does not mean
6 errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
7 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, Nevada State
8 Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson,
9 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

10 4. In considering whether trial counsel has met this standard, the court should first
11 determine whether counsel made a “sufficient inquiry into the information that is
12 pertinent to his client’s case.” Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280
13 (1996); citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once such a
14 reasonable inquiry has been made by counsel, the court should consider whether
15 counsel made “a reasonable strategy decision on how to proceed with his client’s
16 case.” Doleman, 112 Nev. at 846, 921 P.2d at 280, citing Strickland, 466 U.S. at 690-
17 691, 104 S.Ct. at 2066. Finally, counsel’s strategy decision is a “tactical” decision and
18 will be “virtually unchallengeable absent extraordinary circumstances.” Doleman, 112
19 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180
20 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

21 5. Based on the above law, the court begins with the presumption of effectiveness and
22 then must determine whether or not the petitioner has proved disputed factual
23 allegations underlying his ineffective-assistance claim by a preponderance of the
24 evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). The role of a
25 court in considering allegations of ineffective assistance of counsel is “not to pass
26 upon the merits of the action not taken but to determine whether, under the particular
27 facts and circumstances of the case, trial counsel failed to render reasonably effective
28 assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), citing

1 Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977).

- 2 6. This analysis does not mean that the court “should second guess reasoned choices
3 between trial tactics nor does it mean that defense counsel, to protect himself against
4 allegations of inadequacy, must make every conceivable motion no matter how
5 remote the possibilities are of success.” Donovan, 94 Nev. at 675, 584 P.2d at 711. In
6 essence, the court must “judge the reasonableness of counsel's challenged conduct on
7 the facts of the particular case, viewed as of the time of counsel's conduct.”
8 Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.
- 9 7. “There are countless ways to provide effective assistance in any given case. Even the
10 best criminal defense attorneys would not defend a particular client in the same way.”
11 Strickland, 466 U.S. at 689, 104 S.Ct. at 689. “Strategic choices made by counsel
12 after thoroughly investigating the plausible options are almost unchallengeable.”
13 Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992), citing Strickland, 466
14 U.S. at 690, 104 S. Ct. at 2066; see also Ford v. State, 105 Nev. 850, 853, 784 P.2d
15 951, 953 (1989).
- 16 8. Even if a defendant can demonstrate that his counsel's representation fell below an
17 objective standard of reasonableness, he must still demonstrate prejudice and show a
18 reasonable probability that, but for counsel's errors, the result would have been
19 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), citing
20 Strickland, 466 U.S. at 687. “A reasonable probability is a probability sufficient to
21 undermine confidence in the outcome.” Id., citing Strickland, 466 U.S. at 687-89,
22 694. “Surmounting Strickland's high bar is never ... easy.” Harrington v. Richter, 562
23 U.S. ____, 131 S.Ct. 770, 788 (2011). “The question is whether an attorney's
24 representation amounted to incompetence under prevailing professional norms, not
25 whether it deviated from best practices or most common custom.” Id. Moreover,
26 “[r]are are the situations in which the latitude counsel enjoys will be limited to any
27 one technique or approach... Counsel is entitled to balance limited resources in accord
28 with effective trial tactics and strategies.” Id. at 789.

- 1 9. Occasionally, "Criminal cases will arise where the only reasonable and available
2 defense strategy requires consultation with experts or introduction of expert evidence,
3 whether pretrial, at trial, or both. There are, however, countless ways to provide
4 effective assistance in any given case. Even the best criminal defense attorneys would
5 not defend a particular client in the same way. Rare are the situations in which the
6 wide latitude counsel must have in making tactical decisions will be limited to any
7 one technique or approach." Harrington, 131 S.Ct. at 788-789 (internal citations and
8 quotations omitted).
- 9 10. Counsel cannot be deemed ineffective for failing to make futile objections or motions.
10 Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).
- 11 11. Trial counsel does not need to take every conceivable action in order to protect
12 himself against allegations of inadequacy. Donovan, 94 Nev. at 675, 584 P.2d at 711.
- 13 12. Claims asserted in a petition for post-conviction relief must be supported with specific
14 factual allegations, which if true, would entitle the petitioner to relief. Hargrove v.
15 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations
16 are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6)
17 states, in pertinent part:
- 18 [Petitioner] must allege specific facts supporting the claims in
19 the petition [he] file[s] seeking relief from any conviction or
20 sentence. Failure to raise specific facts rather than just
conclusions may cause [the] petition to be dismissed.
- 21 13. Due process does not require every sidebar conference to be recorded. See Daniel v.
22 State, 119 Nev. 498, 78 P.3d 890 (2003).
- 23 14. Missouri v. Frye, 132 S. Ct. 1399, 1408, 182 L. Ed. 2d 379 (2012), holds that defense
24 counsel has the duty to communicate formal offers from the prosecution that may be
25 favorable to the accused. It does not hold that defense attorneys are required to
26 discuss a plea offer with a defendant for any particular period of time.


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1 **ORDER**

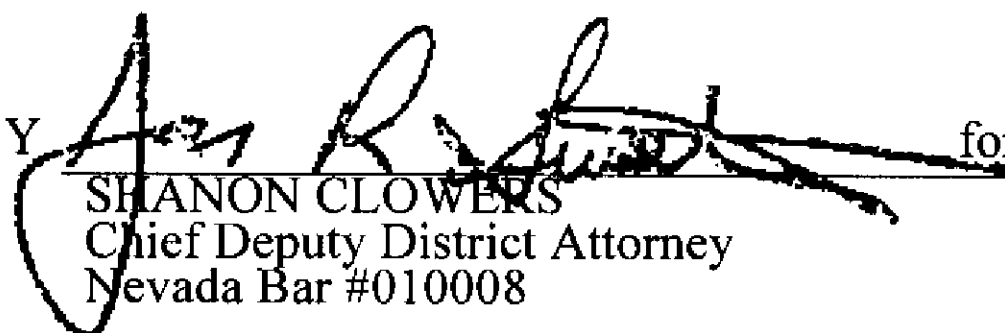
2 THEREFORE, **IT IS HEREBY ORDERED** that the Petition for Writ of Habeas
3 Corpus (Post Conviction) shall be, and it is, denied.

4 DATED this 20th day of November, 2012.

5 
6 Abbi Silver
7 DISTRICT JUDGE

8 STEVEN B. WOLFSON
9 Clark County District Attorney
Nevada Bar #001565

10
11 BY


12 SHANON CLOWERS
13 Chief Deputy District Attorney
Nevada Bar #010008

for

14
15
16
17
18
19 **NOTICE OF SERVICE**

20 I, HOWARD CONRAD, hereby certify that the State forwarded a copy of these
21 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER on the 15th day of
22 NOVEMBER, 2012, to:

23 STEPHANIE KICE, ESQ.
24 skice@kicelaw.com

25 
26 Secretary for the District Attorney's Office

27
28 hjc/SVU

Conrad, Howard

From: Conrad, Howard
Sent: Thursday, November 15, 2012 1:56 PM
To: 'skice@kicelaw.com'
Attachments: 50514601.doc

THE STATE OF NEVADA,)		
)	CASE NO:	05C212968
Plaintiff,)		
-vs-)	DEPT NO:	XV
JOSEPH HENDERSON,)		
#1502730)		
)		
Defendant.)		
)		
)		
)		

FINDINGS OF FACT, CONCLUSIONS OF

LAW AND ORDER

DATE OF HEARING: OCTOBER 22, 2012
TIME OF HEARING: 1:00 PM

Howard Conrad
Special Victims Unit
Clark County District Attorney
(702) 671-2790

"What I really need is a droid
who understands the binary
language of moisture evaporators."

