finding good cause and prejudice for the late filing of the original Petition, it made no findings with regard to any future Supplemental Petition. The nature of the good cause analysis looks to the external impediment standing in the defense's way. When that external impediment is removed, good cause ceases to exist. For this very reason, a motion to dismiss an untimely petition must be resolved before ordering discovery to supplement an untimely petition. Riker, 121 Nev. at 234-35, 112 P.3d at 1076.

VII. The Law of the Case Doctrine Does Not Apply

Department 9 perceived that its unlawful ruling would be sheltered by law of the case. 01-17-2013 Transcript at 7 lns. 6-7. That doctrine does not apply here. "Under the law of the case doctrine, '[w]hen an appellate court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case and must be followed throughout its subsequent progress, both in the lower court and upon subsequent appeal.'" Hsu v. County of Clark, 123 Nev. 625, 629-30, 173 P.3d 724, 728 (2007) (quoting Wickliffe v. Sunrise Hospital, 104 Nev. 777, 780, 766 P.2d 1322, 1324 (1988)) (emphasis added).

Even if the law of the case doctrine were to apply to holdings of one district court judge before transferring the case to another district court judge, "it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." Arizona v. California, 460 U.S. 605, 618 n. 8, 103 S.Ct. 1382 (1983). As discussed above, Judge Togliatti's ruling was clearly erroneous in that: 1) it found NRS 34.726 not to apply; 2) it found good cause based on circumstances already found not to constitute such by the Nevada Supreme Court and/or entirely within the Petitioner's control; 3) it apparently rested its finding of prejudice based on an equitable notion that Petitioner would be "prejudiced" if no court ever considered his post-conviction petition on the merits, instead of looking to whether any of his claims have merit. The ruling continues to work a manifest injustice, both in the waste of time and resources being expended to correct the ruling and provide discovery for an untimely petition and in the potential for federal courts to find that Nevada does not strictly and uniformly enforce its procedural bars.

//

CONCLUSION

In light of the foregoing, the State respectfully requests that this court rule on the State's Motion to Dismiss and find the Petition untimely.

DATED this 5th day of March, 2013.

Respectfully submitted,

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

BY /s/ Michael Staudaher for
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Renewed Response And Motion To Dismiss Defendant's Petition For Writ Of Habeas Corpus (Post-Conviction), was made this 5th day of March, 2013, by facsimile transmission to:

JAMES A. ORONOZ, Esq.
(702) 522-1542

BY: /s/ R. Johnson
R. JOHNSON
Secretary for the District Attorney's Office

EM/PW/rj/M-1

EXHIBIT 1

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **January 17, 2013**

06C228755 The State of Nevada vs Norman H Flowers III

January 17, 2013 **9:00 AM** **Motion for Discovery**

HEARD BY: Togliatti, Jennifer **COURTROOM:** RJC Courtroom 10D

COURT CLERK: Aaron Carbajal (ac)

RECORDER: Yvette G. Sison-Britt

REPORTER:

PARTIES PRESENT:

Gaffney, Lucas	Attorney for Defendant
Ponticello, Frank M.	Deputy District Attorney
State of Nevada	Plaintiff

JOURNAL ENTRIES

- Deft. not present. Court presented counsel with ruling as follows:

This court, after considering the papers and pleadings on file, including Defendant s Motion to Obtain a Complete Copy of Discovery From the State filed on September 12, 2012, and State s Opposition to Defendant s Motion filed on December 14, 2012, and Defendant s Reply to State s Opposition filed on January 8, 2013, as well as the oral arguments heard by this Court on January 16, 2013 makes the following findings.

As an initial matter, before the court may entertain granting or denying the Defendant s present motion, the court must first determine whether the Defendant s Petition for Writ of Habeas Corpus was timely filed. See State v. Dist. Ct. (Riker), 121 Nev. 225, 235 (determining the applicability of procedural bars may eliminate the need for or narrow the scope of any discovery or evidentiary hearing). On September 17, 2012, this Court issued an Order granting the Defendant an additional thirty (30) days from the September 28, 2012 deadline set out in the Nevada Supreme Court s Order dismissing Defendant s pending appeal. While this court is well aware of the mandatory default rules set forth in NRS 34.726, and the strictness in which they are applied, the court notes that NRS 34.726 makes no mention of instances where a pending appeal is dismissed and no remittitur is issued. However, even assuming the Nevada Supreme Court s deadline as set forth in their September 28, 2011 Order is similarly applied, this Court finds good cause for Defendant s untimely filing and

prejudice.

Good cause for delay exists where (1) the delay is not the fault of the petitioner and (2) the petitioner will be unduly prejudice[d] if the petition is dismissed as untimely. Pellegrini v. State, 117 Nev. 860, 868 (2001). In order to establish the first requirement, a petitioner must demonstrate some impediment external to the defense prevented him from complying with the procedural rule that has been violated Lozado v. State, 110 Nev. 349, 353 (1994). Such an external impediment could be that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable. Hathaway v. State, 119 Nev. 248, 252 (2003). To satisfy the second requirement, a petitioner must demonstrate that errors in the proceedings underlying the judgment worked to his actual and substantial disadvantage. Hogan v. Warden, 109 Nev. 952, 959 60 (1993).

Here, Defendant has been unable to obtain a copy of his file for reasons outside of his control which has inhibited his counsel s ability to investigate the merits of Defendant s post-conviction habeas claims. This court notes that Defendant s counsel has made repeated good faith attempts to obtain the file by contacting the Special Public Defender s office, the Defendant, and officials at the Ely State Prison, all of whom claim to either no longer have it within their possession or to have sent the file somewhere else. Defense counsel has also filed the present motion to obtain the file from the Clark County District Attorney s office by court order. However, the District Attorney has opposed producing the file pursuant to their understanding of NRS 34.780(2). In addition, this Court recognizes any prejudicial effect it s September 17, 2012 Order granting an extension of time may have had on Defendant s ability to file a timely petition. As such, for all the reasons set forth above, and because Defendant s filing was within a reasonable time (11 days after the deadline), this Court finds that Defendant s untimely Petition for Writ of Habeas Corpus may be heard for good cause and prejudice has been shown. With regard to Defendant s present motion, the Court intends to address the issues relating to discovery at the next scheduled hearing on March 6, 2013. By way of this minute order the defense is to prepare the order and notify all interested parties.

Mr. Lucas to prepare the Order, circulating to the State for approval as to form and content.

NDC

3/6/13 9:00 AM STATUS CHECK: DISCOVERY (DEPT. 11)

CLERK'S NOTE: A copy of this Minute Order was emailed to Ms. Weckerly, Mr. Ponticello, and Mr. Lucas.

Office of the Special Public Defender

330 S. Third Street, Ste. 800, Las Vegas NV 89155-2316
(702) 455-6265
Fax: (702) 455-6273
Family Defense Division (702) 455-6266
Family Defense Division Fax (702) 380-6948

A CENTURY OF SERVICE

June 22, 2012

James A. Oronoz, Esq.
700 South Third Street
Las Vegas NV 89101

Re: Flowers adv. State, Case No. 228755

Dear Mr. Oronoz,

We are in receipt of your letter dated June 15, 2012 regarding the above referenced matter. In that regard, please be advised that Mr. Flowers requested we send him his case files after we withdrew as attorney of record. On March 22, 2012, we provided Mr. Flowers 4 bankor boxes containing his entire case file in Case No. C228755 and Case No. 216032. He received permission from the prison to be allowed to have his photographs and the CD's in the case. We had to have the Court send the CD's directly to him. Department 8 did this for us.

Sincerely,

RANDY H. PIKE
Deputy Special Public Defender

RHP:kf

EXHIBIT C

ORDR
JAMES A. ORONOZ, ESQ.
Nevada Bar No. 6769
THOMAS A. ERICSSON, ESQ.
Nevada Bar No. 4982
ORONOZ & ERICSSON, L.L.C.
700 SOUTH 3RD STREET
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Telephone: (702) 878-2889
Facsimile: (702) 522-1542
Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

NORMAN FLOWERS,
Petitioner,
vs.
STATE OF NEVADA
Respondents.

CASE NO: C228775
DEPT NO: IX

ORDER

IT IS HEREBY ORDERED that the current deadline (September 28, 2012) for filing the defendant's Post-Conviction Petition for Writ of Habeas Corpus is extended for a period of thirty (30) days.

DATED this 11 Day of September, 2012

JENNIFER P. TOGLIATTI
DISTRICT COURT JUDGE

Respectfully submitted by:

THOMAS A. ERICSSON, ESQ.
Nevada Bar No. 4982

EXHIBIT D

STIP
JAMES A. ORONOZ
Nevada Bar No. 6769
THOMAS A. ERICSSON, ESQ.
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tom@oronozlawyers.com
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. NORMAN FLOWERS, Defendant.	CASE NO: C228755 DEPT NO: IX

STIPULATION TO VACATE BREIFING SCHEDULE AND HEARINGS

IT IS HEREBY STIPULATED by and between, JAMES A. ORONOZ, ESQ., Attorney for Defendant NORMAN FLOWERS, and Chief Deputy District Attorney PAMELA WECKERLY, Attorney for the State of Nevada, that the current Briefing Schedule (State Opposition due 9/19/12; Defendant's Reply 9/26/12) on the issue of Discovery be vacated.

IT IS FURTHER STIPULATED that the parties request this Court vacate the present Hearing set for September 24, 2012 at 9:00 a.m.

///

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IT IS FURTHER STIPULATED that the parties request this Court vacate the present Hearing set for October 1, 2012, at 9:00 a.m.

DATED this 20th day of September, 2012.

JAMES A. ORONOZ, ESQ.
Nevada Bar No.: 6769
700 South Third Street
Las Vegas, NV 89101

DATED this ____day of September, 2012.

PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar No.: 6163
200 East Lewis
Las Vegas, Nevada 89101

ORDR
JAMES A. ORONOZ
Nevada Bar No. 6769
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tom@oronozlawyers.com
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,
Plaintiff,
vs.
NORMAN FLOWERS,
Defendant.

CASE NO: C228755
DEPT NO: IX

ORDER

Upon Stipulation of counsel and good cause appearing therefore,

IT IS HEREBY ORDERED that the current Briefing Schedule (State Opposition due 9/19/12; Defendant's Reply 9/26/12) on the issue of Discovery be vacated.

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IT IS FURTHER ORDERED that the parties request this Court vacate the present Hearing set for September 24, 2012 at 9:00 a.m.

IT IS FURTHER ORDERED that the parties request this Court vacate the present Hearing set for October 1, 2012, at 9:00 a.m.

DATED AND DONE this _____ day of SEP 21 2012, 2012.

TIMOTHY C. WILLIAMS
DISTRICT COURT JUDGE
FOR JENNIFER P. TOGLIATTI

Respectfully Submitted By:

JAMES A. ORONOZ, ESQ.
Nevada Bar No.: 6769
700 South Third Street
Las Vegas, NV 89101

PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar No.: 6163
200 East Lewis
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SUPP
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jim@oronozlawyers.com
Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

NORMAN FLOWERS

Petitioner,

vs.

