IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH HENDERSON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 62629

RESPONDENT'S ANSWERING BRIEF

**Appeal From Findings of Fact,
Conclusions of Law, and Order filed November 21, 2012
Eighth Judicial District Court, Clark County**

JULIAN GREGORY, ESQ.
Nevada Bar #011978
Law Office if Gabriel L. Grasso, P.C.
9525 Hillwood Drive, Suite #190
Las Vegas, Nevada 89134
(702) 868-8866

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar #003926
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

Other Authorities

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH HENDERSON, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 62629

RESPONDENT'S ANSWERING BRIEF

**Appeal from Findings of Fact,
Conclusions of Law, and Order filed November 21, 2012
Eighth Judicial District Court, Clark County**

STATEMENT OF THE ISSUE(S)

1. Whether the district court properly denied Defendant's post-conviction request for funds for another DNA expert during litigation of his post-conviction petition and supplement?

2. Whether the district court properly clarified the record during the Evidentiary Hearing on ineffective assistance of counsel?

3. Whether the district court properly denied Defendant's claims of ineffective assistance of counsel based on counsel's decisions regarding DNA and the trial court's decision not to record bench conferences?

4. Whether the district court properly ruled that Defendant's Brady claim, raised outside the context of ineffective assistance of counsel, was procedurally barred?

/ / /

STATEMENT OF THE CASE

On July 11, 2005, a fourteen count Information was filed by the State against Joseph Henderson ("Defendant"). 2 AA 167. An Amended Information was later filed charging the same crimes as follows: conspiracy to commit burglary, burglary while in possession of a firearm, conspiracy to commit first degree kidnapping, first degree kidnapping with use of a deadly weapon (two counts), conspiracy to commit sexual assault, sexual assault with use of a deadly weapon (three counts), conspiracy to commit robbery, robbery with use of a deadly weapon (two counts), open or gross lewdness and battery with use of a deadly weapon resulting in substantial bodily harm. 1 AA 8-14. On July 14, 2005, the Defendant pled not guilty to all charges. 1 RA 46.

The original trial date for this matter was set for early 2006, but the date was vacated and reset numerous times at Defendant's counsel request. 1 RA 47-50. On August 21, 2007, the trial date was vacated and reset again at Defendant's request. 1 RA 50. Additionally, Defendant's counsel advised the district court that they would retain an expert that would be reviewing the State's DNA reports and they will let the court know at status check whether the Defendant would retest the DNA evidence. Id. On September 27, 2007, and March 19, 2008, the Defendant's counsel informed the district court that they were going to retest the DNA evidence. 1 RA 55-57. However, on April 2, 2008, Defendant's counsel informed

the District Court that they were going to use an expert to confer with regarding the DNA testing, but that the Defendant will not be retesting the DNA. 1 RA 57-58.

On June 3, 2008, Defendant filed a Motion to Dismiss for Destruction of Evidence and a Motion in Limine To Preclude "Prosecutor's Fallacy, Arguments Regarding DNA Material." 1 RA 63-75. On June 16, 2008, the State filed its Oppositions to both of Defendant's Motions. 1 RA 76-87. The State opposed Defendant's motion to dismiss by stating that evidence was neither lost nor destroyed, and that the extraction from the breast swabs, as well as actual vaginal swabs, and bed sheets were all available to the Defendant for retesting. 1 RA 82-87. On June 17, 2008, the District Court denied both of Defendant's motions. 1 RA 61-62.

On June 23, 2008, the trial finally commenced. 1 RA 62. Defendant was convicted of all counts on June 27, 2008. 1 AA 42-47. On August 28, 2008, Defendant was sentenced by the trial court. 1 AA 15-41. Defendant's Judgment of Conviction was filed on September 24, 2008. 1 AA 42-47. The Judgment of Conviction reflected Defendant's sentence 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 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 Consecutive to Count 7; as to Count 9 – 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 Consecutive to Count 8; as to Count 10 – to a Maximum of Sixty (60)

Months with a Minimum Parole Eligibility of Twenty-Four (24) Months, to run Consecutive to Count 9; as to Count 11 – a Maximum of One Hundred Eighty (180) Months with a Minimum Parole Eligibility of Seventy-Two (72) Months, plus an Equal and Consecutive term of Maximum of One Hundred Eighty (180) Months with a Minimum Parole Eligibility of Seventy-Two (72) Months for the Use of a Deadly Weapon, to run Concurrent with Count 10; as to Count 12 – to a Maximum of One Hundred Eighty (180) Months with a Minimum Parole Eligibility of Seventy-Two (72) Months, plus an Equal and Consecutive term of Maximum of One Hundred Eighty (180) Months with a Minimum Parole Eligibility of Seventy-Two (72) Months for the Use of a Deadly Weapon, to run Consecutive to Count 11; as to Count 13 – to Twelve (12) Months in the Clark County Detention Center, to run Concurrent with Count 12; as to Count 14 – a Maximum of One Hundred Fifty-Six (156) Months with a Minimum Parole Eligibility of Sixty-Two (62) Months, to run Consecutive to Count 13; with One Two Hundred Fifty-One (1,251) Days credit for time served. The district court further ordered, a Special Sentence of Lifetime Supervision. 1 AA 42-47. Supervision was imposed to commence upon release from any term of imprisonment, probation or parole. Id.

Defendant filed a direct appeal to the Nevada Supreme Court. 1 AA 102-106. The Nevada Supreme Court affirmed his Judgment of Conviction. Id. Remittitur issued March 2, 2010. Id.

Defendant filed a Pro Per Petition for Writ of Habeas Corpus (Post-Conviction) on January 11, 2011. 2 AA 1-34. The district court appointed counsel for Defendant on March 17, 2011. 2 AA 35-36. The State filed its Response to Defendant's Pro Per Petition on March 29, 2011. 1 RA 235-250. Defendant's appointed counsel filed an [Supplemental] Petition for Writ of Habeas Corpus (Post-Conviction) on August 26, 2011. 2 AA 37-55. The State filed its Response to counsel's Petition on September 30, 2011. 2 AA 56-65.

The district court held an Evidentiary Hearing and heard argument from counsel on October 22, 2012. 2 AA 68-110. The district court denied Defendant's Petitions on all grounds. Id. The district court filed its Findings of Fact, Conclusions of Law, and Order on November 21, 2012. 2 AA 130-145. Notice of Entry of Decision and Order was filed and served on both defendant and his appointed post-conviction counsel by mail on December 3, 2012. 2 AA 153.

Defendant filed a Notice of Appeal with the district court on February 12, 2013. See Henderson v. State, Docket No. 62629, Second Notice of Appeal (February 19, 2013). Defendant was appointed counsel who filed his Opening Brief on October 17, 2013. See Henderson v. State, Docket No. 62629, Opening

Brief (October 17, 2013). The State moved to dismiss the appeal due to an untimely Notice of Appeal. See Henderson v. State, Docket No. 62629, Motion to Dismiss Appeal and Request for Stay of Briefing Schedule (December 16, 2013). Following an Opposition and Reply, this Court denied the State's Motion and reinstated briefing. See Henderson v. State, Docket No. 62629, Order Denying Motion (January 15, 2014).