48

Joseph A. Henderson #167224
P.O. Box 650 HDSP
Indian Springs, Nevada 89018
In Proper Person

FILED

FEB 12 2013

Ch. Clerk
CLERK OF COURT

District Court
Clark County, Nevada

05C212968
NOASC
Notice of Appeal (criminal)
2220973



Joseph A. Henderson,
Petitioner,

05C212968

Case No. C212968

Dept No. XV

- vs -

The State of Nevada,
Respondent.

Second Notice of Appeal

Petitioner, Joseph A. Henderson, with the assistance of another prisoner, in proper person, does now serve this, his Second (2nd) Notice of appeal regarding the denial of a post-conviction writ of habeas corpus by this Court, Judge A. Silver, Department 15, of the Eighth Judicial District Court of the State of Nevada, as petitioner's First (1st) informal notice of appeal has gone unfiled and unnotified contrary to the legal precedent of this State, as well as the United States of America.

Appeal is a matter of right under Nevada law and refusal to file is a denial of due process. Petitioner's informal notice of appeal is and was timely.

Dated this date, 29 January 2013.

Submitted,

Joseph A. Henderson
Joseph A. Henderson
Petitioner/Appellant
In Proper Person

RECEIVED
CLERK OF COURT
FEB 21 2013

Petitioner/Appellant would remind this Court that pro se litigant's pleadings are to be construed liberally and held to less stringent standards than formal pleadings drafted by lawyers; If Court can reasonably read pleadings to state a valid claim on which litigant could prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant's unfamiliarity with pleading requirements. See; Borg v. MacDougall, 102 S.Ct. 700; Green v. Branson, 108 F.3d 1096; Spencer v. Doe, 139 F.3d 107; Huskey v. Owens, 63 F.3d 354; Baker v. Cuomo, 58 F.3d 814.

In addition, Nevada case law is rather clear as to the timely, and effective, filing of a notice of appeal in relation to writs of habeas corpus. "Where the trial court had orally denied the prisoner's petition for habeas corpus and the petitioner filed his notice of appeal before the entry of written order, the notice of appeal was not premature... the appellate court treated it as filed after entry of the order and on the day thereof." See, Hill v. Warden, 96 Nev. 38, cited, State v. Convery, 99 Nev. 342, at 343, Jordan v. Hausenwright, 101 Nev. 146, at 148, Washington v. State, 104 Nev. 309, at 311, Mazzan v. State, 109 Nev. 1067, at 1071, Beets v. State, 110 Nev. 339, at 341, Klein v. Warden, Elly State Prison, 118 Nev. 305, at 310; see also, Dotson v. State, 114 Nev. 582, at 584.

In the instant matter, petitioner attempted first to file his notice of appeal directly with the Nevada Supreme Court due to some lack of communication issues with counsel. In petitioner's own layman words: "Also would you please except this missive as a 'Notice of Appeal' to the habeas corpus hearing..." (emphasis in the original, see attached exhibit "A" incorporated by reference and fact). The Deputy Clerk of the Nevada Supreme Court returned petitioner's documents unfiled (see attached exhibit "B" incorporated by reference and fact).

In turn, petitioner then mailed these documents to the Clark County Clerk's Office, Mr. Steven Grierson for filing. With no response, petitioner wrote again: "In the memo I requested that you please acknowledge my request to the notice of appeal on my habeas corpus hearing..." (See attached exhibit "C" incorporated by reference and fact).

Of import is the fact that not one (1), but two (2), attempts were made by the petitioner to have his notice of appeal filed by the Clerk of the Court for Clark County well before the expiration of the thirty-three (33) days as provided by the "Notice of entry of Findings of fact, conclusions of law and order" (See attached exhibit "D" incorporated by reference and fact). As of 16 January 2013, no reference to these attempts is noted in the "Case Summary" (See attached exhibit "E" incorporated by reference and fact), nor has any notice of appeal been filed. That marks a total of three (3) proper persons, informal, layman attempts by the petitioner to have a timely notice of appeal filed: Once with the Nevada Supreme Court, and twice with the Clark County District Court.

It is therefore respectfully requested that this Court order this notice of appeal filed and noted as timely in accordance with the cases cited herein.

Dated this date, 29 January 2013.

Respectfully Submitted,

Joseph Henderson
Joseph A. Henderson

Certificate of Service

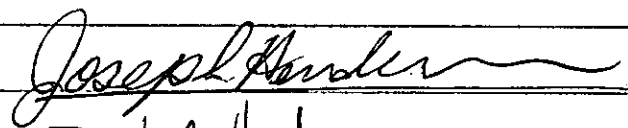
I do hereby certify that I placed a true and correct copy of the foregoing "Second Notice of Appeal", postage pre-paid, in the hands of a prison guard at High Desert State Prison for the express purpose of placing into the United States mail, addressed as follows:

Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155

and

Catherine Carter-Mastro
Attorney General for the State of Nevada
Capitol Complex
Carson City, Nevada 89710

Dated this date, January 2013.


Joseph A. Henderson
P.O. Box 650 HDSP
Indian Springs, Nevada 89308

JOSEPH HENDERSON 61224
PO BOX 650 INDIAN SPRING 21762 NV

11-17-12

CASE- C212968

Memo to Court clerk.

① Please stamp file copy
one of these letters, and please
send the one with Ms Kice
counsel to her, as you see
I've also attached an envelope
already addressed to her.

② Also would you please
except this missive as
a "notice of appeal" to
the Head Corps hearing I
just had in district court
on 9-22-12. disregard if my
lawyer has already done
so.

Thank U.



SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
TRACIE K. LINDEMAN, CLERK
201 SOUTH CARSON STREET, SUITE 201
CARSON CITY, NEVADA 89701-4702

Telephone
(775) 684-1600

December 6, 2012

Joseph A. Henderson
Inmate ID: 67224
HDSP
P.O. Box 650
Indian Springs, NV 89070

Dear Mr. Henderson,

We are returning unfiled the enclosed documents received in this office on December 5, 2012. The remittitur, in case no. 52573 issued on March 2, 2010, closing this case.

Per our records you have no other appeals or petitions currently pending in this court.

All Notice of Appeals are filed directly with the District Court. Please refer to Nevada Rules of Appellate Procedure (NRAP), Rule (3).

Sincerely,

A handwritten signature in black ink, appearing to read "L. Hamilton".

L. Hamilton
Deputy Clerk

Enclosure

att: Mr Steven Grierson

12-27-12

case no C 212968

It is on 12-10-12 I sent you documents to be stamp filed copied, one for the record, one for my lawyer.

In the memo I ~~also~~ requested that you please acknowledge my request to the notice of appeal on my next Corpus hearing I had in 9-22-12

Every other time I requested your help you would always send me something in 2 weeks at most. This is very important to me, I haven't been able to talk to my lawyer lately. So I don't know if she has filed the notice of appeal, but I'm sure she did. But I have to be for sure, my lawyer will tell me one thing and do another. So I have to make sure,

Thank u Steven.

JOSEPH HENDERSON 67224
PO BOX 650 INDIAN SPRING

1 NEO


CLERK OF THE COURT

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4
5 JOSEPH A. HENDERSON,

6 Petitioner,

7 vs.