THE STATE OF NEVADA

Respondent.

CASE NO: C228755
DEPT. NO: IX

Date of Hearing: January 14, 2013
Time of Hearing: 9:00 a.m.

DEFENDANT'S SUPPLEMENTAL OPPOSITION TO STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, the defendant, NORMAN FLOWERS, by and through his attorney, JAMES A. ORONOZ, ESQ. of ORONOZ & ERICSSON, L.L.C., and submits his Defendant's Supplemental Opposition To State's Response And Motion To Dismiss Defendant's Petition For Writ Of Habeas Corpus (Post-Conviction)

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This Supplemental pleading is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support thereof, and oral argument at the time of hearing.

DATED this 8th day of January, 2013.

ORONOZ & ERICSSON, L.L.C.

By: */s/ James Oronoz*
JAMES A. ORONOZ, ESQ.
Nevada Bar No. 6769
700 South 3rd Street
Las Vegas, Nevada 89101
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

Pertinent Procedural Background

On October 22, 2008, the district court adjudicated the Petitioner, Norman Flowers ("Flowers"), guilty of: Count 1 – Burglary; Count 2 – Murder in the First Degree; and Count – 3 Sexual Assault. On January 13, 2009, the court sentenced Flowers as follows: as to Count 1, one hundred twenty (120) months in the Nevada Department of Corrections with a minimum parole eligibility of forty-eight (48) months; as to Count 2, Life Without the Possibility of Parole, to run consecutive to Count 1; as to Count 3, Life With the Possibility of Parole with a minimum parole eligibility of one hundred twenty (120) months, to run consecutive to Count 2.

On January 26, 2009, Flowers filed a Notice of Appeal. On September 28, 2011, in accordance with negotiations in case number C216032, whereby Flowers entered a plea pursuant to North Carolina v. Alford, 400 US 25, 91 S.Ct. 160 (1970), the Nevada Supreme Court dismissed Flowers' appeal (53159) in the instant case. In

its Order Dismissing Appeals, the Nevada Supreme Court stated: "Because no remittitur will issue in this matter, *see* NRAP 42(b), the one-year period for filing a post-conviction habeas corpus petition under NRS 34.726(1) shall commence to run from the date of this order. Flowers v. State, 53159, 2011 WL 4527339 (Nev. Sept. 28, 2011). Therefore, Flowers had until September 28, 2012, to file a post-conviction Petition for Writ of Habeas Corpus ("Petition").

Defense Inability to Obtain Case File

On June 8, 2012, the court appointed James A. Oronoz, Esq. ("Counsel") to represent Flowers in post-conviction relief proceedings. That same day, the Court set a thirty (30) day status check on receipt of Flowers' file. On June 15, 2012, counsel contacted the Special Public Defender's office, which represented Flowers during pretrial and appellate proceedings, to obtain a copy of Flowers' file. On June 22, 2012, Deputy Special Public Defender Randall Pike informed counsel that his office had mailed the original case file to Flowers in Ely State Prison and therefore could not provide counsel with a copy of Flowers' file.

On July 9, 2012, counsel contacted the State in an attempt to obtain a copy of discovery in the instant case. Chief Deputy District Attorney, H. Leon Simon, informed counsel that pursuant to NRS 34.780(2), the State would not provide any discovery until after Flowers' Petition had been granted. On July 13, 2012, counsel informed the Court of the issues that had arisen pertaining to Flowers' file. Counsel explained to the Court that obtaining a copy of the file from Flowers would be problematic because Flowers' had removed or written on certain documents. The Court directed counsel to obtain the file from Flowers and advised the State provide counsel with any missing discovery.

On August 27, 2012, counsel informed the Court that in addition to Flowers' removal of documents, prison officials had removed documents from the file because they contained social security numbers.[1] Upon inquiry, prison officials informed counsel that they did not have the missing documents in their possession.[2] Counsel then contacted the Special Public Defender's office and was told that they did not receive any portion of Flowers' file back from Ely State Prison. After counsel explained to the Court the aforementioned issues, the Court ordered the State to provide the Petitioner with a complete copy of discovery.

Order Extending Deadline to File Petition

Seeking to prevent the defense from receiving a copy of discovery in this case, on August 31, 2012, the State submitted a Setting Slip to the Court requesting a hearing on "Clarification of Discovery." On September 10, 2012, the State orally objected to the Court's Order to provide Flowers with a complete copy of discovery. The State argued that the Court needed to set a briefing schedule so the parties could litigate the discovery issue. The State further argued that if Flowers succeeded in withdrawing his plea in case number C216032, the appeal in the instant case would be reinstated in front of the Nevada Supreme Court, and therefore this Court would lose jurisdiction over Flowers' case. Counsel responded:

MR. GAFFNEY: The problem we have here is that the petition in this case

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[1] *See* Inmate Request Forms and Unauthorized Mail Notifications attached hereto as Exhibit A.

[2] A review of Exhibit A reveals that on March 27, 2012, prison officials issued an Unauthorized Mail Notification to Flowers indicating they had received "legal material w/ personal social security numbers." Prison officials later indicate in an Inmate Request Form that their records show that the material "was shipped" back to the Special Public Defender's office on April 3, 2012.

is due on September 28. The reply [brief] in the case that's currently on appeal in regards to whether or not his appeal here would be reinstated, the reply [brief] isn't even due until September 24th. And so, this case takes precedence, and we were appointed back-

THE COURT: This is the same case. This is one case.

MR. GAFFNEY: Well, I'm sorry, what Ms. Weckerly is saying is currently there's an appeal in another case, and that appeal is on the sole issue of whether or not he could withdraw his guilty plea. If he's successful in withdrawing his guilty plea in that case, this case would be back in front of the Supreme Court. They're actually two separate cases. As part of his guilty plea agreement in the other case, he agreed to dismiss this case which was currently on appeal at that time. And so, what I'm trying to say is that the decision in whether or not he will successfully withdraw his plea is going to take place --we don't even know. I mean, the briefing isn't even done at this point, but his petition in this case is due September 28. We're-- the clock is running.

THE COURT: Well, it's due a year from the time that the appeal is finally decided. So --

MR. GAFFNEY: It's due from the-- when the remittitur issued, and that was September 28, 2011 of last year. We were appointed in June of this year, and we've been struggling to get this file ever since. When we were in front of Judge Bell on the 13th, we attempted to file a discovery motion in Open Court. It was filed and then she rejected it saying; well, why don't you get a copy of the file from the client, and then she advised the State to cooperate with us to provide any discovery that was missing.

We talked to the client. We've had a -- he had part of it, and apparently, Ely State Prison may have a part of it. It's scattered to the four winds. It's problematic for us to get the file from the client, and so when we came back here on I think it was the 27th in front of you when I was here with Mr. Ericsson, that's what prompted us to have the Court sign an order to turn over a copy of the discovery. And here we are, a week later, and we still don't have the file, and the deadline for petition is only three weeks away.

Transcript of Proceedings, 9/10/12, p. 4-5.

The Court capitulated to the State's demand and agreed to vacate its previous Order so that he State could oppose Flowers' discovery request in writing. The Court then set a briefing schedule on the discovery issue:

THE COURT: State, I'm going to-- I mean, setting aside the appeal issues, I'm not waiting for the Supreme Court, because I could be in PERS by then, and quite frankly, I'm going to presume that whoever denied the motion made the right legal decision, and his appeal will be denied.

So, as far as the request for discovery, normally if I had any inclination at the time that there was going to be an objection by the State, I wouldn't have just signed an order. I've inherited, I don't know, 400 active cases from Judge Bell, and I had the impression at the time that I sent the order that this had already kind of been that the road had been laid for this, so I had a misunderstanding. So the extent you want me to vacate the order and you want to litigate it, I'm happy to do that. I'm happy to allow you to do that since I didn't apparently allow you to do that the first time.

MS. WECKERLY: Thank you. We'd like to litigate it.

THE COURT: Okay.

MR. GAFFNEY: Your Honor, at this point, can I make an oral motion to extend the timeline for the filing of his post-conviction petition for writ of habeas corpus. If we put a motion on --

THE COURT: He doesn't have the file.

MS. WECKERLY: His deadline hasn't even started ticking yet, because there's no appeal.

MR. GAFFNEY: That's not correct, Your Honor. It—

THE COURT: Listen, listen. I understand the issues okay. I've been doing this a really long time. I don't need you to say it five times. I agree with you. I'll extend it 30 days. If the District Attorney is correct and it hasn't started ticking yet, then there's zero prejudice to the District Attorney in me extending that deadline 30 days. So, your oral request is granted. You'll need to prepare an order for that. In the meantime, I guess there was no motion filed. I have nothing in the minutes about how they'll be a motion filed, and so I'm vacating the early order-- earlier order for production of discovery because I had a misunderstanding that this was going to be litigated or that the State objected, and so when can you have that done?

MR. GAFFNEY: I'll have it submitted by today or by tomorrow.

Id. at 7-8.

The Court then set the briefing schedule on the discovery issue with the final brief (Flowers' Reply) being due on September 26, 2012, and argument on the pleadings set for October 1, 2012. Id. at 8.

Parties Stipulation Regarding Discovery

On September 12, 2012, Flowers filed his Motion To Obtain A Complete Copy of Discovery From The State. On September 21, 2012, *both* parties were under the mistaken belief that the Nevada Supreme Court's remittitur was forthcoming and that the Court lacked jurisdiction over the instant case. The parties entered into a Stipulation to take the discovery issue off calendar. The Stipulation and Order could not be more clear that the parties only intended to vacate the briefing schedule and hearings pertaining to the discovery issue. Shortly thereafter, counsel became aware that even though no remittitur had issued, the Nevada Supreme Court had established a deadline for filing Flowers' Petition. In a footnote, the Nevada Supreme Court's Order indicated the deadline was September 28, 2012. On October 9, 2012, despite not having obtained the file, Counsel filed Flowers' Petition, well within the time limits specified in this Court's Order extending the deadline.

State's Motion to Dismiss

On October 30, 2012, the State filed the State's Response and Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). On November 14, 2012, Flowers filed Defendant's Opposition to State's Response And Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

On November 26, 2012, the State conceded that Flower's Petition was indeed timely. At that hearing, the Court placed Flowers' Motion to Obtain a Complete Copy

of Discovery From the State back on calendar at the State's request. On December 14, 2012, the State filed the State's Opposition to Defendant's Motion to Obtain a Complete Copy of Discovery From the State.

On December 17, 2012, the State informed the Court that despite its earlier concession, by statute, the State could not stipulate to the fact that Flowers' Petition was timely. Counsel reiterated that Flowers' Petition was timely because it was filed within the timeframe granted by this Court. In response, the Court indicated that it had granted the thirty-day extension to file Flowers' Petition under the belief that Flowers' had requested additional time to file a Supplemental Petition, not an original Petition. The Court then asked counsel to respond in writing to the State's Motion to Dismiss.