STATEMENT OF THE FACTS

The Crime

After spending some time traveling, Dr. E.B. ("E.B.") and his fiancée ("J.K."), were attempting catch up on some much needed rest on the night of September 3, 2004, at their residence located in the northwest part of Las Vegas, Nevada. 1 RA 142-143. At approximately 12:30 a.m. that night, an "olive-skinned" man rang the doorbell. 1 RA 143-144. The olive-skinned man told E.B. that he was his neighbor and that his son had thrown his keys into E.B.'s backyard. 1 RA 143. The olive-skinned man asked if he could look for his keys in the backyard. Id. E.B. closed and locked the front door and in effort to help his alleged neighbor, went to the backyard, turned the lights on and attempted to find the keys, to no avail. 1 RA 143-144. The olive-skinned man then asked E.B. if he could go to the backyard and look for the keys with E.B., at which time E.B. let him in and took him through his house to the backyard. 1 RA 144.

After not finding the keys in the backyard, the olive-skinned man told E.B. he was going to go to his car to get a flashlight to aid the search for the keys. Id. E.B. went to his garage to try to find a flashlight. Id. E.B. returned from the garage to find the olive-skinned man in his house with two masked black men both wielding guns with laser sights (hereinafter collectively referred to as "intruders").[1] Id. Defendant was one of these masked intruders. The intruders tied J.K.'s hands with plastic ties. 1 RA 115. They tried to tie E.B. up with the plastic ties but when the plastic ties did not fit, they used a pair of seemingly real handcuffs[2] and took him to upstairs portion of the house. 1 RA 147.

The olive-skinned man demanded to know where E.B. kept the safe. 1 RA 145-146. E.B. told them that he did not have a safe. Id. In an attempt to appease the intruders, E.B. gave them approximately a thousand dollars he had hidden in a closet. Id. While the intruders were occupied, E.B. was able to get out of his handcuffs. 1 RA 148. He attempted to go down the stairs but was caught by one of the masked intruders eventually leading to a scuffle with both masked intruders. Id. However, while scuffling with one of the intruders, E.B. was pistol-whipped two or three times, splitting his head open. Id. Eventually, the intruders tied E.B. up with electrical cords and left him on the floor to bleed. 1 RA 149.

---

[1] E.B. testified he was able to tell that the color of the masked intruders skin by looking at their hands. 1 RA 144.

[2] It would appear that the intruders were unaware that the handcuffs were "gag" handcuffs that did not require a key to open.

While the olive-skinned man and the other masked intruder were looking for the safe with E.B., the Defendant was downstairs with J.K. 1 RA 116. Defendant held her at gunpoint, put a pair of E.B.'s swim trunks over her head, put a cat toy in her mouth and threatened to kill her if she screamed. Id. He then began to fondle her, placed his mouth on her breasts and sexually assaulted her by inserting his fingers into her vagina. 1 RA 116-118, 120. He then forced J.K. to spread her legs and sexually assaulted her by inserting his penis in her vagina. 1 RA 119.

Defendant was distracted by the commotion caused by E.B.'s scuffle with the other intruders in the upstairs part of the house. 1 RA 119-121. Defendant then took J.K. upstairs to the master bedroom, placed her face down on the bed and sexually assaulted her for a third time by inserting his penis in her vagina. 1 RA 121-122.

Shortly after Defendant's last sexual assault, the intruders tied up J.K.'s legs and left the home. 1 RA 125. J.K. worked her way loose and discovered E.B. lying in a pool of blood. 1 RA 145-146. She untied him and they went downstairs to call the police. 1 RA 126, 150.

DNA Testimony at Preliminary Hearing and Trial

J.K. was taken to UMC, where she underwent a sexual assault examination including buccal swabs, vaginal swabs and breast swabs from the area of her breasts where the Defendant put his mouth. 1 RA 160. Additionally, crime scene

investigators collected, among other things, the top sheet and fitted sheet from the master bedroom. 1 RA 202-203.

Las Vegas Metropolitan Police Department ("LVMPD") forensic scientist David Welch was able to develop unknown male profile from the foreign DNA material detected on the breast swabs of the victim. 1 RA 194-195. Welch testified that he used both breast swabs because based on his experience (thirty years working experience as a forensic scientist) there is usually very little foreign DNA on the breast swabs and that in order to have the best shot at developing a profile it was his policy to always use two breast swabs for an extraction. 1 RA 194.

Welch also tested one of the vaginal swabs but was unable to develop a profile from the vaginal swab at that time. 1 RA 197. Welch testified that his testing of the vaginal swab indicated that semen was present but could not find any spermatozoa (aka sperm), which prevented him from making any conclusive results. Id.

The DNA profile from the breast swabs of the unknown male was searched against the local DNA Index System and no matches were found. 1 RA 39. The DNA profile was then uploaded to the National DNA Index System for comparison; a "CODIS HIT" was discovered and came back to Defendant, who was already in custody for another matter. 1 RA 30.

LVMPD Detective Michael Jefferies obtained a search warrant for a buccal swab from Defendant, to confirm the DNA match was true and correct. 1 RA 165. In March 2005, LVMPD forensic scientist Kathy M. Guenther ("Guenther"), using the unknown male profile created by Welch and the profile created from Defendant's buccal swab, discovered a positive match or positive comparison with Defendant's DNA on all 13 locations used by LVMPD forensic scientist to match DNA at the time. 1 RA 210. Guenther testified under statistical threshold set in the LVMPD laboratory the chances of a random selective sample to have the same profile was six hundred billion (6,000,000,000) to one (1). 1 RA 211. Because six hundred billion was a hundred times the earth's population at that time, under laboratory standards identity is assumed.[3] 1 RA 211-212. In March of 2005, Defendant was officially confirmed as the source of the foreign DNA material taken from J.K.'s body, at which time he was arrested. 1 RA 167.

By July of 2005, the LVMPD forensic lab added two additional markers for DNA match and now had 15 threshold points to match. 1 RA 214. Guenther re-profiled the Defendant's known sample in order to compare his sample with the DNA testing of the rest of the sexual assault examination kit. 1 RA 215. On July 25, 2005, Guenther conducted further DNA testing from J.K.'s sexual assault

[3] The only exception is if an individual has an identical twin. Identical twins can have the same DNA. 1 RA 191. In this case, there is no indication that the Defendant has an identical twin and no such a defense was ever offered by Defendant's counsel.

examination. 1 RA 212. The testing included extractions from Defendant's buccal swab and J.K.'s vaginal swabs from, as well as the bed sheets removed from the bed in the master bedroom, and the bathrobe found in the master bedroom. Id. Semen with sufficient spermatozoa was detected on one of the bed sheets (in two separate stains) and the vaginal swab. 1 RA 214-215. Guenther testified that part of both remaining vaginal swabs were saved for retesting and were still being maintained as of the date of trial. 1 RA 213. Welch testified that while there were no breast swabs left there was an "extract[ion] that was placed in Metro DNA vault freezer for future analysis." 1 RA 184. Once again, Defendant was found to be a complete match with the DNA profiles created by the extractions from the soiled bed sheet and the vaginal swab. 1 RA 215. The evidence showed that DNA profile from the breast swabs matched the Defendant's DNA profile and so did the independently tested DNA profiles derived from the bed sheet and the vaginal swabs - both of which were examined under an even stricter standard then the breast swabs. 1 RA 214-215.