8 THE STATE OF NEVADA,

9 Respondent,

Case No: C212968

Dept No: XV

10 **NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
ORDER**

11 **PLEASE TAKE NOTICE** that on November 21, 2012, the court entered a decision or order in this matter,
12 a true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
15 mailed to you. This notice was mailed on December 3, 2012.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

17 By: 
18 Heather Ungermann, Deputy Clerk

19 **CERTIFICATE OF MAILING**

20 I hereby certify that on this 3 day of December 2012, I placed a copy of this Notice of Entry of Decision
21 and Order in:

22 The bin(s) located in the Office of the District Court Clerk of:
23 Clark County District Attorney's Office
Attorney General's Office – Appellate Division

24 ☒ The United States mail addressed as follows:

25 Joseph Henderson # 67224
26 P.O. Box 650
Indian Springs, NV 89070

Stephanie B. Kice, Esq.
616 S. Eighth St.
Las Vegas, NV 89101

27 
28 Heather Ungermann, Deputy Clerk

DEPARTMENT 15
CASE SUMMARY
CASE NO. 05C212968

Conviction)




















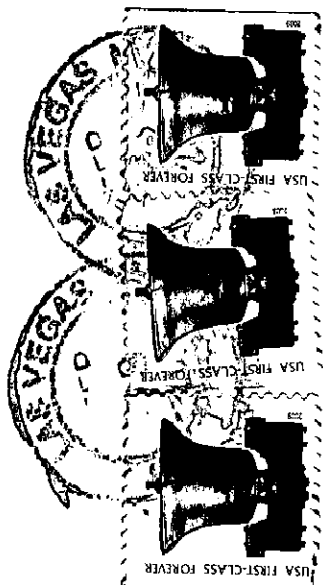
12/01/2011	 Petition for Writ of Habeas Corpus (9:00 AM) (Judicial Officer: Silver, Abbi) 12/01/2011, 01/05/2012, 01/12/2012, 01/19/2012, 01/30/2012, 03/27/2012, 08/27/2012, 10/22/2012 Events: 08/26/2011 Petition for Writ of Habeas Corpus
12/08/2011	 Order for Production of Inmate
01/05/2012	Evidentiary Hearing (10:45 AM) (Judicial Officer: Silver, Abbi) 01/05/2012, 01/12/2012, 01/19/2012, 01/30/2012, 03/27/2012, 08/27/2012, 10/22/2012
01/05/2012	 All Pending Motions (10:45 AM) (Judicial Officer: Silver, Abbi) <i>Evidentiary Hearing and Def't's Writ of Habeas Corpus - Rescheduled</i>
01/12/2012	 All Pending Motions (9:00 AM) (Judicial Officer: Silver, Abbi) <i>Evidentiary Hearing and Def't's Writ of Habeas Corpus</i>
01/19/2012	 All Pending Motions (9:00 AM) (Judicial Officer: Silver, Abbi) <i>Evidentiary Hearing and Def't's Writ of Habeas Corpus</i>
01/30/2012	 All Pending Motions (1:00 PM) (Judicial Officer: Silver, Abbi) <i>Evidentiary Hearing and Def't's Writ of Habeas Corpus</i>
02/03/2012	 Order for Production of Inmate <i>Order for Production of Inmate Joseph Alexander Henderson BAC #67224</i>
03/27/2012	 All Pending Motions (9:00 AM) (Judicial Officer: Silver, Abbi) <i>Evidentiary Hearing and Def't's Petition for Writ of Habeas Corpus</i>
05/08/2012	 Status Check (9:00 AM) (Judicial Officer: Silver, Abbi) 05/08/2012, 05/22/2012 <i>Status Check: Reset Evidentiary Hearing</i>
08/27/2012	 All Pending Motions (1:00 PM) (Judicial Officer: Silver, Abbi) <i>Evidentiary Hearing and Def't's Petition for Writ of Habeas Corpus</i>
08/28/2012	 Order for Production of Inmate
09/21/2012	 PSI - Misc
10/18/2012	 Status Check (9:00 AM) (Judicial Officer: Silver, Abbi) <i>Status Check: Def't's Presence</i>
10/22/2012	 All Pending Motions (1:00 PM) (Judicial Officer: Silver, Abbi) <i>Evidentiary Hearing and Def't's Writ of Habeas Corpus</i>
10/25/2012	 Order Filed By: Plaintiff State of Nevada <i>Order For Transcript</i>
11/13/2012	 Reporters Transcript Filed By: Plaintiff State of Nevada

Exhibit "E"

DEPARTMENT 15
CASE SUMMARY
CASE No. 05C212968

<i>Reporter's Transcript of Evidentiary Hearing</i>	
11/20/2012	 Status Check (9:00 AM) (Judicial Officer: Silver, Abbi) <i>Status Check: Written Order</i>
11/21/2012	 Finding of Fact and Conclusions of Law Filed By: Plaintiff State of Nevada <i>Findings of Fact, Conclusions of Law and Order</i>
12/03/2012	 Notice of Entry Filed By: Plaintiff State of Nevada <i>Notice of Entry of Findings of Fact, Conclusions of Law and Order</i>
DATE	FINANCIAL INFORMATION
	Defendant Henderson, Joseph A
	Total Charges 179.00
	Total Payments and Credits 4.00
	Balance Due as of 01/16/2013 175.00

HEUBERSON 67224
656
STAN SPRINGS N.Y.
89070



STEVEN GRIERSON CLERK OF THE COURT
200 LEWIS AVE SRD FLR
L.V. N.V. 89155-1160

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62629

FILED

MAR 04 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF LIMITED REMAND
FOR APPOINTMENT OF COUNSEL

This is a proper person appeal from an order denying a post-conviction petition for a writ of habeas corpus. Appellant was represented by counsel in the proceedings below. We remand this appeal to the district court for the limited purpose of securing counsel for appellant. The district court shall have 30 days from the date of this order to appoint counsel for appellant. Within 5 days from the date of appointment, the district court clerk shall transmit to the clerk of this court a copy of the district court's written or minute order appointing appellate counsel.

It is so ORDERED.

Pickering, C.J.

cc: Hon. Abbi Silver, District Judge
Joseph Alexander Henderson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

REGISTER OF ACTIONS

CASE NO. 05C212968

The State of Nevada vs Joseph A Henderson

§
§
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§
§

Case Type: **Felony/Gross Misdemeanor**
Date Filed: **06/29/2005**
Location: **Department 15**
Cross-Reference Case Number: **C212968**
Defendant's Scope ID #: **1502730**
Lower Court Case Number: **05F05146**
Supreme Court No.: **62629**

RELATED CASE INFORMATION

Related Cases

05F05146X (Bind Over Related Case)

PARTY INFORMATION

Defendant Henderson, Joseph A

Lead Attorneys

Julian Gregory
Retained
702-471-1436(W)

Plaintiff State of Nevada

Steven B Wolfson
702-671-2700(W)