ARGUMENT

FLOWERS' PETITION IS TIMELY, IN THE ALTERNATIVE – THERE IS GOOD CAUSE FOR THE DELAY IN FILING

In its Opposition, the State argues that Flowers Petition should be dismissed as untimely. Flowers respectfully submits that his Petition is timely because he filed it within the thirty (30) day extension granted by this Court.[3] However, in the event that this Court is inclined to agree that the Petition is untimely, Flowers submits that good cause exists for the delay in filing. NRS 34.726 provides in pertinent part:

> 1. Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, **good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:**

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[3] *See* Defendant's Opposition to State's Response and Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus (Post-conviction), filed November 14, 2012.

> **(a) That the delay is not the fault of the petitioner; and**
>
> **(b) That dismissal of the petition as untimely will unduly prejudice the petitioner…**

NRS 34.726 (emphasis added).

Summary dismissal of a Petition is warranted only if it "plainly appears from the face of the petition" that the petitioner is not entitled to relief; otherwise the district court "shall order the respondent to file an answer…" NRS 34.740(2). Phelps v. Dir., Nevada Dept. of Prisons, 104 Nev. 656, 658, 764 P.2d 1303, 1305 (1988).

Good Cause

Clearly, NRS 34.726 allows a court to use its discretion to determine whether good cause exists to extend the one-year deadline to file a Petition. To establish good cause, "a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994)). "An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, **or that some interference by officials, made compliance impracticable.**' " Id. (emphasis added) (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (citations and quotations omitted)); State v. Huebler, 128 Nev. Ad. Op. 19, 275 P.3d 91, 94-95 (2012).

Flowers' Reliance Upon This Court's Order

Here, Flowers' submits that the record establishes good cause for the late filing in that this Court's Order granting the extension of time for the filing, which

was made in the State's presence and without objection, justified the prolonged filing period. On September 10, 2012, Flowers repeatedly informed this Court that litigating/briefing the issue of discovery would result in Flowers filing an untimely Petition. To allay Flowers' concerns, this Court extended the filing deadline. Pursuant to NRS 34.726, granting an extension to file a Petition is clearly within the Court's discretionary powers. Accordingly, Flowers relied upon this Court's extension when he filed his Petition on October 9, 2012, well within the extended time frame established by this Court's Order. The record reveals no occasion upon which Flowers' was advised by the State or this Court that the Court's Order granting an extension of time was insufficient to extend the statutory deadline. Further, the record reveals no occasion where counsel indicated to the Court that the filing deadline of September 28, 2012, pertained to a Supplemental Petition for Writ of Habeas Corpus. As such, Flowers submits that he is not at fault for the delay in filing his Petition because he relied in good faith upon this Court's Order extending the deadline.

Interference by Ely State Prison Officials

Furthermore, interference by Ely State Prison officials and the State constitutes good cause for the untimely filing of Flowers' Petition. Since July 13, 2012, counsel has argued repeatedly that his inability to secure a copy of Flowers' file or a complete copy of discovery had prevented him from fully investigating and developing Flowers' post-conviction-relief claims. As this Court is aware, counsel cannot obtain a copy of Flowers' file from his previous attorneys, nor can counsel obtain a complete copy of Flowers' file from Flowers because Ely State prison

officials removed unspecified documents from the file.[4] At this point in time it is unknown what documents were removed or the present location of the missing documents. Additionally, even if counsel were to obtain the remaining portion of the file from Flowers, counsel has no way of determining which documents are missing. Given this situation, Flowers has made numerous attempts to obtain a copy of discovery from the State because they are the only known entity that possesses a complete copy of the materials used in Flowers prosecution.

Interference by the State

The State has attempted to delay and obstruct these proceedings since the Court appointed counsel to assist Flowers in developing his post-conviction claims. First, the State has consistently refused to give Flowers' the same discovery it has already provided to trial counsel.[5] The State is well aware that counsel cannot fully investigate and develop Flowers' post-conviction-relief claims without a copy of the materials used in his prosecution. Obviously, without access to fundamental discovery documents such as police reports, counsel cannot begin to understand why Flowers' previous attorneys employed a certain theory of defense, or why they asked certain questions of particular witnesses. Armed with this knowledge, the State has taken every opportunity to delay and derail these proceedings. The record clearly reflects that the State's purposeful resistance resulted in this Court setting a briefing schedule on the issue of discovery, which in turn forced counsel to request an extension to file Flowers' Petition.

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[4] *See* Inmate Request Forms and Unauthorized Mail Notifications attached hereto as Exhibit A.

[5] It is noteworthy that Flowers has not requested any documents in addition to those already provided to trial counsel by the State.

The record also reflects that it was the State who first told this Court to disregard Flowers' concerns about filing his Petition by September 28, 2012. This assertion by the State caused confusion that resulted in delaying these proceedings even further, during which time the clock continued to run on the filing deadline. Now, after making every effort to run out the clock on the deadline, the State presents a disingenuous argument that Flowers' Petition is untimely.

Thus, Flowers submits that interference by Ely State Prison officials in removing documents from his legal mail, as well as interference by the State in refusing to provide discovery and intentionally delaying these proceedings, constitutes an impediment external to the defense that has made compliance with the procedural default rule set forth in NRS 34.726 impracticable. Additionally, Flowers is not at fault for the untimely filing of his Petition because he relied, to his detriment, upon this Court's extension of the filing deadline. As such, this Court should find that good cause exists for the delayed filing of Flowers' Petition.

Undue Prejudice

To establish that the dismissal of a Petition for Writ of Habeas Corpus (post-conviction) as untimely will unduly prejudice the petitioner, the petitioner must demonstrate that prejudice would result if the claims in the Petition are not considered, or absent good cause, he must show that a fundamental miscarriage of justice would result from a court's failure to consider the claims. State v. Bennett, 119 Nev. 589, 597, 81 P.3d 1, 6-7 (2003). The fundamental miscarriage of justice standard requires a colorable showing that constitutional error has resulted in the conviction of one who is actually innocent. Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 526 (2003).

Ineffective Assistance of Trial Counsel & Discovery Provided by the State

Here, Flowers submits that he will suffer undue prejudice if the claims in his Petition are not considered. In his Petition, Flowers claims that trial counsel was ineffective for failing to provide him with a complete copy of his file. On June 22, 2012, Deputy Special Public Defender Randall Pike informed counsel that his office had mailed the original case file to Flowers at Ely State Prison on March 22, 2012, and therefore he could not provide counsel with a copy of Flowers' file. Counsel recently received an Unauthorized Mail Notification that indicates on March 27, 2012, Ely State Prison officials informed Flowers that he had received unauthorized mail in the form of "legal material w/ personal social security numbers." The Notification does not specify what the documents are beyond the term "legal material." Ely State Prison officials then indicate in an Inmate Request Form that they shipped the materials back to the Special Public Defender's office on April 3, 2012. The Special Public Defender's Office has informed counsel that they never received anything back from the prison. The failure of trial counsel to provide Flowers with a complete copy of his file has significantly undermined the ability of counsel and this Court to review the constitutionality of Flowers' conviction.

Based on the foregoing, the State is the only entity known to counsel who possesses a complete copy of the materials used to convict Flowers. Therefore, obtaining those materials is imperative to challenging Flowers' conviction. If Flowers' Petition is dismissed as untimely, he'll have no recourse to obtain said materials in order to challenge the constitutionality of his conviction and sentence of Life without the possibility of parole. As this Court is aware, the dismissal of Flowers' Petition as untimely would prevent both State and Federal review of his

post-conviction-relief claims. As such, Flowers will suffer undue prejudice if this Court dismisses his Petition as untimely and does not consider these claims.

Ineffective Assistance of Appellate Counsel

Furthermore, in his Petition, Flowers asserts that appellate counsel was ineffective by convincing him to dismiss his appeal in the instant case. Specifically, on June 9, 2011, appellate counsel informed Flowers through written correspondence that his appeal had a very low likelihood of success, and therefore he should accept the State's plea offer in case number C216032, which contemplated the dismissal of his pending appeal in the instant case. On June 10, 2011, after taking appellate counsel's advice into consideration, Flowers reluctantly agreed to accept the State's offer. Shortly thereafter, on June 28, 2011, Flowers filed a Motion to Withdraw Plea, arguing that his attorneys had coerced him into pleading guilty. Because appellate counsel's letter played a significant role in Flowers decision to dismiss his appeal, Flowers submits that this Court must consider whether appellate counsel's actions constitute ineffective assistance. Again, dismissal of Flowers' Petition as untimely would leave him with no recourse to challenge the constitutionality of his appeal since dismissal would preclude both State and Federal review of his post-conviction-relief claims

The record plainly demonstrates that Flowers claims have merit and that he cannot fully develop his post-conviction-relief claims without obtaining a complete copy of discovery from the State. Additionally, the record demonstrates by a preponderance of the evidence that appellate counsel was ineffective by convincing Flowers to dismiss his pending appeal. As such, dismissing Flowers' Petition as

untimely would preclude this Court from considering Flowers' claims, thereby resulting in undue prejudice to Flowers.

CONCLUSION

Based on the foregoing, Flowers submits that his Petition is timely. In the alternative, Flowers submits that there is good cause to excuse the delay in filing his Petition because the delay was caused by an impediment external to the defense and the dismissal of the Petition as untimely will result in undue prejudice. Lastly, Flowers' Petition clearly demonstrates on its face that his claims have merit and he is entitled to relief. *See* Phelps, 104 Nev. 656 (1988). Therefore, the Petitioner prays that this Honorable Court deny the State's request to dismiss Flowers' Petition for Writ of Habeas Corpus (Post-conviction).

DATED this 8th day of January, 2013.

ORONOZ & ERICSSON, L.L.C.

By: */s/ James Oronoz*
JAMES A. ORONOZ, ESQ.
Nevada Bar No. 6769
700 South 3rd Street
Las Vegas, Nevada 89101
Attorney for Petitioner

AFFIDAVIT OF LUCAS J. GAFFNEY

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

LUCAS J. GAFFNEY, being first duly sworn, deposes and says:

1. That I am an attorney duly licensed to practice before all the Courts of the state of Nevada, and I am an associate attorney for JAMES A. ORONOZ who is appointed counsel for the defendant, NORMAN FLOWERS, herein;

2. That I have knowledge of the facts contained herein and am competent to testify as to those facts;

3. That I sent written correspondence to the Office of the Special Public Defender requesting Norman Flowers' case file for case number C288755;

4. That on or about June 22, 2012, I received written correspondence from Deputy Special Public Defender Randy Pike informing me the entire case file had been sent to Norman Flowers;

5. That in late June of 2012, Norman Flowers informed me that some documents had been removed from the case file he received;

6. That on July 9, 2012, I contacted the State in an attempt to obtain a copy of discovery in the instant case. Chief Deputy District Attorney, H. Leon Simon, informed me that pursuant to NRS 34.780(2), the State would not provide any discovery until after Norman Flowers' Petition for Writ of Habeas Corpus (post-conviction) had been granted;

7. That in late July of 2012, Norman Flowers informed me that Ely State Prison officials had removed documents that included social security numbers from the case file he received from the Special Public Defender's Office in this case;

8. That in late July of 2012, I contacted a representative at Ely State Prison regarding the documents removed from Norman Flowers' file and the representative informed me that they did not have any of the documents in their possession;

9. That in late July of 2012, I contacted a representative of the Special Public Defender's office regarding the documents removed from Norman Flowers' file and the representative informed me that they did not have any of the documents in their possession;

10. That on approximately December 1, 2012, I received an Unauthorized Mail Notification and Inmate Request Form from Norman Flowers, which are attached hereto as Exhibit A.