Evidentiary Hearing

The district court found the testimony of Mr. Norm Reed and Ms. Violet Radosta, Defendant's trial attorneys, at the evidentiary hearing to be credible. 2 AA 135.

Mr. Reed was brought into this case to aid Ms. Radosta as second chair. 2 AA 70. Ms. Radosta specifically selected him because Mr. Reed had been dealing with DNA in two well-known murder trials in their office. 2 AA 88. Mr. Reed's job was to "examine, interpret and attack the DNA evidence." 2 AA 70.

Mr. Reed testified that he had been a defense attorney for over 80 felony jury trials, with at least dozens that involved DNA. 2 AA 69. Additionally, he attended at least 2 CLEs and had 15-16 hours of total CLE time regarding forensic testing and DNA. Id. He also had read up on the topic, attended conferences, and attended in-house trainings. Id. Further, he learned from the experts that he worked with over the years in his many cases. 2 AA 70.

Mr. Reed testified that his initial step is always to "have someone look at the DNA." 2 AA 74. The defense hired and consulted with an expert named Norah Rudin; in fact Ms. Radosta initially hired Ms. Rudin even prior to Mr. Reed's involvement. 2 AA 74, 90. Ms. Rudin is one of the nation's leading experts on DNA. 2 AA 81. Mr. Reed had worked with Ms. Rudin several times and described her as a very good expert. 2 AA 74. The defense subpoenaed all of the forensic lab's records from LVMPD. Id. They also investigated the CODIS hit from California. Id. The defense was able to have the forensic lab at LVMPD send all of the forensic information directly to their expert, rather than just sending Ms. Rudin a copy of the reports. 2 AA 75. This allowed Ms. Rudin to conduct her

own analysis; absent physical testing she was able to recreate all of the testing and analysis done by the crime lab and do her own interpretations. Id. Once Ms. Rudin received all of the materials she reviewed the forensic file and consulted with the defense about their approach to the DNA, including whether they should seek retesting. 2 AA 74.

Ms. Rudin concluded that she agreed with the ultimate conclusions reached by the LVMPD crime lab. 2 AA 75. Essentially, while she may have taken a couple of different turns in her analysis she would have reached the same conclusion. Id. Ms. Rudin informed the defense that their best avenue of attack on the DNA was to cross-examine on the subjective areas of DNA analysis, particularly alleles and peaks which could indicate the existence of a mixture or that the source might be someone else. Id. The defense worked with Ms. Rudin to develop a strong cross-examination to challenge the method of interpretation and the strength of the DNA conclusions. Id. However, Mr. Reed testified that they determined that the defense could not have Ms. Rudin testify as a witness because "she would have to say, while I disagree with some of the interpretation, I agree with the overall results." Id.

The defense also sought to consult their expert during trial when the State offered a rebuttal witness following their strong cross-examination, the supervisor

who had peer-reviewed the findings of the initial forensic analysts. 2 AA 73. The district court denied this request. Id.

Ms. Rudin was also consulted regarding the initial CODIS hit out of California which identified Defendant as a possible suspect. 2 AA 76, 80. CODIS is the national database where the unknown DNA profile was entered upon initial review by LVMPD. Id. CODIS contains the DNA profiles for millions of individuals and functions by making only the initial probable cause determination. Id. From there, the lab that input the unknown profile is notified, regardless of where the match was found. Id. That lab is then responsible for doing an independent exam and manual comparison. Id. While it was strange that the CODIS hit occured in California rather than Nevada, where Defendant's DNA should have been on file from a prior conviction it would only have harmed the defense to bring that information out at trial. 2 AA 76. After consultation with Ms. Rudin, the defense approached the prosecution and obtained the prosecutor's agreement to eliminate the discussion of the California CODIS hit and focus on only the manual comparison in Nevada. Id. By doing so the defense avoided the jury learning (1) that Defendant was an ex-felon and also (2) that two independent labs confirmed a DNA match placing Defendant at the crime and demonstrating his sexual assault of the victim. 2 AA 76, 80. This allowed the defense to limit the number of DNA matches they had to attack to just the LVMPD lab's work, for

which they developed the cross-examination strategy with their expert. Id. Ms. Rudin's conclusion was that it did not matter why the CODIS result came from California rather than Nevada because the California match, like the LVMPD results, was accurate. 2 AA 82-83. It was possible that even though Nevada had previously collected Defendant's DNA, it might not have been entered into the system yet. Id.

Mr. Reed also testified regarding the decision not to retest the DNA samples and Ms. Rudin's advice on the matter. 2 AA 77. Ms. Radosta had filed the motion even before Mr. Reed became involved in the case. Id. However, after Ms. Rudin had the opportunity to review the DNA analysis conducted by LVMPD she advised against retesting because she agreed with the results. Id. Therefore, the defense then "did everything [they] could to make sure that somehow people forgot about that motion because there was no basis to retest because [their] expert said don't retest." Id. The prosecution already had a single-source DNA match to Defendant from the bed sheets, and single-source DNA matches from the breast and vaginal swabs after separating out the female DNA of the victim from the unknown male DNA that was found to match Defendant. 2 AA 81-82. Thus, the defense specifically wanted to avoid having to turn over results of a retest, likely another positive match to Defendant, to the State as required. 2 AA 77.

Defendant made admissions to his attorneys prior to trial about being present at the crime. 2 AA 70. Ms. Radosta confirmed that Defendant told them two different versions of his defense at different points in the case. 2 AA 88. On the morning of trial, Defendant told his attorneys that he knew the victim and alleged that the sex was consensual on the night of the crime as payment for drugs. 2 AA 98-99. The defense elected not to pursue this last-minute theory of defense because it would not have provided any defense to the remaining charges, only to the sexual assault; no evidence at trial confirmed this theory offered by Defendant. Id. Mr. Reed testified that, in his opinion, the Defendant's chances of winning this case were almost nonexistent and negotiating the matter would have been in his best interest yet Defendant rejected the plea offer given to him on the eve of trial. 2 AA 78-79.