CHARGE INFORMATION

Charges: Henderson, Joseph A	Statute	Level	Date
1. CONSPIRACY TO COMMIT A CRIME	199.480	Gross Misdemeanor	01/01/1900
1. BURGLARY.	205.060	Gross Misdemeanor	01/01/1900
2. BURGLARY.	205.060	Felony	01/01/1900
3. CONSPIRACY TO COMMIT A CRIME	199.480	Felony	01/01/1900
3. KIDNAPPING IN FIRST DEGREE	200.320	Felony	01/01/1900
3. KIDNAP WITH USE OF A DEADLY WEAPON	200.310	Felony	01/01/1900
4. KIDNAPPING IN FIRST DEGREE	200.320	Felony	01/01/1900
4. KIDNAP WITH USE OF A DEADLY WEAPON	200.310	Felony	01/01/1900
4. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
5. KIDNAPPING IN FIRST DEGREE	200.320	Felony	01/01/1900
5. KIDNAP WITH USE OF A DEADLY WEAPON	200.310	Felony	01/01/1900
5. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
6. CONSPIRACY TO COMMIT A CRIME	199.480	Felony	01/01/1900
6. SEXUAL ASSAULT	200.366	Felony	01/01/1900
6. SEXUAL ASSUALT	200.364	Felony	01/01/1900
7. SEXUAL ASSAULT	200.366	Felony	01/01/1900
7. SEXUAL ASSUALT	200.364	Felony	01/01/1900
7. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
8. SEXUAL ASSAULT	200.366	Felony	01/01/1900
8. SEXUAL ASSUALT	200.364	Felony	01/01/1900
8. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
9. SEXUAL ASSAULT	200.366	Felony	01/01/1900
9. SEXUAL ASSUALT	200.364	Felony	01/01/1900
9. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
10. CONSPIRACY TO COMMIT A CRIME	199.480	Felony	01/01/1900
10. ROBBERY	200.380	Felony	01/01/1900
11. ROBBERY	200.380	Felony	01/01/1900
11. USE OF A DEADLY WEAPON OR TEAR GAS IN	193.165	Felony	01/01/1900

COMMISSION OF A CRIME.			
12.ROBBERY	200.380	Felony	01/01/1900
12.USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
13.OPEN OR GROSS LEWDNESS	201.210	Gross Misdemeanor	01/01/1900
14.BATTERY WITH THE USE OF A DEADLY WEAPON AND SUBSTANTIAL BODILY HARM	200.481-2E2	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

03/14/2013 **Status Check** (9:00 AM) (Judicial Officer Silver, Abbi)

Status Check: Appointment of Counsel

Minutes

03/14/2013 9:00 AM

- Mr. Julian Gregory, Esq. present and accepting appointment as Deft's counsel. COURT stated, this matter just had an Evidentiary Hearing on a Post Conviction Writ of Habeas Corpus for ineffective assistance of counsel, which was denied and that decision is now being appealed. Accordingly, COURT ORDERED, Mr. Gregory is APPOINTED. NDC

[Parties Present](#)

[Return to Register of Actions](#)

REGISTER OF ACTIONS

CASE NO. 05C212968

The State of Nevada vs Joseph A Henderson

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Case Type: **Felony/Gross Misdemeanor**
Date Filed: **06/29/2005**
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Lead Attorneys

Julian Gregory

Retained

702-471-1436(W)

Plaintiff State of Nevada

Steven B Wolfson

702-671-2700(W)

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Charges: Henderson, Joseph A

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3. KIDNAP WITH USE OF A DEADLY WEAPON	200.310	Felony	01/01/1900
4. KIDNAPPING IN FIRST DEGREE	200.320	Felony	01/01/1900
4. KIDNAP WITH USE OF A DEADLY WEAPON	200.310	Felony	01/01/1900
4. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
5. KIDNAPPING IN FIRST DEGREE	200.320	Felony	01/01/1900
5. KIDNAP WITH USE OF A DEADLY WEAPON	200.310	Felony	01/01/1900
5. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
6. CONSPIRACY TO COMMIT A CRIME	199.480	Felony	01/01/1900
6. SEXUAL ASSAULT	200.366	Felony	01/01/1900
6. SEXUAL ASSUALT	200.364	Felony	01/01/1900
7. SEXUAL ASSAULT	200.366	Felony	01/01/1900
7. SEXUAL ASSUALT	200.364	Felony	01/01/1900
7. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
8. SEXUAL ASSAULT	200.366	Felony	01/01/1900
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9. SEXUAL ASSAULT	200.366	Felony	01/01/1900
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11. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
12. ROBBERY	200.380	Felony	01/01/1900
12. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
13. OPEN OR GROSS LEWDNESS	201.210	Gross Misdemeanor	01/01/1900

EVENTS & ORDERS OF THE COURT

DISPOSITIONS

01/01/1900	Plea (Judicial Officer: User, Conversion) 1. CONSPIRACY TO COMMIT A CRIME Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 1. BURGLARY. Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 2. BURGLARY. Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 3. CONSPIRACY TO COMMIT A CRIME Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 3. KIDNAPPING IN FIRST DEGREE Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 3. KIDNAP WITH USE OF A DEADLY WEAPON Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 4. KIDNAPPING IN FIRST DEGREE Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 4. KIDNAP WITH USE OF A DEADLY WEAPON Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 4. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME. Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 5. KIDNAPPING IN FIRST DEGREE Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 5. KIDNAP WITH USE OF A DEADLY WEAPON Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 5. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME. Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 6. CONSPIRACY TO COMMIT A CRIME Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 6. SEXUAL ASSAULT Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 6. SEXUAL ASSUALT Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 7. SEXUAL ASSAULT Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 7. SEXUAL ASSUALT Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 7. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME. Not Guilty

01/01/1900	Plea (Judicial Officer: User, Conversion) 8. SEXUAL ASSAULT Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 8. SEXUAL ASSAULT Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 8. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME. Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 9. SEXUAL ASSAULT Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 9. SEXUAL ASSAULT Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 9. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME. Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 10. CONSPIRACY TO COMMIT A CRIME Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 10. ROBBERY Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 11. ROBBERY Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 11. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME. Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 12. ROBBERY Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 12. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME. Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 13. OPEN OR GROSS LEWDNESS Not Guilty
01/01/1900	Plea (Judicial Officer: User, Conversion) 14. BATTERY WITH THE USE OF A DEADLY WEAPON AND SUBSTANTIAL BODILY HARM Not Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 1. CONSPIRACY TO COMMIT A CRIME Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 1. BURGLARY. Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 2. BURGLARY. Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 3. CONSPIRACY TO COMMIT A CRIME Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 3. KIDNAPPING IN FIRST DEGREE Guilty

08/28/2008	Disposition (Judicial Officer: User, Conversion) 3. KIDNAP WITH USE OF A DEADLY WEAPON Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 4. KIDNAPPING IN FIRST DEGREE Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 4. KIDNAP WITH USE OF A DEADLY WEAPON Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 4. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME. Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 5. KIDNAPPING IN FIRST DEGREE Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 5. KIDNAP WITH USE OF A DEADLY WEAPON Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 5. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME. Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 6. CONSPIRACY TO COMMIT A CRIME Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 6. SEXUAL ASSAULT Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 6. SEXUAL ASSAULT Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 7. SEXUAL ASSAULT Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 7. SEXUAL ASSAULT Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 7. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME. Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 8. SEXUAL ASSAULT Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 8. SEXUAL ASSAULT Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 8. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME. Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 9. SEXUAL ASSAULT Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 9. SEXUAL ASSAULT Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 9. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME. Guilty