11. That I submit this affidavit in good faith in support of Norman Flowers' Defendant's Supplemental Opposition to State's Response and Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus (post-conviction);

12. Further your affiant sayeth naught.

LUCAS J. GAFFNEY, ESQ.

SUBSCRIBE AND SWORN TO before me

this 8 day of January, 2013.

ALICIA M. ORONOZ
Notary Public-State of Nevada
APPT. NO. 10-2613-1
My App. Expires July 08, 2014

EXHIBIT A

1B44

NEVADA DEPARTMENT OF CORRECTIONS
UNAUTHORIZED MAIL NOTIFICATION

TO: N F Flowers NDOC # 39975

FROM: MAILROOM OFFICER SSP FINAL DATE FOR DISPOSITION OF UNAUTHORIZED MAIL: 4/7/12

RECEIVED: _____ _____ (DATE)

Legal material w/personal social security number.
Contacted D. Schieck's office. These were sent on accident.
They will pay postage to have them returned if you
chose to send them back to their office.

From: David Schieck
GCSPD
330 S 3rd St #800
LV, NV 89155

You have ten (10) working days from this date to inform the Mailroom Officer, in writing, of what you want done with this mail. Your choices are:

_____ 1. Ship or mail out at your expense;

_____ 2. Have the unauthorized mail disposed of according to NDOC procedures; or,

_____ 3. Appeal the decision through the inmate grievance process.

If the Mailroom Officer does not receive the above information within ten (10) days, this mail will be destroyed.

THIS IS THE ONLY NOTICE YOU WILL RECEIVE

Sgt A Smith 3/27/12
(MAILROOM OFFICER SIGNATURE) (DATE)

White: Inmate
Yellow: Mailroom
Pink: Attach to Unauthorized Mail

DOC 1518 (1/04)

INMATE REQUEST FORM

1.) INMATE NAME	DOC #	2.) HOUSING UNIT	3.) DATE
Norman Flowers	39975	1 B 44	11/12/12

4.) REQUEST FORM TO: (CHECK BOX)

___ CASEWORKER ___ MEDICAL ___ MENTAL HEALTH ___ CANTEEN

___ EDUCATION ___ VISITING ___ LAW LIBRARY ___ DENTAL

___ LAUNDRY ☒ PROPERTY ROOM ___ SHIFT COMMAND

___ OTHER _____

5.) NAME OF INDIVIDUAL TO CONTACT: Officer Cicciano or Sgt Wilte

6.) REQUEST: (PRINT BELOW) On or near 3/27/12 I received (2) notices for unauthorized mail from The Special Public Defenders office which was actually Legal paper work/discoveries to my case. The first notice stated 8-Legal CD's must come directly from the court not my Lawyer. The second notice was for Legal material w/personal info on legal work containing Social security numbers, DOB and addresses and how D. Schicks was contacted and agreed to pay postage to have the items/material returned. The prison returned these items/materials to the C.C.S.P.D. office But I never recieved any notice of when or statement showing they were sent or received Could You Please help me obtain some type of Documentation showing so

7.) INMATE SIGNATURE _____ DOC # 39975

8.) RECEIVING STAFF SIGNATURE _____ DATE _____

****

9.) RESPONSE TO INMATE Because The Public Defenders Are Denying Material was returned which is false

Our records show it was sent 4-3-12

10.) RESPONDING STAFF SIGNATURE _____ DATE _____

DOC – 3012 (REV. 7/01)

CERT
JAMES A. ORONOZ, ESQ.
Nevada Bar No. 6769
ORONOZ & ERICSSON, L.L.C.
700 SOUTH 3RD STREET
Las Vegas, Nevada 89101
Telephone: (702)878-2889
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jim@oronozlawyers.com
Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

NORMAN FLOWERS Petitioner, vs. THE STATE OF NEVADA Respondent.	CASE NO: C228755 DEPT. NO: IX

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of January, 2013, I served a true and correct copy of the foregoing DEFENDANT'S SUPPLEMENTAL OPPOSITION TO STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) on the following:

STEVE WOLFSON, Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101
PDMotions@CCdanv.com

/s/ Alicia Oronoz
An employee of Oronoz & Ericsson L.L.C.

ORDR
JAMES A. ORONOZ, ESQ.
Nevada Bar No. 6769
LUCAS J. GAFFNEY, ESQ.
Nevada Bar No. 12373
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Telephone: (702) 878-2889
Facsimile: (702) 522-1542
Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

NORMAN FLOWERS,

Petitioner,

vs.

STATE OF NEVADA

Respondents.

CASE NO: C228755

DEPT NO: IX

ORDER

This Court, after considering the papers and pleadings on file, including Defendant's Motion to Obtain a Complete Copy of Discovery From The State filed on September 12, 2012, and State's Opposition to Defendant's Motion filed on December 14, 2012, and Defendant's Reply to State's Opposition filed on January 8, 2013, as well as the oral arguments heard by this Court on January 16, 2013 makes the following findings.

As an initial matter, before the Court may entertain granting or denying the Defendant's present motion, the Court must first determine whether Defendant's Petition for Writ of Habeas Corpus was timely filed. *See* State v. Dist. Ct. (Riker), 121 Nev. 225, 235 (determining the applicability of procedural bars may eliminate the need for or narrow the scope of discovery or evidentiary hearing). On September 17, 2012, this Court issued an Order granting the Defendant an additional thirty (30) days from the September 28, 2012 deadline set out in the Nevada

Supreme Court's Order dismissing Defendant's pending appeal. While this Court is well aware of the mandatory default rules set forth in NRS 34.726, and the strictness in which they are applied, the Court notes that NRS 34.726 makes no mention of instances where a pending appeal is dismissed and no remittitur is issued. However, even assuming the Nevada Supreme Court's deadline as set forth in their September 28, 2011 Order is similarly applied, this Court finds good cause for Defendant's untimely filing and prejudice.

Good cause for delay exists where (1) the delay is not the fault of the petitioner and (2) the petitioner will be unduly prejudice[d] if the petition is dismissed as untimely. Pellegrini v. State, 117 Nev. 860, 868 (2001). In order to establish the first requirement, a petitioner must demonstrate some impediment external to the defense prevented him from complying with the procedural rule that has been violated. Lozada v. State, 110 Nev. 349, 353 (1994). Such an external impediment could be that the factual or legal basis for claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable. Hathaway v. State, 119 Nev. 248, 252 (2003). To satisfy the second requirement, a petitioner must demonstrate that errors in the proceedings underlying the judgment worked to his actual and substantial disadvantage. Hogan v. Warden, 109 Nev. 952, 959-60 (1993).

Here, Defendant has been unable to obtain a copy of his file for reasons outside of his control, which has inhibited his counsel's ability to investigate the merits of Defendant's post-conviction habeas claims. This court notes that Defendant's counsel has made repeated good faith attempts to obtain the file by contacting the Special Public Defender's office, the Defendant, and officials at the Ely State Prison, all of whom claim to either no longer have it within their possession or to have sent the file somewhere else. Defense counsel has also filed the present Motion to obtain the file from the Clark County District Attorney's office by court

order. However, the District Attorney has opposed producing the file pursuant to their understanding of NRS 34.780(2). In addition, this Court recognizes any prejudicial effect its September 17, 2012 Order granting an extension of time may have had on Defendant's ability to file a timely petition. As such, for all the reasons set forth above, and because Defendant's filing was within a reasonable time (11 days after the deadline), this Court finds that Defendant's untimely Petition for Writ of Habeas Corpus may be heard for good cause and prejudice has been shown. With regard to Defendant's present Motion, the Court intends to address the issues relating to discovery at the next scheduled hearing on March 6, 2013. By way of this Minute Order, the defense is to prepare the order and notify all interested parties.

Mr. Gaffney to prepare the Order, circulating to the State for approval as to form and content.

DATED this 22nd Day of February, 2013

DISTRICT COURT JUDGE

Respectfully submitted by:

LUCAS J. GAFFNEY, ESQ.
Nevada Bar No. 12373

Electronically Filed
03/05/2013 10:15:30 AM

CLERK OF THE COURT

RSPN

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Respondent,

-vs-

NORMAN KEITH FLOWERS, aka,
Norman Harold Flowers III, #1179383

Petitioner.

CASE NO: 06C228755

DEPT NO: XI

STATE'S RENEWED RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: MARCH 18, 2013
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through PAMELA WECKERLY, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities as a Supplemental Response and Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

This supplemental 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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POINTS AND AUTHORITIES

Because this Petition was recently transferred to this department from Department 9, the State seeks to apprise the court of the current procedural posture. Prior to the transfer, the State moved to dismiss the Petition as untimely. The State's motion to dismiss has never been ruled on, but rather Department 9 granted discovery pursuant to a finding of good cause to overcome the procedural bar. As such, this court is faced with administering erroneously ordered discovery to supplement an untimely Petition. District courts lack the discretion to ignore procedural bars when properly raised by the State.

STATEMENT OF THE CASE

I. Petitioner Is Charged and Found Guilty by Jury

On December 13, 2006, a Grand Jury issued an indictment on NORMAN KEITH FLOWERS, aka, Norman Harold Flowers III (hereinafter "Petitioner") for the following: COUNT 1 – Burglary, COUNT 2 – Murder, COUNT 3 – Sexual Assault and COUNT 4 – Robbery. The State issued a Notice of Intent to Seek the Death Penalty on January 11, 2007. An Amended Indictment was filed on October 15, 2008.

After a jury trial, the jury verdict was entered into judgment on October 22, 2008. The Jury found the Petitioner guilty of COUNT 1 – Burglary, COUNT 2 – Murder in the First Degree and COUNT 3 – Sexual Assault. The jury found the Petitioner not guilty of COUNT 4 – Robbery. On October 24, 2008, the jury rendered a special verdict finding mitigating circumstances and a sentence of Life Without The Possibility Of Parole for COUNT 2. On October 30, 2008, Petitioner filed a motion for new trial. The court denied this motion on November 12, 2008.

II. Petitioner Is Sentenced

On January 13, 2009, Petitioner was sentenced as follows: as to COUNT 1, to a maximum of ONE HUNDRED TWENTY (120) MONTHS in the Nevada Department of Corrections with a minimum parole eligibility of FORTY-EIGHT (48) MONTHS; as to COUNT 2, to Life Without The Possibility Of Parole, to run consecutive to COUNT 1; as to COUNT 3, to Life With The Possibility Of Parole after ONE HUNDRED TWENTY (120)

MONTHS, to run consecutive to COUNT 2. The Judgment of Conviction was filed on January 16, 2009, erroneously noting as to COUNT 3 a sentence of Life *Without* The Possibility Of Parole, with a minimum parole eligibility of ONE HUNDRED TWENTY (120) MONTHS. On January 29, 2009, Petitioner appeared in court with counsel pursuant to the State's request for clarification of the sentence. An Amended Judgment of Conviction was filed February 12, 2012 to reflect the true sentence of Life *With* The Possibility Of Parole with a minimum parole eligibility of ONE HUNDRED TWENTY (120) MONTHS for COUNT 3.