SUMMARY OF THE ARGUMENT

The district court properly denied Defendant's post-conviction request for funds for another DNA expert during litigation of his post-conviction petition and supplement because it is within the court's discretion to grant discovery and the Defendant failed to make a showing of good cause for a need to appoint a second DNA expert. The district court properly clarified the record during the Evidentiary Hearing on ineffective assistance of counsel and in doing so did not violate the exclusionary rule concerning witness testimony. The district court properly denied

Defendant's claims of ineffective assistance of counsel based on counsel's decisions regarding DNA because counsel did retain an expert witness and made strategic decisions based on that expert's review of the DNA evidence. Additionally, the district court properly denied Defendant's claims of ineffective assistance of counsel regarding the trial court's decision not to record bench conferences because trial counsel ensured that a record was made and the district court was not required to record the conferences. Finally, the district court properly ruled that Defendant's Brady claim, raised outside the context of ineffective assistance of counsel, was procedurally barred because it was not raised on direct appeal.

/ / /

/ / /

/ / /

ARGUMENT

I.

THE DISTRICT COURT PROPERLY DENIED DEFENDANT'S POST-CONVICTION REQUEST FOR FUNDS FOR ANOTHER DNA EXPERT DURING LITIGATION OF HIS POST-CONVICTION PETITION AND SUPPLEMENT

NRS 34.750 controls the appointment of counsel for a Petition for Writ of Habeas Corpus (Post-Conviction), and states in relevant part:

> 1. A petition may allege that the petitioner is unable to pay the costs of the proceedings or to employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily, the court may appoint counsel to represent the petitioner.

> In making its determination, the court may consider, among other things, the severity of the consequences facing the petitioner and whether:
>
> (a) The issues presented are difficult;
> (b) The petitioner is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery.

NRS 34.750. Discovery is merely a factor within the multiple considerations of the statute. Id. NRS 34.780 provides that a district court has the discretion to allow discovery upon a showing of good cause. NRS 34.780. Thus, a district court's decision is reviewed for abuse of discretion. Kirksey v. State, 112 Nev. 980, 1003, 923 P.2d 1102, 1117 (1996). The appointment of counsel does not necessitate discovery in every case, nor does discovery necessarily dictate that an investigator or expert witness should be appointed. See NRS 34.750, 34.780. Furthermore, Ake v. Oklahoma, 470 U.S. 68, 84-87, 105 S. Ct. 1087, 1097-98 (1985), requires the appointment of counsel for trial, not for litigation of a post-conviction petition.

Defendant cites to the court's minutes of March 27, 2012, to support his claim. 2 AA 66-67; see Appellant's Opening Brief (AOB), pg. 7. The extent of the record on appeal is the following: "Ms. Kice requested Indigent Defense funds for independent expert. COURT FURTHER ORDERED, request is DENIED as there was already and independent expert, Nora Rudin therefore another one is not necessary as this is not another trial." 2 AA 66-67. Counsel fails to cite to the record, and the record does not appear to contain a motion with

authority supporting Defendant's request; thus it appears post-conviction counsel did not file one. See NRAP 28(e)(1). Furthermore, Defendant fails to provide a transcript from the March 27, 2012, hearing in his record on appeal therefore preventing this Court from reviewing either counsel's arguments or the complete ruling and reasoning of the district court. The burden to make a proper appellate record and include any documents necessary for the Nevada Supreme Court's decision rest on the appellant; where a necessary part of the documentation is absent this Court presumes that such documentation supports the district court's decision. NRAP 3C(e)(2)(C); NRAP 30(b)(1)-(4); Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007); Prabhu v. Levine, 112 Nev. 1538, 1549-50, 930 P.2d 103, 111 (1996); M&R Investiment Company, Inc. v. Mandarino, 103 Nev. 711, 718, 748 P.2d 488, 493 (1987).

Here, the district court did not abuse its discretion in determining that there was not good cause shown to appoint an expert for Defendant in post-conviction litigation. The minutes of March 27, 2012, reflect that post-conviction counsel received the discovery in this case and the subsequent discussion reveals that she also received the trial defense attorneys' file. 2 AA 67. Mr. Reed confirmed at the Evidentiary Hearing that Ms. Kice received their entire file during the course of the

post-conviction litigation. 2 AA 86. Therefore, Defendant did receive the necessary discovery in this matter.

However, as evidenced by the testimony presented at the Evidentiary Hearing a second DNA expert was unnecessary. As the district court noted, Defendant received the assistance of a DNA expert at trial as contemplated by Ake, 470 U.S. at 84-87, 105 S. Ct. at 1097-98. The defense hired and consulted with an expert named Norah Rudin. 2 AA 74, 90. Ms. Rudin is one of the nation's leading experts on DNA. 2 AA 81. Mr. Reed had worked with Ms. Rudin several times and described her as a very good expert. 2 AA 74. The defense subpoenaed all of the forensic lab's records from LVMPD. Id. They also investigated the CODIS hit from California. Id. The defense was able to have the forensic lab at LVMPD send all of the forensic information directly to Ms. Rudin, rather than just sending their expert a copy of the reports. 2 AA 75. This allowed Ms. Rudin to conduct her own analysis; absent physical testing she was able to recreate all of the testing and analysis done by the crime lab and do her own interpretations. Id.

Once Ms. Rudin received all of the materials she reviewed the forensic file and consulted with the defense about their approach to the DNA. 2 AA 74. Ms. Rudin concluded that she agreed with the ultimate conclusions reached by the LVMPD crime lab. 2 AA 75. The LVMPD results included a single-source DNA match to Defendant from the bed sheets, and single-source DNA matches from the

breast and vaginal swabs after separating out the female DNA of the victim from the unknown male DNA that was found to match Defendant. 2 AA 81-82. Ms. Rudin also confirmed that the CODIS result from California, like the LVMPD results, was accurate. 2 AA 82-83. Thus, Defendant received the assistance of one of the top DNA experts in the country who confirmed that the results were accurate, thus eliminating the need for another DNA review in post-conviction litigation. Therefore, the district court properly found that Defendant failed to show good cause to entitle him to the appointment of such an expert and did not abuse its discretion.

II.
THE DISTRICT COURT PROPERLY CLARIFIED THE RECORD DURING THE EVIDENTIARY HEARING ON INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant did not object to the questioning and discussion which he now raises as improper on appeal. 2 AA 91-94. As such, review by this Court is typically precluded. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). "However, 'this court has the discretion to address an error if it was plain and affected the defendant's substantial rights.'" Id. (internal citations omitted). In doing so, this Court determines "whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights. Additionally, the burden is on the defendant to show actual prejudice or a miscarriage of justice." Id.