08/28/2008	Disposition (Judicial Officer: User, Conversion) 10. CONSPIRACY TO COMMIT A CRIME Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 10. ROBBERY Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 11. ROBBERY Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 11. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME. Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 12. ROBBERY Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 12. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME. Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 13. OPEN OR GROSS LEWDNESS Guilty
08/28/2008	Disposition (Judicial Officer: User, Conversion) 14. BATTERY WITH THE USE OF A DEADLY WEAPON AND SUBSTANTIAL BODILY HARM Guilty
08/28/2008	Adult Adjudication (Judicial Officer: User, Conversion) 1. CONSPIRACY TO COMMIT A CRIME Converted Disposition: Sentence# 0001: Minimum 12 Months to Maximum 12 Months Placement: CCDC Converted Disposition: Sentence# 0002: LIFETIME SUPERVISION Converted Disposition: Sentence# 0003: CREDIT FOR TIME SERVED Minimum 625 Days to Maximum 626 Days Converted Disposition: Sentence# 0004: RESTITUTION Amount: \$50000.00 Converted Disposition: Sentence# 0005: DNA FEE/GENETIC MARKERS ANALYSIS Amount: \$150.00 Converted Disposition: Sentence# 0006: ADMINISTRATION FEE Amount: \$25.00
08/28/2008	Adult Adjudication (Judicial Officer: User, Conversion) 1. BURGLARY. Converted Disposition: Sentence# 0001: LIFE WITH POSSIBILITY OF PAROLE Cons/Conc: Concurrent w/Charge Item: 0001 and Sentence#: 0001
08/28/2008	Adult Adjudication (Judicial Officer: User, Conversion) 2. BURGLARY. Converted Disposition: Sentence# 0001: Minimum 62 Months to Maximum 156 Months Placement: NSP Cons/Conc: Concurrent w/Charge Item: 0001 and Sentence#: 0001
08/28/2008	Adult Adjudication (Judicial Officer: User, Conversion) 3. KIDNAPPING IN FIRST DEGREE Converted Disposition:

	<p>Sentence# 0001: LIFE WITH POSSIBILITY OF PAROLE Cons/Conc: Consecutive w/Charge Item: 0003 and Sentence#: 0001</p> <p>Converted Disposition: Sentence# 0002: LIFE WITH POSSIBILITY OF PAROLE Cons/Conc: Consecutive w/Charge Item: 0001 and Sentence#: 0001</p>
08/28/2008	<p>Adult Adjudication (Judicial Officer: User, Conversion) 3. KIDNAP WITH USE OF A DEADLY WEAPON</p> <p>Converted Disposition: Sentence# 0001: LIFE WITH POSSIBILITY OF PAROLE Cons/Conc: Consecutive w/Charge Item: 0001 and Sentence#: 0001</p>
08/28/2008	<p>Adult Adjudication (Judicial Officer: User, Conversion) 4. KIDNAPPING IN FIRST DEGREE</p> <p>Converted Disposition: Sentence# 0001: LIFE WITH POSSIBILITY OF PAROLE Cons/Conc: Consecutive w/Charge Item: 0005 and Sentence#: 0001</p> <p>Converted Disposition: Sentence# 0002: LIFE WITH POSSIBILITY OF PAROLE Cons/Conc: Consecutive w/Charge Item: 0001 and Sentence#: 0001</p>
08/28/2008	<p>Adult Adjudication (Judicial Officer: User, Conversion) 5. KIDNAPPING IN FIRST DEGREE</p> <p>Converted Disposition: Sentence# 0001: LIFE WITH POSSIBILITY OF PAROLE Cons/Conc: Consecutive w/Charge Item: 0005 and Sentence#: 0001</p> <p>Converted Disposition: Sentence# 0002: LIFE WITH POSSIBILITY OF PAROLE Cons/Conc: Consecutive w/Charge Item: 0001 and Sentence#: 0001</p>
08/28/2008	<p>Adult Adjudication (Judicial Officer: User, Conversion) 6. CONSPIRACY TO COMMIT A CRIME</p> <p>Converted Disposition: Sentence# 0001: Minimum 24 Months to Maximum 60 Months Placement: NSP Cons/Conc: Consecutive w/Charge Item: 0010 and Sentence#: 0001</p>
08/28/2008	<p>Adult Adjudication (Judicial Officer: User, Conversion) 7. SEXUAL ASSAULT</p> <p>Converted Disposition: Sentence# 0001: LIFE WITH POSSIBILITY OF PAROLE Cons/Conc: Consecutive w/Charge Item: 0013 and Sentence#: 0001</p>
08/28/2008	<p>Adult Adjudication (Judicial Officer: User, Conversion) 8. SEXUAL ASSAULT</p> <p>Converted Disposition: Sentence# 0001: LIFE WITH POSSIBILITY OF PAROLE Cons/Conc: Consecutive w/Charge Item: 0016 and Sentence#: 0001</p> <p>Converted Disposition: Sentence# 0002: LIFE WITH POSSIBILITY OF PAROLE Cons/Conc: Consecutive w/Charge Item: 0001</p>

and Sentence#: 0001

08/28/2008 **Adult Adjudication** (Judicial Officer: User, Conversion)
 9. SEXUAL ASSAULT
 Converted Disposition:
 Sentence# 0001: LIFE WITH POSSIBILITY OF PAROLE
 Cons/Conc: Concurrent
 w/Charge Item: 0019
 and Sentence#: 0001
 Converted Disposition:
 Sentence# 0002: LIFE WITH POSSIBILITY OF PAROLE
 Cons/Conc: Consecutive
 w/Charge Item: 0001
 and Sentence#: 0001

08/28/2008 **Adult Adjudication** (Judicial Officer: User, Conversion)
 10. CONSPIRACY TO COMMIT A CRIME
 Converted Disposition:
 Sentence# 0001:
 Minimum 24 Months to Maximum 60 Months
 Placement: NSP
 Cons/Conc: Concurrent
 w/Charge Item: 0022
 and Sentence#: 0001

08/28/2008 **Adult Adjudication** (Judicial Officer: User, Conversion)
 11. ROBBERY
 Converted Disposition:
 Sentence# 0001:
 Minimum 72 Months to Maximum 180 Months
 Placement: NSP
 Cons/Conc: Consecutive
 w/Charge Item: 0025
 and Sentence#: 0001
 Converted Disposition:
 Sentence# 0002:
 Minimum 72 Months to Maximum 180 Months
 Placement: NSP
 Cons/Conc: Consecutive
 w/Charge Item: 0001
 and Sentence#: 0001

08/28/2008 **Adult Adjudication** (Judicial Officer: User, Conversion)
 12. ROBBERY
 Converted Disposition:
 Sentence# 0001:
 Minimum 72 Months to Maximum 180 Months
 Placement: NSP
 Cons/Conc: Consecutive
 w/Charge Item: 0027
 and Sentence#: 0001

08/28/2008 **Adult Adjudication** (Judicial Officer: User, Conversion)
 13. OPEN OR GROSS LEWDNESS
 Converted Disposition:
 Sentence# 0001:
 Minimum 12 Months to Maximum 12 Months
 Placement: CCDC
 Cons/Conc: Consecutive
 w/Charge Item: 0029
 and Sentence#: 0001

08/28/2008 **Adult Adjudication** (Judicial Officer: User, Conversion)
 14. BATTERY WITH THE USE OF A DEADLY WEAPON AND SUBSTANTIAL BODILY HARM
 Converted Disposition:
 Sentence# 0001:
 Minimum 62 Months to Maximum 156 Months
 Placement: NSP
 Cons/Conc: Concurrent
 w/Charge Item: 0031
 and Sentence#: 0001
 Converted Disposition:

Sentence# 0002:
Minimum 62 Months to Maximum 156 Months
Placement: NSP
Cons/Conc: Consecutive
w/Charge Item: 0001
and Sentence#: 0001

OTHER EVENTS AND HEARINGS

06/29/2005 **Information**
INFORMATION Fee \$0.00
05C2129680001.tif pages

07/05/2005 **Criminal Bindover**
CRIMINAL BINDOVER
05C2129680002.tif pages

07/05/2005 **Hearing**
INITIAL ARRAIGNMENT
05C2129680003.tif pages

07/11/2005 **Information**
INFORMATION
05C2129680007.tif pages

07/14/2005 **Initial Arraignment** (9:00 AM) ()
INITIAL ARRAIGNMENT Court Clerk: Linda Skinner Reporter/Recorder: Maureen Schorn Heard By: Donald Mosley
[Parties Present](#)
Result: Matter Heard