III. Petitioner Begins the Direct Appeal Process

On January 26, 2009, Petitioner filed a Notice of Appeal from the Judgment of Conviction. On February 20, 2009, Petitioner filed an Amended Notice of Appeal.

On March 3, 2010, Petitioner filed a Motion for New Trial Based Upon Newly Available Evidence, Specifically the Conviction of George Brass for Murder. The State opposed the motion on March 9, 2010. At a court hearing on March 17, 2010, the State argued that although the defense tried to blame Mr. Brass and another individual, the Petitioner went to trial knowing that the trial of Mr. Brass was pending and that Mr. Brass had an alibi. The District Court denied the Motion for New Trial. On April 1, 2010, Petitioner filed a Notice of Appeal from the Court's denial of his motion for a new trial.

IV. Petitioner Voluntarily Withdraws His Direct Appeal Pursuant to Negotiations in Another Case

On June 10, 2011, pursuant to negotiations, Petitioner entered an Alford plea to an Amended Information in District Court Case Number 05C216032 (Dept. 8), charging Appellant with two (2) counts of murder.[1] Pursuant to the plea negotiations, Petitioner additionally agreed to withdraw his appeals in this case before the Nevada Supreme Court

[1] Prior to sentencing in Case Number 05C216032 (Dept. 8), Petitioner moved to withdraw his Alford plea. The court denied the motion and sentenced Petitioner to Life Without The Possibility Of Parole (COUNT 1) and Life With The Possibility Of Parole after TWENTY-FIVE (25) YEARS (COUNT 2), COUNT 2 to run concurrent with COUNT 1 and both to run consecutive to the sentence imposed in Case Number 06C228755. Petitioner appealed the Judgment of Conviction, arguing that the district court abused its discretion by denying his presentence motion to withdraw his guilty plea. On December 13, 2012, the Nevada Supreme Court affirmed the judgment of the district court, finding no abuse of discretion. Norman K. Flowers v. Nevada, Order of Affirmance, Case Number 59250. Remittitur issued January 9, 2013.

for Docket Numbers 53159 (Appeal from the Judgment of Conviction, Case Number 06C228755) and 55759 (Appeal from the District Court's order denying Petitioner's motion for new trial, Case Number 06C228755). On June 13, 2011, Petitioner filed the agreed-upon Motion to Voluntarily Dismiss his Appeal with the Nevada Supreme Court for Docket Numbers 53159 (Appeal from the Judgment of Conviction, Case Number 06C228755) and 55759 (Appeal from the District Court's order denying Petitioner's motion for new trial, Case Number 06C228755).

V. Nevada Supreme Court Issues Order Dismissing Appeals Ordering the One-Year Period for Filing a Post-Conviction Petition to Commence September 28, 2011

The Supreme Court issued an Order Dismissing Appeals (Docket Numbers 53159 and 55759) on September 28, 2011. That order stated that "[b]ecause no remittitur will issue in this matter, see NRAP 42(b), the one-year period for filing a post-conviction habeas corpus petition under NRS 34.726(1) shall commence to run from the date of this order."

VI. Petitioner Begins the Post-Conviction Process

On February 3, 2012, Petitioner filed a motion to withdraw counsel. On February 15, 2012, the motion was granted. On May 16, 2012, Petitioner filed a Motion for the Appointment of Counsel and Request for Evidentiary Hearing. The court granted the motion on May 30, 2012 and appointed James A. Oronoz as post-conviction counsel on June 8, 2012. Post-conviction counsel presented the court with an Order which was signed in open court on August 27, 2012 ordering the District Attorney's Office to provide Petitioner with a copy of discovery.[2]

A. Prior to the Running of the Statutory Time Period, Department 9 Grants Oral Motion to Extend the Timeline for the filing of Petitioner's Post-Conviction Petition for Writ of Habeas Corpus

On September 10, 2012, before the time to file the Petition would expire on September 28, 2012 in this case, the parties appeared in court at the State's request for a clarification of the August 27 discovery order. That day, post-conviction counsel

[2] On July 13, 2012, post-conviction counsel unsuccessfully attempted to file a Motion for Leave to Conduct Discovery and for Court Order to Obtain Requested Documents and Discovery, which the State did not receive.

acknowledged that any post-conviction petition must be filed by September 28, 2012: "The problem we have here is that the petition in this case is due on September 28th . . . [i]t's due from the – when the remittitur issued, and that was September 28, 2011 of last year." 09-10-12 Transcript of Proceedings at 4-5. Notwithstanding his acknowledgment of the deadline, post-conviction counsel "ma[de] an oral motion to extend the timeline for the filing of [Petitioner's] post-conviction petition for writ of habeas corpus." 09-10-12 Transcript of Proceedings at 7. When post-conviction counsel made the oral motion to extend the timeline for the filing of the petition, the State mistakenly recalled the appeal pending in the companion Case Number 05C216032 (Dept. 8), NSC No. 59250 which had not yet been affirmed and asserted that the deadline in this case had not yet started running. 09-10-12 Transcript of Proceedings at 7. The court then held

> I agree with you. I'll extend it 30 days. If the District Attorney is correct and it hasn't started ticking yet, then there's zero prejudice to the District Attorney in me extending that deadline 30 days. So, your oral request is granted.

09-10-12 Transcript of Proceedings at 8. Because the court had not known there would be an objection to providing discovery by the State, the court vacated the discovery order signed on August 27, 2012 and ordered briefing on the matter.

B. On October 9, 2012, Post-conviction Counsel Files an Untimely Original Petition

On October 9, 2012, Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) with the aid of counsel, which the State moved to dismiss as untimely on October 30, 2012. On October 31, 2012, Petitioner's post-conviction counsel filed a Motion to Place on Calendar to Supplement Petitioner's Petition for Writ of Habeas Corpus, which the State opposed. On November 23, 2012, post-conviction counsel filed a Reply to State's Opposition to Petitioner's Motion to Place on Calendar to Supplement Petitioner's Petition for Writ of Habeas Corpus.

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C. In an Attempt to Remedy the Former Purported Extension of Time to File a Petition, the Department 9 Finds Good Cause for the Late Filing in Resolving Motion for Discovery

On September 12, 2012, Petitioner's post-conviction counsel filed a Motion to Obtain a Complete Copy of Discovery from the State, which the State vigorously opposed. The State noted NRS 34.780(2) provides that post-conviction discovery only becomes available after the writ has been granted and upon a showing of good cause, that the Petition was untimely, and that, pursuant to State v. Dist. Ct. (Riker), 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005), "the statutory rules regarding procedural default are mandatory and cannot be ignored when properly raised by the State." The State urged the district court to resolve the pending motion to dismiss before potentially ordering the State to provide post-conviction discovery.

On January 16, 2013, the district court heard argument on the Motion for Discovery. The next day, the district court issued a minute order granting the Motion for Discovery. Ex. A. That court found: 1) that the mandatory time bar of NRS 34.726 does not apply in situations where no remitter issues from the Nevada Supreme Court; 2) even assuming NRS 34.726 applied there was good cause to overcome the procedural bar because post-conviction counsel had been unable to obtain a copy of the file and because of the court's September 17, 2012 Order granting an extension of time to file the Petition; 3) the court's September 17, 2012 Order granting an extension created prejudice; and 4) Petitioner's filing of the Petition within eleven (11) days of the deadline was reasonable. Id.

Having found cause and prejudice for the late filing of the Petition, and apparently for any future Supplemental Petition, Department 9 then left the management of discovery and consideration of the Petition to this court.

ARGUMENT

I. Petitioner's Petition Was Untimely Filed

"[T]he statutory rules regarding procedural default are mandatory and cannot be ignored when properly raised by the State." State v. Dist. Ct. (Riker), 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005). The mandatory provisions of NRS 34.726 state:

> 1. Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed ***within 1 year after entry of the judgment of conviction*** or, if an appeal has been taken from the judgment, within 1 year after the supreme court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
>
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner. . .

NRS 34.726(1) (Emphasis added).

A. Because No Remittitur Issued, the Time Limit Began to Run from the Date of Entry of the Nevada Supreme Court's Order Granting the Motion for Voluntary Dismissal; NRS 34.726 Applies Even When No Remittitur Issues

As set out above, NRS 34.726 provides that a petition "must be filed within one-year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within one-year after the supreme court issues its remittitur." Where no appeal is filed, the default rule applies: a petition must be filed within one-year after entry of the judgment of conviction. Where a direct appeal is filed but voluntarily dismissed, the Nevada Supreme Court does not issue a remittitur, but "the one-year time period for filing a post-conviction petition under NRS 34.726 commences to run from date of entry of [the Nevada Supreme Court's] order granting the motion for voluntary dismissal."[3] Gonzales v. State, 118 Nev. 590, 595 n.18, 53 P.3d 901, 904 n.18 (2002); NRAP 42(b).

Here, Petitioner's Judgment of Conviction was filed on January 16, 2009.[4] Petitioner appealed. The Supreme Court dismissed the appeal pursuant to NRAP 42(b) on September 28, 2011, noting, in accordance with Gonzales, that because no remittitur would issue, the one-year period for filing a post-conviction habeas corpus petition would run from the date

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[3] Department 9 noted, "While this court is well aware of the mandatory default rules set forth in NRS 34.726, and the strictness in which they are applied, the court notes that NRS 34.726 makes no mention of instances where a pending appeal is dismissed and no remittitur issued." 01-17-2013 Minute Order at 1. Indeed, NRS 34.726 does not mention this specific instance, but the court's holding that NRS 34.726 does not apply to such situations is directly contradicted by Nevada Supreme Court caselaw in Gonzales.

[4] Petitioner erroneously notes the date of Judgment of Conviction as February 12, 2009. This is the date of the Amended Judgment of Conviction which has no effect on the timeliness of the petition, but, rather, affects whether the Petitioner can show good cause for his failure to present the petition in a timely manner, which is discussed below. Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

of the order, or September 28, 2011. Consequently, Petitioner had until September 28, 2012 to file his post-conviction habeas petition as it pertains to his conviction. Petitioner filed the instant petition on October 9, 2012. This is over the one-year time limitation which must be applied by the District Court, and therefore Petitioner's petition must be dismissed.

B. The District Court Lacks the Discretion to Find a Late Filing "Reasonable"

In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late, pursuant to the "clear and unambiguous" mandatory provisions of NRS 34.726(1). Gonzales reiterated the importance of filing the petition with the district court within the one-year mandate, absent a showing of "good cause" for the delay in filing. Gonzales, 590 P.3d at 902. The one-year time bar is therefore strictly construed.