Neither the purpose behind the rule, nor the witness exclusionary rule itself, were violated in the instant matter. "The purpose of sequestration of witnesses is to prevent particular witnesses from shaping their testimony in light of other witnesses' testimony, and to detect falsehood by exposing inconsistencies." Givens v. State, 99 Nev. 50, 55-56, 657 P.2d 97, 100-01 (1983) (disapproved of on other grounds by Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986)). Additionally, prejudice is not presumed where the record shows it did not occur. Id. In fact, this Court in Givens found no prejudice. Id. "Several options are available to the trial judge when a witness violates the rule of witness exclusion. The judge may hold the witness in contempt, allow cross-examination concerning the violation, prevent the witness from testifying, give a curative jury instruction and, finally, declare a mistrial." Romo v. Keplinger, 115 Nev. 94, 96, 978 P.2d 964, 966 (1999). Further, "[w]hile a violation of the rule may subject a witness to punishment such as contempt of court and will affect his credibility it will not of itself operate to render the witness incompetent to testify." Rainsberger v. State, 76 Nev. 158, 161-62, 350 P.2d 995, 997 (1960) (citing State v. Lewis, 50 Nev. 212, 255 P. 1002; State v. Salge, 2 Nev. 321). In an evidentiary hearing the judge is the finder of fact and accesses the credibility of a witness. Ybarra v. State, 127 Nev. Adv. Op. 4, 247 P.3d 269, 276-77 (2011) (quoting Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002) (observing that on remand for evidentiary hearing "the district

court will be better able to judge credibility"); Mulder v. State, 116 Nev. 1, 15, 992 P.2d 845, 853 (2000) ("[t]he trier of fact determines the weight and credibility to give conflicting testimony")).

Here, the trial judge did not violate the exclusionary rule in reviewing the record of the case with the attorneys; regardless, the remedy for any violation would have been satisfied. There are no allegations that Ms. Radosta sat in court during Mr. Reed's testimony or acted in bad faith. See AOB, pgs. 9-21. A review of the entire discussion, to which Defendant now objects on appeal, reveals that the Court was merely seeking to clarify a historical fact regarding whether there was enough DNA to retest and the trial judge's ruling on the motion to dismiss. 2 AA 91-94. The trial court only initially inquired because post-conviction counsel asked "[a]nd had that motion been granted what would have been your strategy at that point in time?" at which time the district court sought to clarify if the motion had been granted or not to see if retesting was even a possibility because it changed the ineffective assistance of counsel analysis. 2 AA 91, 94. Ms. Radosta even clarified, after post-conviction counsel refreshed her recollection using the minutes of June 17, 2008, that at the argument on the motion to dismiss they argued that while there was an extraction in existence it did not offer the ability to retest. 2 AA 92. With regard to the motion to dismiss, Mr. Reed had similarly testified that although extractions can be retested, typically labs prefer to take new extractions

from the original sample because there is a risk of "denigration" of a preserved extraction. 2 AA 78.

Further, the conversation objected to was not between the witness, Ms. Radosta, and the Court, but rather between the Court and the attorneys as they checked the record to clarify the court's question:

> THE COURT: Let me get this straight. Did Judge Mosley actually do that before we're going down this road? Because that's the opposite of what Norm Reed just said.
>
> MS. KICE: I'm trying to find it, Your Honor.
>
> …
>
> MS. CLOWERS: Can I read from the Nevada supreme court decision in the case that tells us what happened.
>
> THE COURT: Can I see that?
>
> …
>
> THE COURT: So then you continue on with the record of Judge Mosley denied it. Everything is belied by the record of what just - - of what just went on here.
>
> MS. KICE: Okay.
>
> THE COURT: So I don't want this record to be wrong.
>
> …
>
> THE COURT: Is that what the Nevada supreme court says?
>
> MS. KICE: Yes, Your Honor.

> THE COURT: Then let's go with that. Let's go with okay, even if there was enough to retest…

Id. It is the Court's duty to dismiss claims which are belied by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Thus, the district court made an appropriate inquiry into the record. 2 AA 91-94. In fact, the district court only mentioned Mr. Reed briefly three times and did not ever read or disclose his actual testimony to Ms. Radosta. 2 AA 91-92, 94; compare Ibsen v. State, 83 Nev. 42, 48, 422 P.2d 543, 547 (1967) (where this Court found a judge's decision to read the defendant's testimony at an evidentiary hearing directly to another witness and then ask if the defendant's testimony was true or false to be improper; yet even then this Court found the error harmless). Ms. Kice asked Ms. Radosta to clarify, after her recollection was refreshed by the Nevada Supreme Court opinion not by any information about Mr. Reed's testimony, at which time she testified consistent with her original response:

> A: I, I - - my, my recollection is that there was nothing left for us to retest.
>
> The only reason why we would not have, had there been a sample to retest, the only reason why we would not have retested, there's, there's two reasons. One, there's no sample to retest; or two, because our expert tells us you don't want to retest it, that's not gonna help you at all. Those are the only times we don't retest if there's a sample.

2 AA 91-92. She offered this same response in more detail at the end of the conversation between the district court and counsel without anyone ever informing

her of the details of Mr. Reed's testimony. 2 AA 91-94. As such, the record shows that Ms. Radosta remembered the consultation with Ms. Rudin independently. Id. At one point, Ms. Radosta even said "[a]nd I mean, I'm not sure what Mr. Reed testified to, but…." 2 AA 92. Thus, the record reflects that the exclusionary rule was not violated and there was no prejudice to defendant from the conversation.

However, even if this Court views the discussion as a violation of the exclusionary rule, the appropriate remedies were satisfied because further examination was allowed and the credibility of the witness was assessed by the judge as the trier of fact. Romo, 115 Nev. at 96, 978 P.2d at 966; Rainsberger v. State, 76 Nev. at 161-62, 350 P.2d at 997. Even a violation of the exclusionary rule does not render a witness' testimony inadmissible and does not constitute reversible error; it merely affects their credibility. Ibsen, 83 Nev. at 48, 422 P.2d at 547; Rainsberger v. State, 76 Nev. at 161-62, 350 P.2d at 997. As such, any error would have been harmless here. Valdez v. State, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008). As shown above, Ms. Radosta's testimony was not altered. 2 AA 91-94. Additionally, since Mr. Reed was brought in to handle the DNA and had a better memory of the events his testimony would have been more credible and controlled. 2 AA 70, 77. By the same reasoning, prejudice is not presumed because the record shows that there was no prejudice. Givens, 99 Nev. at 55-56,

657 P.2d at 100-101. Therefore, the district court did not err by clarifying the record during the Evidentiary Hearing.

III.
THE DISTRICT COURT PROPERLY DENIED DEFENDANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

"A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review [*de novo*]." Evans v. State, 117 Nev. 609, 622, 28 P.2d 498, 508 (2001); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996); Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). "However, the district court's purely factual findings regarding a claim of ineffective assistance of counsel are entitled to deference on subsequent review by this court." Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994) (a district court's factual findings will be given deference by this court on appeal, unless they are clearly wrong and not supported by substantial evidence).

/ / /

/ / /

B. Nevada's Standards for Ineffective Assistance of Counsel

Nevada has adopted the standard outlined in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), for determining the effectiveness of counsel.

Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984). Under Strickland, in order to assert a claim for ineffective assistance of counsel, the defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying a two-pronged test. Strickland 466 U.S. at 686–687, 104 S.Ct. at 2063-64; see State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the Defendant must show: first, that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. See Strickland, 466 U.S. at 687–688, 694, 104 S.Ct. at 2065, 2068.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S.Ct. 1473, 1485 (2010).