07/19/2005 **Motion**
DEFT'S O.R. RELEASE/BAIL REDUCTION /4
05C2129680010.tif pages

07/21/2005 **Opposition**
STATES OFFPOSITION TO DEFENDANTS MOTION FOR SETTING OF REASONABLE BAIL
05C2129680011.tif pages

07/21/2005 **Motion for Own Recognizance Release/Setting Reasonable Bail** (9:00 AM) ()
DEFT'S O.R. RELEASE/BAIL REDUCTION /4 Relief Clerk: Melissa Swinn Reporter/Recorder: Joe D Amato Heard By: Donald Mosley
[Parties Present](#)
Result: Granted

08/02/2005 **Bond**
BOND - #S50 00958302 - \$46,000.00
05C2129680012.tif pages

08/02/2005 **Bond**
BOND - #S50 00968164 - \$40,000.00
05C2129680013.tif pages

08/02/2005 **Bond**
BOND - #S25 01004046 - \$20,000.00
05C2129680014.tif pages

08/02/2005 **Bond**
BOND - #S25 01004181 - \$20,000.00
05C2129680015.tif pages

08/02/2005 **Bond**
BOND - #S25 01004182 - \$20,000.00
05C2129680016.tif pages

08/05/2005 **Reporters Transcript**
REPORTER'S TRANSCRIPT BINDOVER VOLUME V
05C2129680017.tif pages

08/18/2005 **Motion**
STATE S MTN TO REVOKE BAIL/05
05C2129680018.tif pages

08/22/2005 **Motion** (9:00 AM) ()
STATE S MTN TO REVOKE BAIL/05 Court Clerk: Linda Skinner Reporter/Recorder: Maureen Schorn Heard By: Donald Mosley
[Parties Present](#)
Result: Granted

01/31/2006 **Motion**
DEFT'S MOTION TO CONTINUE TRIAL DATE /6
05C2129680019.tif pages

02/09/2006 **Motion to Continue** (9:00 AM) ()
DEFT'S MOTION TO CONTINUE TRIAL DATE /6 Court Clerk: Linda Skinner Reporter/Recorder: Maureen Schorn Heard By: Donald Mosley
[Parties Present](#)
Result: Matter Heard

04/04/2006 **CANCELED Calendar Call** (9:00 AM) ()
vacated

04/10/2006 Result: Vacate
CANCELED Jury Trial (1:30 PM) ()
vacated

08/16/2006 Result: Vacate
Expert Witness List
NOTICE OF WITNESSES AND/OR EXPERT WITNESSES
05C2129680022.tif pages

09/05/2006 **Calendar Call** (9:00 AM) ()
CALENDAR CALL Court Clerk: Linda Skinner Reporter/Recorder: Joe D Amato Heard By: Mosley, Donald M.
[Parties Present](#)

09/07/2006 Result: Matter Continued
Hearing
TRIAL SETTING
05C2129680023.tif pages

09/07/2006 **Calendar Call** (9:00 AM) ()
CALENDAR CALL Court Clerk: Linda Skinner Reporter/Recorder: Joe D Amato Heard By: Donald Mosley
[Parties Present](#)

09/11/2006 Result: Matter Heard
CANCELED Jury Trial (1:30 PM) ()
vacated

09/14/2006 Result: Vacate
Conversion Hearing Type (9:00 AM) ()
TRIAL SETTING Court Clerk: Linda Skinner Reporter/Recorder: Maureen Schorn Heard By: Donald Mosley
[Parties Present](#)

01/19/2007 Result: Matter Heard
Motion
DEFT'S MTN TO CONTINUE TRIAL DATE /14
05C2129680028.tif pages

01/23/2007 **Motion to Continue** (9:00 AM) ()
DEFT'S MTN TO CONTINUE TRIAL DATE /14 Court Clerk: Linda Skinner Reporter/Recorder: Maureen Schorn Heard By: Donald Mosley
[Parties Present](#)

02/06/2007 Result: Granted
CANCELED Calendar Call (9:00 AM) ()
vacated

02/12/2007 Result: Vacate
CANCELED Jury Trial (1:30 PM) ()
vacated

08/20/2007 Result: Vacate
Reporters Transcript
REPORTER'S TRANSCRIPT OF PRELIMINARY HEARING VOLUME IV
05C2129680029.tif pages

08/21/2007 **Hearing**
STATUS CHECK: TRIAL SETTING
05C2129680030.tif pages

08/21/2007 **Calendar Call** (9:00 AM) ()
CALENDAR CALL (#1) Court Clerk: Linda Skinner Reporter/Recorder: Maureen Schorn Heard By: Donald Mosley
[Parties Present](#)

08/27/2007 Result: Matter Heard
CANCELED Jury Trial (1:30 PM) ()
vacated

09/17/2007 Result: Vacate
Status Check (9:00 AM) ()
STATUS CHECK: TRIAL SETTING Court Clerk: Linda Skinner Reporter/Recorder: Maureen Schorn Heard By: Mosley, Donald M.
[Parties Present](#)

09/27/2007 Result: Matter Continued
Status Check (9:00 AM) ()
STATUS CHECK: TRIAL SETTING Court Clerk: Linda Skinner Reporter/Recorder: Joe D Amato Heard By: Donald Mosley
[Parties Present](#)

10/18/2007 Result: Matter Heard
CANCELED Calendar Call (9:00 AM) ()
vacated

10/22/2007 Result: Vacate
CANCELED Jury Trial (1:30 PM) ()
vacated

10/30/2007 Result: Vacate
Minute Order (9:00 AM) ()
MINUTE ORDER RE: 10/30/07 Court Clerk: Linda Skinner Reporter/Recorder: Maureen Schorn Heard By: Donald Mosley

[Parties Present](#)
Result: Matter Heard

10/31/2007 **Hearing**
MINUTE ORDER RE: 1C/3C/07
05C2129680035.tif pages

10/31/2007 **Hearing**
STATUS CHECK: DNA
05C2129680040.tif pages

03/19/2008 **Status Check** (9:00 AM) ()
STATUS CHECK: DNA Court Clerk: Linda Skinner Reporter/Recorder: Joe D'Amato Heard By: Mosley, Donald M.
[Parties Present](#)
Result: Matter Continued

04/02/2008 **Status Check** (9:00 AM) ()
STATUS CHECK: DNA Court Clerk: Linda Skinner Reporter/Recorder: Maureen Schorn Heard By: Donald Mosley
[Parties Present](#)
Result: Matter Resolved

04/08/2008 **CANCELED Calendar Call** (9:00 AM) ()
Vacated
Result: Vacate

04/14/2008 **CANCELED Jury Trial** (1:30 PM) ()
Vacated
Result: Vacate

04/22/2008 **CANCELED Calendar Call** (9:00 AM) ()
Vacated
Result: Vacate

04/28/2008 **CANCELED Jury Trial** (1:30 PM) ()
Vacated
Result: Vacate

06/03/2008 **Motion**
DEFT'S MTN TO DISMISS FOR DESTRUCTION OF EVIDENCE/26
05C2129680041.tif pages

06/03/2008 **Motion**
DEFT'S MTN IN LIMINE TO PRECLUDE PROSECUTOR'S FALLACY, RE DNA MATERIAL/27
05C2129680042.tif pages

06/03/2008 **Notice of Witnesses and/or Expert Witnesses**
SUPPLEMENTAL NOTICE OF WITNESSES AND/OR EXPERT WITNESSES
05C2129680043.tif pages