Department 9 found that the Petition was filed within a reasonable time of the deadline (eleven (11) days late). Ex. A at 2. NRS 34.726 does not allow such a finding. Even two (2) days late could be construed as "reasonable," yet the Nevada Supreme Court has refused to inject such an ad hoc analysis into the application of the clear, unambiguous, and mandatory provisions of NRS 34.726.

II. Because the Petition Is Untimely, the Petition Must Be Dismissed Unless Petitioner Demonstrates Good Cause and Actual Prejudice

An untimely petition must be dismissed unless the petitioner can meet his burden to demonstrate good cause and actual prejudice. Pellegrini v. State, 117 Nev. 860, 878, 34 P.3d 519, 531 (2001); see also State v. Huebler, 128 Nev. __, 275 P.3d 91, 94-95 (2012), reh'g denied (Aug. 1, 2012), cert. denied, 133 S. Ct. 988 (2013). To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate two things: 1) "that an impediment external to the defense prevented him or her from complying with the state procedural default rules" and 2) that the petitioner will be "unduly prejudice[d]" if the petition is dismissed as untimely. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994)). "An impediment

external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.'" Id. (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639 (1986) (citations and quotations omitted)). Under the second requirement, "[a]ctual prejudice requires him to show 'not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" Riker, 121 Nev. at 232, 112 P.3d at 1075 (quoting United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584 (1982) and citing Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993)). Absent a showing of good cause and prejudice to excuse procedural default, the court will consider a claim only if the petitioner demonstrates that failure to consider it will result in a fundamental miscarriage of justice. Riker, 121 Nev. at 232, 112 P.3d at 1075 (citing Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996)).

III. Nothing Alleged in the Petition Nor Any Situation Created by Department 9 Establishes Good Cause

Petitioner has not demonstrated good cause or actual prejudice sufficient to overcome the procedural bars. "To establish good cause, appellants *must* show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see also Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003) ("In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules."); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Such an external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Id. (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986)); see also Gonzales, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114

Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). The Nevada Supreme Court has clarified that, "appellants cannot attempt to manufacture good cause[.]" Clem, 119 Nev. at 621, 81 P.3d at 526.

To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Excuses such as the lack of assistance of counsel when preparing a petition as well as the failure of trial counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. See Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995); Phelps v. Dir. Nev. Dep't of Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988), superseded by statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004);.

A. Any Stipulation by the State Did Not Toll the Statutorily-Imposed Time Limit, Nor Is The District Court Empowered to Extend the Time Bar. Neither of These Situations Creates Good Cause.

The confusion in this case regarding the time bar started on September 10, 2012. On that day, post-conviction counsel represented in court on September 10, 2012 – before the running of the deadline on September 28, 2012 – that he was aware of the September 28, 2012 deadline, but he needed more time to file a petition.[5] "The problem we have here is that the petition in this case is due on September 28th . . . [i]t's due from the – when the remittitur issued, and that was September 28, 2011 of last year." 09-10-12 Transcript of Proceedings at 4-5. Post-conviction counsel made an oral motion to extend the timeline for the filing of the petition. When he did so, in responding, the State mistakenly recalled the appeal pending in the companion Case Number 05C216032 (Dept. 8), NSC No. 59250 which had not yet been affirmed and asserted that the deadline had not yet started running. 09-10-12 Transcript of Proceedings at 7. The court then held:

> I agree with you. I'll extend it 30 days. If the District Attorney is correct and it hasn't started ticking yet, then there's zero prejudice to the District Attorney in me extending that deadline 30 days. So, your oral request is granted.

[5] This contradicts his assertion in the Petition that he overlooked the footnote in the Nevada Supreme Court order (Pet. at 12-13).

09-10-12 Transcript of Proceedings at 8.

First, post-conviction counsel's need for more time espoused prior to the running of the time bar does not, by definition, constitute "an impediment external to the defense." Clem, 119 Nev. at 621, 81 P.3d at 525. Second, any stipulation by the State to waive or toll the procedural bars is without effect. In State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003), the Nevada Supreme Court held that, "a stipulation by the parties cannot empower a court to disregard the mandatory procedural default rules." There, the State and Petitioner entered into a stipulation allowing the Petitioner to raise issues on the merits that were barred by mandatory procedural bars. The Petitioner relied to his detriment on that stipulation. Nevertheless, the Court held that any stipulation to waive the procedural bars is a nullity.

Pursuant to Haberstroh's ruling that "a stipulation by the parties cannot empower a court to disregard the mandatory procedural default rules," any representations made by the parties regarding the statutory deadline and relied on by the court should be disregarded. Riker, 121 Nev. at 231, 112 P.3d at 1074; Haberstroh, 119 Nev. at 181, 69 P.3d at 681). Petitioner's time to file a petition expired on September 28, 2012.

B. Petitioner's Inability to Secure His Own File Is Not Good Cause

Petitioner implies that post-conviction counsel's inability to secure the file from himself should be good cause for his failure to comply with procedural rules. Pet. at 11-12. By definition, Petitioner's difficulties obtaining the file from himself can never constitute an "impediment external to the defense." Hathaway, 119 Nev. at 251, 71 P.3d at 506. Further, just as counsel's failure to send a prisoner his files does not constitute good cause excusing the prisoner from filing a timely petition, Hood v. State, 111 Nev. 335, 338, 890 P.2d 797, 798 (1995), nor is counsel's inability to obtain the file from his client or the prison good cause. Petitioner's argument fails explain *how* his inability to obtain the State's file prevented him from filing a timely petition. Hood, 111 Nev. at 338, 890 P.2d at 798. He does not show that the discovery boxes possessed by the Petitioner himself are missing any material relevant to issues counsel wishes to brief in a potential Supplemental Petition.

Petitioner alleges the prison would not give him any discovery with a social security number, but Petitioner does not allege what had a social security number that is so crucial to the desired Supplemental Petition. Because Petitioner's Petition is time-barred, anything he might now seek discovery for is frivolous and by its nature fails to rise to the level of good cause.

Notably, Petitioner's only substantive claims appear to be ineffective assistance of trial counsel for failure to provide Petitioner with a complete copy of his file and ineffective assistance of appellate counsel for informing Petitioner of his low probability of success on direct appeal. Neither of these grounds would require a copy of the State's or defense counsel's file. There is no reason why Petitioner could not have filed a timely petition and then thereafter seek leave to amend or supplement the petition after receiving the discovery he alleges he required. Moreover, Petitioner waived any claims that were appropriate for direct appeal when he voluntarily dismissed his direct appeal. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

C. Post-Conviction Counsel's Failure to Notice the Nevada Supreme Court's Footnote or Know the Law Is Not Good Cause

Post-conviction counsel's failure to notice the Nevada Supreme Court's footnote regarding the commencement of the one-year statute of limitations is not good cause. By definition, this is not an impediment external to the defense. See Hathaway, 119 Nev. at 251, 71 P.3d at 506. Post-conviction counsel makes no showing that he was somehow prevented from reading this publicly-available document.

Further, ineffective assistance of post-conviction counsel does not constitute good cause. Mazzan v. Whitley, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). This is so because the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546 (1991); McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), ("[t]he Nevada Constitution…does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision

as being coextensive with the Sixth Amendment to the United States Constitution."). With the exception of NRS 34.820(1)(a) [entitling appointed counsel when petition is under a sentence of death], one does not have "[a]ny constitutional or statutory right to counsel at all" in post-conviction proceedings. McKague, 112 Nev. at 164, 912 P.2d at 258. Because there is no right to counsel on post-conviction, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. Coleman, 501 U.S. at 752-53, 111 S. Ct. at 2566 (citing Wainwright v. Torna, 455 U.S. 586, 102 S.Ct. 1300 (1982)). An attorney's error that led to the late filing of a habeas petition cannot be constitutionally ineffective; therefore a petitioner must "bear the risk of attorney error that results in a procedural default." Id., 501 U.S. at 752-53, 754, 111 S. Ct. at 2566, 2567 ("where the State has no responsibility to ensure that the petitioner was represented by competent counsel. . . . it is the petitioner who must bear the burden of a failure to follow state procedural rules.").

D. The Amended Judgment of Conviction Is Not Good Cause

The Amended Judgment of Conviction here is not good cause for the delay in filing. Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004). Because the claims presented have no relation to the proceeding leading to the amendment, the Amended JOC is not good cause. Nor, as Sullivan requires, was the amendment substantive, but, rather, was clerical to reflect what actually transpired at the sentencing hearing.

IV. Actual Prejudice May Not Be Found Without an Examination of the Merits of Petitioner's Claims

Actual prejudice requires a Petitioner to show "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Riker, 121 Nev. at 232, 112 P.3d at 1075 (quoting United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584 (1982)); see also Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993). Whether a petitioner "can show prejudice from the dismissal of his petition is intricately related to the merits of his claims." Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995).

Petitioner has not made an adequate showing of actual prejudice. Pursuant to the law above, a finding of actual prejudice cannot happen without a finding that at least one claim in an underlying petition has merit. Department 9 seemingly found that "prejudice" was the inability to have a post-conviction Petition considered on the merits. But actual prejudice, rather, involves the merits of Petitioner's claims and requires Petitioner to show that errors of constitutional magnitude infected his trial. Because Department 9 made no such finding, it did not find actual prejudice, and did not therefore make the findings necessary to overcome the procedural bar.

V. Petitioner Fails to Demonstrate a Fundamental Miscarriage of Justice

Courts may excuse the failure to show good cause where the prejudice from a failure to consider the claim amounts to a "fundamental miscarriage of justice." Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); Hogan, 109 Nev. at 959, 860 P.2d at 715-16; cf. NRS 34.800(1)(b). This standard can be met where the petitioner makes a colorable showing he is actually innocent of the crime or is ineligible for the death penalty. See Mazzan, 112 Nev. at 842, 921 P.2d at 922; Hogan, 109 Nev. at 954-55, 959, 860 P.2d at 712, 715-16. To avoid application of the procedural bar to claims attacking the validity of the conviction, a petitioner claiming actual innocence must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation. Schlup v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (quoting Carrier, 477 U.S. at 496, 106 S.Ct. 2639).

Not only has Petitioner failed to attempt to demonstrate his actual innocence, but his grounds for relief fall well short of this stringent standard. That trial counsel failed to provide Petitioner with a complete copy of his file and that appellate counsel apprised Petitioner of the low probability of success on direct appeal have no bearing on whether a reasonable juror would have convicted Petitioner absent these errors, because these alleged errors took place after the jury rendered its verdict based on the evidence.

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VI. Because the Petition Was Untimely, So Too Will Be the Supplement; Any Good Cause and Actual Prejudice Does Not Extend Ad Infinitum

To the extent the Motion seeks discovery with which to file a Supplemental Petition, the mandatory provisions of NRS 34.726 dictate that the Petition was untimely filed. A Supplemental Petition timely filed under a briefing schedule set by the court does not save an untimely original Petition. See State v. Powell, 122 Nev. 751, 757, 138 P.3d 453, 457 (2006) (a supplement to a timely petition is considered timely). Before the State may be compelled to produce voluminous discovery and waste taxpayer resources, the underlying procedural bar issue must be addressed. The following language from the Nevada Supreme Court case is particularly relevant here:

> Particularly in this case where the claims are so numerous and the requests for discovery so extensive, judicial economy and sound judicial administration militate for granting relief: determining the applicability of procedural bars may eliminate the need for or narrow the scope of any discovery or evidentiary hearing.