The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. ____, ____, 131 S.Ct. 770, 778 (2011). Furthermore, "[e]ffective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970)).

The court begins with a presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1013, 103 P.3d 25, 33 (2004). The role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

In considering whether trial counsel was effective, the court must determine whether counsel made a "sufficient inquiry into the information . . . pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996), citing Strickland, 466 U.S. at 690–691, 104 S.Ct. at 2066. Once this decision is made, the court will consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280, citing Strickland, 466 U.S. at 690–691, 104 S.Ct. at 2066. Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

This analysis does not indicate that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. However, counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064-66). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Furthermore, claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225

(1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.

C. The district court did not err in denying Defendant's Petition and Supplemental Petition

1. The district court did not err in finding that counsels' actions and investigation of the DNA evidence were reasonable and provided effective assistance of counsel

Defendant raises various claims in this section, all of which have no merit. See AOB, pgs. 23-25. Defendant's claims appear to be the following based on his heading and arguments: (1) trial counsel's failure to retest DNA was ineffective assistance of counsel, (2) trial counsel rendered ineffective assistance of counsel when they failed to hire or secure an expert to review the LVMPD report or advise on DNA, and (3) trial counsel rendered ineffective assistance of counsel when they failed to hire an expert to review the CODIS hit from California and consult on a strategy to challenge it. Id. Defendant fails to reference any of the court's findings, argue how the court allegedly erred, or even cite to the record to show where these claims were raised; thus his argument is largely incoherent. NRAP 28(e)(1).

The district court made the following findings that are relevant to Defendant's claims on appeal:

> 15. Defendant claims his attorney was ineffective for failing to "call into question and have tested the evidence of California authorities'

lab work matching petitioner to Nevada's profile." Pet. at 5q. Defendant was identified as a suspect by witness Kathy Gunther, who matched the unknown DNA profile to Defendant with the assistance of outside agencies. 6/26/08 TT p.109. Defendant claims that his attorney should have challenged the DNA profile generated by the outside agency which identified him as the unknown perpetrator. However, such an action by trial counsel would have been useless since Ms. Gunther matched the DNA profile of the unknown perpetrator to a buccal swab obtained from Defendant in a confirmatory match. Id. As such, Defendant does not demonstrate that counsel was ineffective or that he was prejudiced, since counsel cannot be deemed ineffective for failing to make futile objections or motions.

…

17. In the Supplemental Petition, Defendant claims his attorney was ineffective for failing to retain his own DNA expert to either retest or make an independent evaluation of the DNA report. Supp. Pet. at 8-9. The mere failure to retain an expert does not render counsel per se ineffective. Further, Defendant's bare allegations that mistakes "may have been made" during testing are insufficient to demonstrate prejudice under Strickland.

18. Mr. Norm Reed's and Ms. Violet Radosta's testimony at the evidentiary hearing was credible.

19. Defendant waived his attorney client privilege at the evidentiary hearing. 10-22-2012 Evidentiary Hearing at 12.

…

20. […] Defendant's allegation that defense counsel failed to consult with a DNA expert is belied by the record. Mr. Reed and Ms. Radosta consulted with a DNA expert, Norah Rudin, one of the nation's renowned DNA experts. 10-22-2012 Evidentiary Hearing at 26-27, 53, 128. Ms. Rudin reviewed the DNA evidence – the entire forensic file – including the bed sheet, the vaginal swabs, the breast swabs, and the California DNA results. Id. Reviewing the entire file allows her to make her own interpretation of it. Id. at 29. Mr. Reed consulted with Ms. Rudin regarding her findings. Id. at 27.

...

21. Defense counsel made the strategic decision not to put Ms. Rudin

on the stand because, although she disagreed with some points of interpretation, she agreed with the overall results reached by Metro, which were that Defendant's DNA was present at the scene. 10-22-2012 Evidentiary Hearing at 30-31.

22. There was enough DNA to retest, but defense counsel made the strategic choice not to do so because they would have been obligated to turn the results over to the State. 10-22-2012 Evidentiary Hearing at 40, 101-104, 106, 108. Ms. Rudin advised against having the DNA retested. Id. at 39-40. […] Bringing in the CODIS or California match would also raise questions about why Defendant's DNA was on file with California and lead to the inference that he was a felon. 10-22-2012 Evidentiary Hearing at 52.

23. Based on the number of independent labs confirming Defendant's DNA at the scene, Mr. Reed and Ms. Radosta made the reasonable strategic decision to proceed only with Metro's lab results, so they could try to cross-examine the DNA expert regarding testing procedures such that it may raise doubt to the jury that this Defendant was the source of the DNA. 10-22-2012 Evidentiary Hearing at 88-89. To advance this trial tactic, Mr. Reed and Ms. Radosta held mock trials and practiced their cross-examination with the help of Norah Rudin. Ms. Rudin prepared a list of potential cross-examination questions for counsels. 10-22-2012 Evidentiary Hearing at 31.

…

32. Defendant received effective assistance of counsel.

2 AA 130-140; see also 2 AA 140-144 (Conclusions of Law).

Contrary to Defendant's vague assertions, the record and the evidence presented at the Evidentiary Hearing support the district court's rulings. The district court's findings were supported by substantial evidence and it did not err in concluding that Defendant did not receive ineffective assistance of counsel on the claims in his Petition and Supplemental Petition raised on appeal here. Evans, 117 Nev. at 622, 28 P.2d at 508; Kirksey, 112 Nev. at 987, 923 P.2d at 1107; Lader,

121 Nev. at 686, 120 P.3d at 1166; Lara, 120 Nev. at 179, 87 P.3d at 530; Riley, 110 Nev. at 647, 878 P.2d at 278. First, the evidence demonstrates that trial counsel did investigate the DNA and provided effective assistance by securing and consulting with one of the nation's leading experts in the field. 2 AA 81. Mr. Reed testified that his initial step is always to "have someone look at the DNA." 2 AA 74. The defense hired and consulted with an expert named Norah Rudin; in fact Ms. Radosta initially hired Ms. Rudin even prior to Mr. Reed's involvement. 2 AA 74, 90. Mr. Reed had worked with Ms. Rudin several times and described her as a very good expert. 2 AA 74. The defense subpoenaed all of the forensic lab's records from LVMPD. Id. They also investigated the CODIS hit from California. Id. The defense was able to have the forensic lab at LVMPD send all of the forensic information directly to their expert, rather than just sending her a copy of the reports. 2 AA 75. This allowed Ms. Rudin to conduct her own analysis; absent physical testing she was able to recreate all of the testing and analysis done by the crime lab and do her own interpretations. Id. Once Ms. Rudin received all of the materials she reviewed the forensic file and consulted with the defense about their approach to the DNA, including whether they should seek retesting. 2 AA 74. The defense also sought to consult their expert during trial when the State offered a rebuttal witness following their strong cross-

examination, the supervisor who had peer-reviewed the findings of the initial forensic analysts. 2 AA 73. The district court denied this request. Id.