06/16/2008 **Opposition**
STATES OPPOSITION TO DEFENDANTS MOTION TO DISMISS FOR DESTRUCTION OF EVIDENCE
05C2129680045.tif pages

06/16/2008 **Opposition**
OPPOSITION TO DEFENDANTS MOTION IN LIMINE TO PRECLUDE PROSECUTOR'S FALLACY ARGUMENTS REGARDING DNA MATERIAL ARGUMENTS REGARDING DNA MATERIAL
05C2129680046.tif pages

06/17/2008 **Motion**
ALL PENDING MOTIONS 6/17/08
05C2129680044.tif pages

06/17/2008 **Calendar Call** (9:00 AM) ()
CALENDAR CALL (#1) Heard By: Donald Mosley
Result: Matter Heard

06/17/2008 **Motion to Dismiss** (9:00 AM) ()
DEFT'S MTN TO DISMISS FOR DESTRUCTION OF EVIDENCE/26 Heard By: Donald Mosley
Result: Denied

06/17/2008 **Motion in Limine** (9:00 AM) ()
DEFT'S MTN IN LIMINE TO PRECLUDE PROSECUTOR'S FALLACY, RE DNA MATERIAL/27 Heard By: Donald Mosley
Result: Denied

06/17/2008 **All Pending Motions** (9:00 AM) ()
ALL PENDING MOTIONS 6/17/08 Court Clerk: Linda Skinner Reporter/Recorder: Maureen Schorn Heard By: Donald Mosley
[Parties Present](#)
Result: Matter Heard

06/20/2008 **Conversion Case Event Type**
PROPOSED VOIR DIRE QUESTIONS
05C2129680048.tif pages

06/23/2008 **Information**
AMENDED INFORMATION
05C2129680049.tif pages

06/23/2008 **Jury Trial** (1:30 PM) ()
TRIAL BY JURY (#1) Court Clerk: Linda Skinner Reporter/Recorder: Joe D'Amato Heard By: Mosley, Donald M.
[Parties Present](#)

06/24/2008 Result: Matter Continued
Jury List
DISTRICT COURT JURY LIST
05C2129680050.tif pages

06/24/2008 **Jury Trial** (1:30 PM) ()
TRIAL BY JURY (#1) Court Clerk: Linoa Skinner Reporter/Recorder: Joe D Amato Heard By: Mosley, Donald M.
[Parties Present](#)
Result: Matter Continued

06/25/2008 **Jury Trial** (1:30 PM) ()
TRIAL BY JURY (#1) Court Clerk: Linoa Skinner Reporter/Recorder: Joe D Amato Heard By: Mosley, Donald M.
[Parties Present](#)
Result: Matter Continued

06/26/2008 **Jury Trial** (1:30 PM) ()
TRIAL BY JURY (#1) Court Clerk: Linoa Skinner Reporter/Recorder: Joe D Amato Heard By: Mosley, Donald M.
[Parties Present](#)
Result: Matter Continued

06/27/2008 **Reporters Transcript**
REPORTER'S TRANSCRIPT ROUGH DRAFT EXCERPT
05C2129680052.tif pages

06/27/2008 **Order**
ORDER FOR DAILY TRANSCRIPT
05C2129680053.tif pages

06/27/2008 **Instructions to the Jury**
INSTRUCTIONS TO THE JURY
05C2129680054.tif pages

06/27/2008 **Judgment**
VERDICT
05C2129680055.tif pages

06/27/2008 **Jury Trial** (1:30 PM) ()
TRIAL BY JURY (#1) Court Clerk: Linoa Skinner Reporter/Recorder: Joe D Amato Heard By: Donald Mosley
[Parties Present](#)
Result: Matter Heard

07/01/2008 **Conversion Case Event Type**
SENTENCING
05C2129680057.tif pages

07/03/2008 **Proposed Jury Instructions Not Used At Trial**
DEFTS PROPOSED JURY INSTRUCTIONS NOT USED AT TRIAL
05C2129680058.tif pages

08/05/2008 **Sentencing** (9:00 AM) ()
SENTENCING Court Clerk: Linoa Skinner Reporter/Recorder: Joe D Amato Heard By: Mosley, Donald M.
[Parties Present](#)
Result: Matter Continued

08/28/2008 **Sentencing** (9:00 AM) ()
SENTENCING Court Clerk: Linoa Skinner Reporter/Recorder: Maureen Schorn Heard By: Donald Mosley
[Parties Present](#)
Result: Matter Continued

09/24/2008 **Judgment**
JUDGMENT OF CONVICTION/ADMIN ASSESSMENT
05C2129680060.tif pages

09/24/2008 **Judgment**
JUDGMENT OF CONVICTION/GENETIC TESTING
05C2129680061.tif pages

09/24/2008 **Judgment**
JUDGMENT OF CONVICTION/RESTITUTION
05C2129680062.tif pages

10/09/2008 **Notice of Appeal**
NOTICE OF APPEAL (SC 52573)
05C2129680063.tif pages

10/09/2008 **Statement**
CASE APPEAL STATEMENT
05C2129680064.tif pages

11/07/2008 **Reporters Transcript**
REPORTER'S TRANSCRIPT OF INITIAL ARRAIGNMENT
05C2129680065.tif pages

11/07/2008 **Reporters Transcript**
REPORTER'S TRANSCRIPT OF DEFTS MTNS CALENDAR CALL
05C2129680066.tif pages

11/07/2008 **Reporters Transcript**

	REPORTER'S TRANSCRIPT OF STATUS CHECK - DNA 05C2129680067.tif pages
11/07/2008	Reporters Transcript REPORTER'S TRANSCRIPT OF SENTENCING - PUBLIC DEFENDERS MTN TO WITHDRAW DUE TO CONFLICT TO CONFLICT 05C2129680068.tif pages
11/25/2008	Reporters Transcript REPORTER'S TRANSCRIPT OF PROCEEDINGS 05C2129680069.tif pages
11/25/2008	Reporters Transcript REPORTER'S TRANSCRIPT OF PROCEEDINGS 05C2129680070.tif pages
11/25/2008	Reporters Transcript REPORTER'S TRANSCRIPT OF PROCEEDINGS 05C2129680071.tif pages
11/25/2008	Reporters Transcript REPORTER'S TRANSCRIPT OF PROCEEDINGS 05C2129680072.tif pages
11/25/2008	Reporters Transcript REPORTER'S TRANSCRIPT OF PROCEEDINGS 05C2129680073.tif pages
11/25/2008	Reporters Transcript REPORTER'S TRANSCRIPT OF PROCEEDINGS 05C2129680074.tif pages
04/16/2009	Reporters Transcript REPORTER'S TRANSCRIPT OF PROCEEDINGS - HEARD 06-27-08 05C2129680075.tif pages
03/05/2010	Judgment CLERK'S CERTIFICATE JUDGMENT AFFIRMED 05C2129680078.tif pages
03/29/2010	Motion DEFT'S PRO FER MTN TO WITHDRAW CNSL& REQ REC 05C2129680080.tif pages
04/08/2010	Motion (9:00 AM) () DEFT'S PRO FER MTN TO WITHDRAW CNSL& REQREC Court Clerk: Jenniter Kimmel Reporter/Recorder: JoAnn Orauna Heard By: Abbi Silver Parties Present Minutes Result: Matter Heard
05/20/2010	Motion DEFT'S PRO FER MTN FOR PRODUCTION OF ADDITIONAL RECORDS 05C2129680083.tif pages
06/02/2010	Opposition STATES OF OPPOSITION TO DEFTS MTN FOR PRODUCTION OF ADDITIONAL RECORDS 05C2129680085.tif pages
06/03/2010	Motion (9:00 AM) () DEFT'S PRO FER MTN FOR PRODUCTION OF ADDITIONAL RECORDS Court Clerk: Jenniter Kimmel Reporter/Recorder: JoAnn Melendez Heard By: Abbi Silver Parties Present Minutes Result: Matter Heard
06/18/2010	Order ORDER DENYING DEFTS MTN FOR PRODUCTION OF ADDITIONAL RECORDS 05C2129680086.tif pages
08/28/2010	Request Defendant's Request for Production of Documents
01/11/2011	Petition for Writ of Habeas Corpus
01/18/2011	Order for Petition for Writ of Habeas Corpus
03/01/2011	Motion for Appointment of Attorney Proper Motion for the Appointment of Counsel; Request for Evidentiary Hearing
03/01/2011	Affidavit in Support Affidavit in Support of Motion for Appointment of Counsel
03/15/2011	Motion for Appointment of Attorney (9:00 AM) (Judicial Officer Silver, Abbi) Proper Motion for the Appointment of Counsel; Request for Evidentiary Hearing Parties Present Minutes Result: Granted in Part
03/17/2011	Confirmation of Counsel (9:00 AM) (Judicial Officer Silver, Abbi) Request of Evidentiary Hearing