Riker, 121 Nev. at 234-35, 112 P.3d at 1076.

NRS 34.780(2) provides that post-conviction discovery only becomes available after the writ has been granted and upon a showing of good cause:

> 2. ***After the writ has been granted*** and a date set for the hearing, a party may invoke any method of discovery available under the Nevada Rules of Civil Procedure if, and to the extent that, the judge or justice for good cause shown grants leave to do so.

Id. (emphasis added.) Petitioner's petition has not yet been granted – and indeed it should not be because it is untimely and Petitioner has failed to show good cause to overcome the procedural bar. Petitioner is therefore not entitled to discovery. As set out above, no party had the power to stipulate to extend the statutory deadline for filing an original Petition for Writ of Habeas Corpus, and a district court relying on such a stipulation or representation by the parties errs.

Although Department 9 purported to find good cause and actual prejudice it did so erroneously. And, even if Department 9's minute order could be construed as properly

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 68140

NORMAN KEITH FLOWERS

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Appeal from a Denial of Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County
The Honorable Elizabeth Gonzalez, District Court Judge
District Court Case No. C228755

APPENDIX TO APPELLANT'S OPENING BRIEF

VOLUME VI

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[1] Although there appear to be two (2) transcripts labeled "3-B," one transcript is the October 17, 2008 morning session, and the second "3-B" transcript is the afternoon session. The court reporter labeled both sets of for October 17, 2008, as "3-B."

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 5, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

STEVEN S. OWENS
Chief Deputy District Attorney

BY */s/ Rachael Stewart*
An Employee of Oronoz & Ericsson LLC

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN K. FLOWERS

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 53159

Direct Appeal From A Judgment of Conviction,
Amended Judgment of Conviction and Order Denying Motion for New Trial
Eighth Judicial District Court
The Honorable Stewart Bell, District Judge
District Court No. 52733

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Appellant Norman Keith Flowers was convicted of burglary, sexual assault, and first degree murder (under a felony-murder theory), following the death of Sheila Quarles. Sheila drowned in a bathtub, showed signs of strangulation, and was found to have vaginal injuries. Her body contained semen which was identified as belonging to Flowers and George Brass. The State's theory was that Brass had sex with Sheila a few hours prior to her death and that Flowers subsequently went to her apartment, sexually assaulted her and killed her. Other than the semen, there was no physical evidence that Flowers was in the apartment and no one saw him near or in the apartment the day Sheila was killed.

The State obtained a conviction against Flowers based upon the improper use of bad act evidence from another murder case; by eliciting testimony about a statement he gave to detectives, while he was in custody for the other murder, even though he was represented by counsel in the other case and this case serves as an aggravating circumstance in the other case; and by commenting on his decision not to talk to the detectives or testify about this case. The conviction is also the result of the introduction of gruesome photographs from the autopsy, introduction of testimonial hearsay evidence from expert witnesses, and by prohibiting Flowers from introducing evidence that would have supported his defense.

These errors, both alone and in combination, deprived Flowers of his right to a fair trial and rendered the proceedings against him fundamentally unfair. He asks that this Court reverse his conviction and remand this case for a new trial.

II. STATEMENT OF THE CASE AND JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of first degree murder, one count of sexual assault, and one count of burglary. The judgment of conviction was filed on January 16, 2009. 2 App. 250. A timely notice of appeal was filed on January 26, 2009. 2 App. 252. An amended judgment of conviction was filed on February 12, 2009. 2 App. 254. The district court sentenced Flowers to serve a term of 48 months to 120 months for burglary, a consecutive term of life without the possibility of parole for first degree murder, and a consecutive term of 120 months to life with the

possibility of parole for sexual assault. 2 App. 255; 3 App. 640. A timely amended notice of appeal was filed on February 20, 2009. 2 App. 256. This Court has jurisdiction over this appeal pursuant to NRS 177.015.

III. STATEMENT OF THE ISSUES

A. Whether the district court violated Flowers' constitutional rights by allowing the State to introduce unrelated prior bad act testimony

B. Whether the district court violated Flowers' constitutional rights by allowing testimony to be introduced in violation of Crawford v. Washington and Commonwealth v. Melendez-Diaz.

C. Whether the district court violated Flowers' constitutional rights by admitting as evidence a statement given by Flowers to detectives following invocation of his right to remain silent and right to counsel

D. Whether the district court violated Flowers' constitutional rights by admitting gruesome photographs from the autopsy.

E. Whether the district court violated Flowers' constitutional right to present evidence by precluding Kinsey from testifying that the victim told him she was seeing someone named "Keith."

F. Whether the prosecutor committed misconduct by commenting on Flowers' right to remain silent

G. Whether there is insufficient evidence to support the conviction

H. Whether the judgment should be vacated based upon cumulative error.

IV. PROCEDURAL HISTORY

On December 13, 2006, the State charged Appellant Norman Flowers with one count of burglary, one count of first degree murder, one count of sexual assault and one count of robbery. 1 App. 1. Sheila Quarles was identified in the Indictment as the victim. 1 App. 1. The State filed a motion indicating its intent to seek the death penalty. 1 App. 30, 82, 112.

On December 26, 2006, the State filed a motion to consolidate this case with the case of State v. Flowers Dist. Ct. No. C216032. 1 App. 8. Marilee Coote and Rena Gonzalez were identified as the victims in that case. 1 App. 8-12. Flowers opposed the motion to consolidate. 1 App. 21. During a hearing on April 13, 2007, the State informed the district court (Judge Mosley) that Judge Bonaventure denied the motion to consolidate the two cases. 2 App. 259. Judge Mosley indicated a desire to have the cases consolidated and asked that

the matter be heard before Judge Villani, who was assigned the other case following Judge Bonaventure's retirement. 2 App. 261-62.

On January 23, 2007, Flowers filed a motion to preclude evidence of other bad acts. 1 App. 35. The State opposed the motion. 1 App. 48. On November 5, 2007, the State filed a motion for clarification of the court's ruling. 1 App. 64. Flowers opposed the motion. 1 App. 77. On November 15, 2007, the matter was heard by Judge Bell. 2 App. 63. He ordered that a Petrocelli hearing be conducted. 2 App. 264. The hearing was held on August 1, 2008. 2 App. 267-324. The district court ruled that evidence concerning the Coote allegation was admissible but evidence concerning the Gonzalez allegation was not. 2 App. 318, 327, 332. The district court further ruled that the State could present evidence from the detective about similarities between the two cases, from the nurse and the coroner/medical examiner about the way Coote died, and DNA evidence. Other evidence concerning that case was found to be inadmissible. 2 App. 318. On September 29, 2008, Flowers filed a motion to reconsider the ruling on the motion in limine to preclude evidence of other bad acts. 1 App. 120. The district court denied the motion and allowed Flowers to make a continuing objection to the evidence. 2 App. 331-34. The district court found that the record was preserved concerning admissibility of the evidence. 2 App. 334. The district court ruled that Flowers was entitled to a cautionary instruction as the evidence was introduced and to a jury instruction. 2 App. 334. During trial, the jury was admonished that the bad act testimony was only to be considered if the jury found that it had been proven by clear and convincing evidence and should be used only to prove identity, intent, motive, and absence of mistake or accident. 2 App. 421.

On July 30, 2008, Flowers filed a bench brief. 1 App. 95.

Jury trial began on October 15, 2008. 2 App. 331. During trial, the State objected to testimony from William Kinsey, who was called as a witness by Flowers. 3 App. 541-42. Specifically, Flowers wished to elicit testimony from Kinsey that he was aware of the fact that Sheila Quarles was dating someone named Keith. 3 App. 541. The district court sustained the State's hearsay objection to this testimony after noting that Kinsey did not ever

personally observe Sheila and Keith together as Kinsey was incarcerated during the relevant time. 3 App. 541-43.

The parties settled jury instructions on October 22, 2008. 1 App. 146. Flowers proposed jury instructions that were not given by the district court. 1 App. 126. During settlement of jury instructions, Flowers proffered instructions on the State's failure to test speaker wires that were found at the crime scene; circumstantial evidence; other matter evidence; flight of another potential suspect; corroboration of DNA; the lesser-included offense of manslaughter; and specific intent and robbery. 3 App. 545. Flowers objected to instructions on the State's burden to prove elements of the offense of burglary, the instruction beginning "the jury must decide if the defendant is guilty"; malice aforethought; express malice; and premeditation. 3 App. 546.

Instructions were read to the jury. 3 App. 576-80. After struggling with deliberations for more than 24 hours, the jury returned verdicts of guilty on the charges of burglary, first degree murder and sexual assault. 1 App. 182-83; 3 App. 625. The jury noted on a special verdict that it unanimously found Flowers guilty of a murder committed during the perpetration of a burglary, sexual assault or robbery. It did not unanimously find him guilty of willful, deliberate and premeditated murder. 1 App. 183; 3 App. 622. The jury found him not guilty of robbery. 1 App. 183; 3 App. 622.

Following the trial phase, evidence and argument was heard by the jury concerning the penalty to be imposed for murder. The jury returned special verdicts for mitigating circumstances. 1 App. 185. It returned a verdict for life without the possibility of parole. 1 App. 186.

Following the verdicts, on October 30, 2008, Flowers filed a motion for a new trial. 1 App. 187. The motion was based upon the district court's rulings on the admission of evidence from another case and the admission of a portion of Flowers' statement to the police. The State opposed the motion. 1 App. 236. On November 18, 2008, the district court denied the motion. 1 App. 248; 3 App. 630.

The sentencing hearing was held on January 13, 2009. 3 App. 632. The judgment of

conviction was filed on January 16, 2009. 2 App. 250. A notice of appeal was filed on January 26, 2009. 2 App. 252. An amended judgment of conviction was filed on February 12, 2009. 2 App. 254. The district court sentenced Flowers to serve a term of 48 months to 120 months for burglary, a consecutive term of life without the possibility of parole for first degree murder, and a consecutive term of 120 months to life with the possibility of parole for sexual assault. 2 App. 255; 3 App. 640. An amended notice of appeal was filed on February 20, 2009. 2 App. 256.

V. STATEMENT OF FACTS

Sheila Quarles was 18 years old when she was killed by drowning in an apartment that she shared with her mother Debra and her siblings Miracle and Xavier. 2 App. 373. On the day she was killed, March 24, 2005, Sheila returned home at about 6:30 a.m., after spending the night with Qunise Toney, with whom she was in a relationship. 2 App. 375. Robert Lewis, Debra's companion, Debra and the two younger children left the apartment, so Sheila was alone in the apartment. 2 App. 375.