Second, the evidence showed that the decisions not to seek retesting and not to have their expert testify were well-reasoned strategic decisions. Ms. Rudin concluded that she agreed with the ultimate conclusions reached by the LVMPD crime lab. 2 AA 75. Essentially, while she may have taken a couple of different turns in her analysis she would have reached the same conclusion. Id. Ms. Rudin informed the defense that their best avenue of attack on the DNA was to cross-examine on the subjective areas of DNA analysis, particularly alleles and peaks which could indicate the existence of a mixture or that the source might be someone else. Id. The defense worked with Ms. Rudin to develop a strong cross-examination to challenge the method of interpretation and the strength of the DNA conclusions. Id. However, Mr. Reed testified that they determined that the defense could not have Ms. Rudin testify as a witness because "she would have to say, while I disagree with some of the interpretation, I agree with the overall results." Id.

Mr. Reed also testified regarding the decision not to retest the DNA samples and Ms. Rudin's advice on the matter. 2 AA 77. Ms. Radosta had filed the motion even before Mr. Reed became involved in the case. Id. However, after Ms. Rudin had the opportunity to review the DNA analysis conducted by LVMPD she

advised against retesting because she agreed with the results. Id. Therefore, the defense then "did everything [they] could to make sure that somehow people forgot about that motion because there was no basis to retest because [their] expert said don't retest." Id. The prosecution already had a single-source DNA match to Defendant from the bed sheets, and single-source DNA matches from the breast and vaginal swabs after separating out the female DNA of the victim from the unknown male DNA that was found to match Defendant. 2 AA 81-82. Thus, the defense specifically wanted to avoid having to turn over results of a retest, likely another positive match to Defendant, to the State as required. 2 AA 77.

Third, the evidence showed that trial counsel did hire an expert, investigate, and consult on a strategy for the CODIS match from California. Thus, their decisions in that regard were also well-reasoned strategic decisions. Ms. Rudin was also consulted regarding the initial CODIS hit out of California which initially identified Defendant as a possible suspect. 2 AA 76, 80. While it was strange that the CODIS hit alerted in California rather than Nevada, where Defendant's DNA should have been on file from a prior conviction, it would only have harmed the defense to bring that information out at trial. 2 AA 76. After consultation with Ms. Rudin, the defense approached the prosecution and obtained the prosecutor's agreement that the State would eliminate the discussion of the California CODIS hit and focus on only the manual comparison in Nevada. Id. By doing so the

defense avoided the jury learning (1) that Defendant was an ex-felon and also (2) that two independent labs confirmed a DNA match placing Defendant at the crime and demonstrating his sexual assault of J.K. 2 AA 76, 80. This allowed the defense to limit the number of DNA matches they had to attack to one, the LVMPD lab's work, for which they developed the cross-examination strategy with their expert. Id. Ms. Rudin's conclusion was that it did not matter why the CODIS result came from California rather than Nevada because the California match, like the LVMPD results, was accurate. 2 AA 82-83. It was possible that even though Nevada had previously collected Defendant's DNA, it might not have been entered into the system yet. Id. Additionally, Mr. Reed did not remember any chain of custody issues with the DNA, specifically with the CODIS hit in California, and definitely would have raised a challenge if any had existed. 2 AA 80. In all of his prior cases, he has never been able to challenge a search warrant based on a CODIS hit. 2 AA 85. Mr. Reed testified that there was nothing further the defense could have requested from CODIS. 2 AA 82. He clarified that the CODIS, because it is merely a probable cause determination and not intended to be a conclusive determination for a court of law, does not accept requests to recheck or retest their matching of DNA profiles entered in the system. 2 AA 82. Rather, they notify the lab whose input matched and that lab is responsible for obtaining an

independent sample and conducting an independent manual comparison. 2 AA 76, 80.

Finally, Defendant failed to show prejudice. As set forth above, the evidence against Defendant was strong. Additionally, Defendant made admissions to his attorneys prior to trial about being present at the crime. 2 AA 70. Ms. Radosta confirmed that Defendant told them two different versions of his defense at different points in the case. 2 AA 88. On the morning of trial, Defendant told his attorneys that he knew the victim and alleged that the sex was consensual on the night of the crime as payment for drugs. 2 AA 98-99. Mr. Reed testified that, in his opinion, the Defendant's chances of winning this case were almost nonexistent and negotiating the matter would have been in his best interest yet Defendant he rejected the plea offered to him on the eve of trial. 2 AA 78-79.

Therefore, the district court's findings were supported by substantial evidence and not clearly erroneous; the district court did not err in finding that Defendant did not receive ineffective assistance of counsel from trial counsel as it related to the investigation of DNA and the retention of a DNA expert.

2. The district court did not err in finding that counsel was not ineffective in failing to persuade the district court to record bench conferences

Again, Defendant fails to even mention the district court's findings or argue how such findings were allegedly erroneous. The district court found as follows on this issue:

> 29. In the Supplemental Petition, Defendant claims that trial counsel failed to make an adequate record by recording bench conferences. Supp. Pet. at 11. Defendant's general allegations of unrecorded bench conferences fail to explain which judicial actions should have been preserved, how such actions did or did not have merit, or a reasonable probability that their preservation would have alter the outcome of his trial or appeal. Defendant's allegations are too vague to warrant relief per Hargrove and NRS 34.735(6). Further, Mr. Reed testified at the evidentiary hearing that he was not prevented in any way from making a record on anything that was said at a bench conference. 10-22-2012 Evidentiary Hearing at 66. The trial judge always gave defense counsel the opportunity to put material off-record discussions on the record at a later time. Id. Mr. Reed testified that nothing in the unrecorded bench conferences would have changed the outcome of the trial. Id. at 72.

2 AA 139. Contrary to Defendant's vague assertions, the record and the evidence presented at the Evidentiary Hearing support the district court's ruling. The district court's findings were not clearly erroneous and were supported by substantial evidence; thus it did not err in concluding that Defendant did not receive ineffective assistance of counsel on the claims raised regarding bench conferences. Evans, 117 Nev. at 622, 28 P.2d at 508; Kirksey, 112 Nev. at 987, 923 P.2d at 1107; Lader, 121 Nev. at 686, 120 P.3d at 1166; Lara, 120 Nev. at 179, 87 P.3d at 530; Riley, 110 Nev. at 647, 878 P.2d at 278.

The claims were vague and insufficient to warrant relief. 2 AA 47. The testimony at the Evidentiary Hearing also demonstrated that Defendant suffered no prejudice. Mr. Reed was very clear that he was able to make a full record of any issues raised in bench conferences, both in this case and any case he had in front of Judge Mosley. 2 AA 84-85. Specifically, Mr. Reed testified that:

> I don't know how many trials you've done in front of Judge Mosley, but there are a lot of conferences with Judge Mosley that might not be on the record initially. But everything I thought was material in every trial I've ever done with, with Judge Mosley since like 1990 I think was my first trial in there, he'll go back and put it on the record or give you an opportunity to put it on the record.
> …
> He always gave me an opportunity to make a record. I've never remembered judge Mosley saying you can't you know, make a record about an issue, even if he disagreed with me.