[Parties Present](#)
[Minutes](#)
 Result: Matter Heard
 03/29/2011 **Response**
State's Response to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction)
 03/31/2011 **Petition for Writ of Habeas Corpus** (9:00 AM) (Judicial Officer Silver, Abbi)
[Parties Present](#)
[Minutes](#)
 Result: Matter Heard
 03/31/2011 **Status Check: Trial Setting** (9:00 AM) (Judicial Officer Silver, Abbi)
 08/01/2011 **Motion**
Motion to Place on Calendar to Set Hearing Date on Petition for Writ of Habeas
 08/11/2011 **Motion** (9:00 AM) (Judicial Officer Silver, Abbi)
Motion to Place on Calendar to Set Hearing Date on Petition for Writ of Habeas Corpus
[Parties Present](#)
[Minutes](#)
 Result: Hearing Set
 08/26/2011 **Petition for Writ of Habeas Corpus**
Petition for Writ of Habeas Corpus (Post-Conviction)
 09/29/2011 **CANCELED Hearing** (9:00 AM) (Judicial Officer Silver, Abbi)
vacated - per Judge
Petition for Writ of Habeas Corpus
 09/30/2011 **Response**
Response to Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)
 12/01/2011 **Petition for Writ of Habeas Corpus** (9:00 AM) (Judicial Officer Bonaventure, Joseph T.)
12/01/2011, 01/05/2012, 01/12/2012, 01/19/2012, 01/30/2012, 03/27/2012, 08/27/2012, 10/22/2012
[Parties Present](#)
[Minutes](#)
01/09/2012 Reset by Court to 01/05/2012
03/12/2012 Reset by Court to 03/27/2012
06/11/2012 Reset by Court to 08/27/2012
 Result: Evidentiary Hearing
 12/08/2011 **Order for Production of Inmate**
 01/05/2012 **Evidentiary Hearing** (10:45 AM) (Judicial Officer Silver, Abbi)
01/05/2012, 01/12/2012, 01/19/2012, 01/30/2012, 03/27/2012, 08/27/2012, 10/22/2012
01/09/2012 Reset by Court to 01/05/2012
03/12/2012 Reset by Court to 03/27/2012
03/27/2012 Reset by Court to 03/27/2012
06/11/2012 Reset by Court to 08/27/2012
 Result: Minute Order - No Hearing Held
 01/05/2012 **All Pending Motions** (10:45 AM) (Judicial Officer Silver, Abbi)
Evidentiary Hearing and Delt's Writ of Habeas Corpus - Rescheduled
[Minutes](#)
 Result: Continued
 01/12/2012 **All Pending Motions** (9:00 AM) (Judicial Officer Silver, Abbi)
Evidentiary Hearing and Delt's Writ of Habeas Corpus
[Parties Present](#)
[Minutes](#)
 Result: Continued
 01/19/2012 **All Pending Motions** (9:00 AM) (Judicial Officer Silver, Abbi)
Evidentiary Hearing and Delt's Writ of Habeas Corpus
[Parties Present](#)
[Minutes](#)
 Result: Hearing Set
 01/30/2012 **All Pending Motions** (1:00 PM) (Judicial Officer Silver, Abbi)
Evidentiary Hearing and Delt's Writ of Habeas Corpus
[Parties Present](#)
[Minutes](#)
 Result: Continued
 02/03/2012 **Order for Production of Inmate**
Order for Production of Inmate Joseph Alexander Henderson BAC #67224
 03/27/2012 **All Pending Motions** (9:00 AM) (Judicial Officer Silver, Abbi)

	<i>Evidentiary Hearing and Delt's Petition for Writ of Habeas Corpus</i>
	Parties Present
	Minutes
	Result: Continued
05/08/2012	Status Check (9:00 AM) (Judicial Officer Silver, Abbi)
	05/08/2012, 05/22/2012
	<i>Status Check: Reset Evidentiary Hearing</i>
	Parties Present
	Minutes
	Result: Continued
08/27/2012	All Pending Motions (1:00 PM) (Judicial Officer Silver, Abbi)
	<i>Evidentiary Hearing and Delt's Petition for Writ of Habeas Corpus</i>
	Parties Present
	Minutes
	Result: Continued
08/28/2012	Order for Production of Inmate
09/21/2012	PSI - Misc
10/18/2012	Status Check (9:00 AM) (Judicial Officer Silver, Abbi)
	<i>Status Check: Delt's Presence</i>
	Parties Present
	Minutes
	Result: Matter Heard
10/22/2012	All Pending Motions (1:00 PM) (Judicial Officer Silver, Abbi)
	<i>Evidentiary Hearing and Delt's Writ of Habeas Corpus</i>
	Parties Present
	Minutes
	Result: Denied
10/25/2012	Order
	<i>Order For Transcript</i>
11/13/2012	Reporters Transcript
	<i>Reporter's Transcript of Evidentiary Hearing</i>
11/20/2012	Status Check (9:00 AM) (Judicial Officer Silver, Abbi)
	<i>Status Check: Written Order</i>
	Minutes
	Result: Statistical Closure Recommended
11/21/2012	Finding of Fact and Conclusions of Law
	<i>Findings of Fact, Conclusions of Law and Order</i>
12/03/2012	Notice of Entry
	<i>Notice of Entry of Findings of Fact, Conclusions of Law and Order</i>
02/12/2013	Notice of Appeal (criminal)
	<i>Second Notice of Appeal</i>
02/15/2013	Case Appeal Statement
	<i>Case Appeal Statement</i>
03/14/2013	Status Check (9:00 AM) (Judicial Officer Silver, Abbi)
	<i>Status Check: Appointment of Counsel</i>
	Parties Present
	Minutes
	Result: Decision Made
03/27/2013	Order
	<i>Order Appointing Counsel</i>

FINANCIAL INFORMATION

	Defendant Henderson, Joseph A	
	Total Financial Assessment	179.00
	Total Payments and Credits	4.00
	Balance Due as of 10/16/2013	175.00
08/11/2005	Transaction Assessment	4.00
08/11/2005	Conversion Payment Receipt # 01173854	(4.00)
09/25/2008	Transaction Assessment	175.00