2 AA 84. Mr. Reed further testified that as an attorney who handles many death penalty cases, where Supreme Court Rule 250 requires recorded bench conferences, he understands the value of recording them but felt that Judge Mosley's approach properly preserved the record. 2 AA 85. Furthermore, this Court has held that even a defendant in a capital case does not have an absolute right to have the proceedings transcribed and that SCR 250(5)(a) allows parties to have discussions without being recorded so long as they later make a record of the unreported proceedings. Archanian v. State, 122 Nev. 1019, 1032-35, 145 P.3d 1008, 1018-20 (2006). This Court recently extended the approach for capital cases to non-capital cases in Preciado v. State, 130 Nev. Adv. Op. 6, ____ (February 13,

2014). In Preciado, this Court specifically stated that bench conferences could be memorialized either through contemporaneous recording "*or by allowing the attorneys to make a record afterward*." Id. (emphasis added).

As demonstrated above, a record was appropriately made of all issues discussed in any unrecorded bench conference. Therefore, counsel acted reasonably and provided effective assistance of counsel. Therefore, the district court's findings were supported by substantial evidence and not clearly erroneous; it did not err in finding that Defendant did not receive ineffective assistance of counsel from trial counsel as it related to the trial court's decision to not record bench conferences.

IV.
THE DISTRICT COURT PROPERLY RULED THAT DEFENDANT'S BRADY CLAIM RAISED OUTSIDE THE CONTEXT OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS PROCEDURALLY BARRED

A. Standard of Review

Petitions for Writs of Habeas Corpus (Post-Conviction) "[present] mixed question of law and fact, subject to independent [*de novo*] review." Evans, 117 Nev. at 622, 28 P.2d at 508; Kirksey, 112 Nev. at 987, 923 P.2d at 1107; Lader, 121 Nev. at 686, 120 P.3d at 1166.

"However, the district court's purely factual findings regarding a claim of ineffective assistance of counsel are entitled to deference on subsequent review by this court." Lara, 120 Nev. at 179, 87 P.3d at 530; Riley, 110 Nev. at 647, 878

P.2d at 278 (a district court's factual findings will be given deference by this court on appeal, unless they are clearly wrong and not supported by substantial evidence).

B. The district court did not err in denying Ground Two of Defendant's Supplemental Petition

The district court did not err in finding that Ground Two of Defendant's Supplemental Petition was waived per NRS 34.810 because it was not raised on direct appeal. Defendant cites "Order 5" for the location of the denial; so far as the State can deduce Defendant is referring to page "2 AA 134" in the record on appeal. See NRAP 28(e)(1); see also AOB, pg. 27; 2 AA 134.

In Defendant's Supplemental Petition, Ground Two, Defendant raised a claim of an alleged violation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555 (1995), and Jimenez v. State, 112 Nev. 610, 618, 918 P.2d 687, 692 (1996). The claim alleged that there was nothing in the file regarding the DNA sample in the CODIS database and no indication that the state investigated it. 2 AA 49. Defendant then argued that do to the lack of information, "Mr. Henderson believes and therefore alleges that the State of Nevada has in its possession information[,]" and that "[t]he State never turned over this evidence." Id. This claim was largely incoherent and failed to identify what alleged Brady evidence the State might be in possession of, although at the same time arguing that the State and Defendant's file are void of such

information. Id. In contrast, the claim raised on direct appeal was a subpart of Defendant's argument that the district court erred in denying Defendant's motion for a mistrial. 1 AA 60-62. In that sub-part, the Defendant argued on direct appeal that a Brady violation occurred because the Defendant did not receive a rebuttal witness' (supervisor at the LVMPD crime lab who conducted a peer review of the other testing) notes prior to trial and was not given a recess to review those notes. 1 AA 60-62, 84-86, 103. The Nevada Supreme Court later held that the district court had not abused its discretion in denying the motion and that the State was not required to disclosure such notes because they were merely a "personal summary of official reports already provided to the defense." 1 AA 103. Therefore, the claim raised on direct appeal and the claim raised in Ground Two of Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) have nothing to do with each other beyond containing an alleged Brady violations relating to DNA; the LVMPD analysis to which the rebuttal witness testified would have involved the comparison of DNA from Defendant's buccal swab to the DNA recovered from the victim, thus not involving the California CODIS hit. 1 RA 165, 167, 184, 210-215. Defendant's argument that the claims "dovetail" therefore the issue was raised on direct appeal and "thus properly raised and improperly barred as untimely," is illogical. See AOB, pgs. 28-29. Defendant argues first that the district court erred in finding the claim procedurally barred for a failure to raise it

on direct appeal, and then argues that it was "improperly barred as untimely." See AOB, pgs. 27, 29. For the sake of clarity, the district court's ruling was actually:

> In Ground 2 of the Supplemental Petition, defendant alleges that the State committed a violation of Brady v. Maryland 373 U.S. 83, 83 S.Ct. 1194 (1963). Defendant did not raise these claims on direct appeal and, as such, they are waived per NRS 34.810.

2 AA 134. The district court properly concluded that the claim was waived per NRS 34.810 because Defendant failed to raise it on appeal. Id.

Regardless, even if the claims are considered to be the same, the district court's finding that the claim in Ground Two of the Supplemental Petition was waived per NRS 34.810 is not reversible error. Where the district court reaches the right result, even based on errant reasoning, this Court will affirm the order on appeal. Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 328, 341 (1970); see also Bellon v. State, 121 Nev. 436, 443-444, 117 P.3d 176, 180 (2005).

Here, if this Court finds the district court erred and that the claim from Ground Two was the same raised on direct appeal, then this Court's ruling on direct appeal that the district court did not abuse its discretion in denying the motion for mistrial and that the State was not required to disclose the rebuttal expert's notes would be preclude any review under the law of the case doctrine because this Court already found that a Brady violation did not occur. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001); see McNelton v. State, 115 Nev. 396, 990

P.2d 1263, 1276 (1999); Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); see also Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993); see also 1 AA 103. Thus, the result is the same regardless of whether the claims from Ground Two are found to be raised on direct appeal or not. The district court properly denied relief on Ground Two of the Supplemental Petition.

CONCLUSION

Based on the foregoing, the State respectfully requests that the district court's Findings of Fact, Conclusions of Law, and Order be AFFIRMED.

Dated this 14th day of February, 2014.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Steven S. Owens*

STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 11,328 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 14th day of February, 2014.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Steven S. Owens*

STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 14th day of February, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

JULIAN GREGORY, ESQ.
Counsel for Appellant

STEVEN S. OWENS
Chief Deputy District Attorney

/s/ j. garcia
Employee, Clark County
District Attorney's Office

SSO/Sarah Killer/jg