Qunise talked with Sheila on the phone three or four times that day. 2 App. 409. They last talked around 11:00 a.m. or 12:30 p.m. and Sheila was in a good mood at that time. 2 App. 409-11. Debra talked to Sheila about five times during the day, and Sheila sounded normal during those conversations. 2 App. 375. They last talked at about 1:00 p.m. 2 App. 375. During that call, the phone went dead and Debra tried to call Sheila, but no one answered. 2 App. 375. Qunise received a call from Sheila's phone at 1:35 p.m., but when Qunise answered the phone, no one said anything. 2 App. 410, 412. When Qunise called back, she received a voicemail message. 2 App. 410.

Debra returned home around 3:00 p.m. She called for Sheila to assist her with groceries, but Sheila did not respond. 2 App. 376, Robert came down to help Debra carry the groceries to her apartment. 2 App. 376, 385. Sheila's habit was to have the door to the apartment locked while she was inside, but on this occasion the door was open. 2 App. 376. Debra put down the groceries and realized the stereo was missing. 2 App. 376. She heard water in her bathroom, went there to turn off the water, and discovered Sheila's body in the

tub. 2 App. 376-77. On the way the bathroom, Debra noticed that her bedroom was messed-up. 2 App. 376. Debra and Robert pulled Sheila out of the hot water. 2 App. 377, 385. Debra then left the apartment and got her oldest son Ralph, who was working a few minutes away. 2 App. 377. Robert also left the apartment. 2 App. 386.

Robert told neighbors that Pooka, which is Sheila's nickname, needed help. 2 App. 368. One of the neighbors, Marquita Carr, went into the Quarles apartment, saw Sheila lying on the floor with no clothes, and had someone call 911. 2 App. 368. Carr covered the body after checking to see if Sheila was breathing. 2 App. 368. Officer Brian Cole responded to the 911 call at about 2:50 p.m. 2 App. 364. He saw Sheila's body on the bathroom floor, face up with her feet on top of the tub. He secured the scene. 2 App. 365.

Debra returned to the apartment with her son Ralph after the police and paramedics had arrived. 2 App. 377. Debra talked with detectives and told them that perhaps Qunise was the person who killed Sheila and that she could not think of any other person with whom she had any troubles. 2 App. 378. Debra went back into the apartment with a detective and noticed a whole bunch of keys. She told the detective that items were missing, including her stereo, pillow cases, Sheila' cell phone, her bank card, jewelry, and CDs. 2 App. 378.

Detective James Vaccaro was assigned to the case along with Detectives Sherwood, Long, Wildeman, and Wallace. 2 App. 389, 477. Vaccaro descried the crime scene to the jury. 2 App. 389-90. There did not appear to be a forced entry into the apartment. 2 App. 390, 478; 3 App. 510. He noticed that two pillows in the bedroom did not have pillowcases. 2 App. 392. Sheila's clothing was found in the bathroom. 2 App. 394; 3 App. 512. The police recovered underwear, jeans, and a wig. 2 App. 394. The underwear was on the outside of the jeans, were inside out and backwards. 2 App. 394, 415-16. Vaccaro stated his belief that the victim did not place her underwear on the jeans. 2 App. 394.

A crime scene analyst collected 21 samples for fingerprint examinations. 2 App. 414. Prints were found on nine of those items. 2 App. 420. None of the prints belonged to Keith Flowers. 2 App. 420. No attempt was made to lift fingerprints from the body. 2 App. 417. The police did not examine the apartment with special equipment to determine if semen or

other bodily fluids were present. 2 App. 417. No evidence of blood was found on the body or at the scene. 3 App. 511. There was no sign of a physical struggle. 3 App. 512, 515.

Items taken from the apartment, including a stereo and cell phone, were never found by police officers. 3 App. 517. Detective Sherwood tested a key that was found in the bedroom on various doors in the apartment complex but it did not fit any of those doors. 3 App. 517. He did not test the key in the lock of the apartment where Flowers stayed. 3 App. 531. The detectives did not subpoena bank records following August of 2005 to determine whether the bank card was used. 3 App. 531. Detective Long was not aware that a bank card had been stolen and was unaware of any investigation concerning its use. 2 App. 492. Sheila' telephone records were examined. 2 App. 491. The last call recorded was an incoming call on March 24, 2005 at 1: 35 p.m. 2 App. 491. The last outgoing call was to Qunise's number. 2 App. 491. Detectives did not examine cell tower records. 3 App. 531.

Vaccaro attended the autopsy. 2 App. 401. It was not immediately apparent to the coroner that Sheila's death was the result of a homicide, and the coroner did not immediately find that a sexual assault was involved. 2 App. 401. Eventually, DNA from two male sources was found on Sheila's underwear. 2 App. 406. Other clothing was not collected, so no tests were performed on those items. 2 App. 406. Vaccaro agreed with the prosecutor that "women can have sex with people consensually and later get murdered and there is not necessarily a sexual component to the homicide." 2 App. 403. Over objection, he agreed with the prosecutor's statement that "when you have an individual who has consensual sex and then maybe has lacerations to her vagina and has an additional source of DNA in her, then perhaps there might be a sexual component to the homicide." 2 App. 403-04.

The medical examiner who performed the autopsy, Dr. Knoblock, did not testify at trial. 2 App. 354. Instead his findings were presented by medical examiner Lary Simms. 2 App. 354. Simms testified that Sheila was asphyxiated by strangulation to her neck. 2 App. 350, 351. There were no ligature marks so it was likely that there was a manual strangulation or compression. 2 App. 351. There was bruising on her abdomen, an abrasion on her knee, and some lacerations in the vaginal area. 2 App. 350. The tears which appeared

in the lining of the opening of the vagina were consistent with sexual assault and did not normally happen except in a forcible kind of situation. 2 App. 350. The lacerations were made prior to Sheila's death. 2 App. 350. Based upon the absence of swelling, the medical examiner believed that the insertion which caused the laceration took place within an hour of her death. 2 App. 351. He could not determine whether the lacerations were caused by a penis or a foreign object. 2 App. 362. The presence of DNA inside the vagina did not indicate that the semen was contemporaneous with the sexual assault. 2 App. 362. It is not scientifically possible to determine which male had sex with a female first in a case where the semen of two men is identified. 2 App. 362. There was a fresh hemorrhage to Sheila's head that was consistent with a blunt force injury. 2 App. 351. She had a frothy fluid in her airways, which is a sign of drowning. 2 App. 352. Simms testified that Knoblock formed the opinion that the cause of death was drowning and that strangulation was a contributing factor. 2 App. 354. Based upon his observations in the photographs and report, Sims agreed with Knoblock's opinion. 2 App. 354. Although Flowers did not contest the cause of death, over a defense objection, the district court allowed the State to introduce photographs from the autopsy. 2 App. 353. The photographs were admitted as Exhibits 93 to 108. 2 App. 352-55; 3 App. 695a-713. They include several photographs of Sheila's tongue after it was removed from her body by the medical examiner. 3 App. 695a-704.

Linda Ebbert, a sexual assault nurse examiner, testified that in the thousands of examinations she has performed she has concluded that 65 to 67percent resulted in injuries. 2 App. 446. Injuries are often found between five o'clock and seven o'clock of the genitalia. 2 App. 446. She reviewed Sheila's autopsy report and photographs from the autopsy. 2 App. 446. There were two lacerations, one of which was significant because it was wide and deep. 2 App. 447. She believed that it was consistent with non-consensual sex. 2 App. 447, 450. On cross-examination, Ebbert acknowledged that injuries can occur during consensual sex. 2 App. 449. She did not review photographs of Sheila's cervix. 2 App. 449.

Over objection, Detective Sherwood was allowed to testify that hemorrhages to the neck and petechial hemorrhages in the eyes were findings consistent with strangulation. 3

App. 520. He participated in other investigations where strangulation was the cause of death. 3 App. 520. He was present when vaginal, anal, and oral swabs were collected during the autopsy. 3 App. 520. He requested that the swabs be tested for DNA and requested comparison to swabs taken from Qunise Toney and Robert Lewis. 3 App. 520. On cross-examination, Detective Sherwood acknowledged that he was not a doctor and basically went by what others told him. 3 App. 532.

DNA tests were conducted by Kristina Paulette. 3 App. 547. Sheila's vaginal sample showed a mixture belonging to Sheila and two males. 2 App. 548. Robert Lewis and Qunise Toney were excluded as a sources of the samples. 3 App. 549. She identified Flowers as the probable source of one of the male samples. 3 App. 549. She did not obtain any foreign results from samples taken of Sheila's fingnails or a Gatorade bottle. 3 App. 550. A sperm sample consistent with Flowers was found on Sheila's underwear. 3 App. 551.

Detective Sherwood testified that he learned there were two different sources of DNA inside of Quarles, one of which was identified as belonging to Norman Flowers. 3 App. 522. He realized that there was another detective who had a suspect by that name on a different case. 3 App. 522. Over a hearsay objection, he was allowed to testify that he looked at a homicide notebook by Detective Tremel and found that there was another victim who had been strangled and violently sexually assaulted by Flowers. 3 App. 523.

Sherwood contacted Debra and then contacted Flowers, who was in custody on another matter. 3 App. 524. Flowers was given his Miranda rights. 3 App. 714. He talked with the detective after being told that they would not discuss the case for which he was in custody. 3 App. 525, 665. Flowers would not give a response when asked if he knew Debra Quarles and indicated that he knew Sheila Quarles by her nickname, Pooka. 3 App. 526. He told the detective that he did not want to be involved and would not answer any questions about the Quarles case. 3 App. 526.[1]

[1]The testimony concerning this matter is set forth in full in the Appendix as it is relevant to Flowers' contention that the district court erred in failing to suppress this evidence.

In 2008, Paulette tested a sample from George Brass and found that he was a probable source of samples from Quarles' vagina and underwear. 3 App. 551. Detective Sherwood investigated the source of the second semen sample and learned from Detective Long that the source had been identified. 3 App. 527. George Brass, who was also known as "Chicken" was identified as the second source of semen. The detectives only learned of "Chicken" or George Brass a few months before trial. 3 App. 530. The DNA levels from Sheila's vaginal sample and the sample from her underwear were "pretty much even" as to the levels attributed to Flowers and Brass.[2] 3 App. 556.

Debra knew both Flowers and Brass. 2 App. 373. Flowers dated Debra for about four months in 2004. 2 App. 378. Flowers knew Sheila and Debra's other children. 2 App. 378. She saw Flowers at her apartment complex about two weeks prior to Sheila's death. 2 App. 379. At that time, Debra and Sheila were sitting outside near their apartment. 2 App. 379. They asked Flowers what he was doing there and he said that he worked as a maintenance man at a couple of the apartment complexes owned by the landlord. 2 App. 379. They talked for about 20 minutes. 2 App. 379.

Brass lived in the same apartment complex as the Quarles family as did several members of Brass's family. 2 App. 373. Debra knew that Brass and Sheila were friends, but did not know of any sexual relationship between them. 2 App. 374.

Following Sheila' death, Flowers approached Debra while she was at work, hugged her and said "I hear what happened to your baby. That's really . . . fucked up. She was a nice girl. She didn't deserve that." 2 App. 379. He also said that Debra looked down and out and that she should see a psychiatrist for depression. 2 App. 379. Flowers recommended

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[2] George Schiro, a DNA expert, testified that it is possible to have a false "hit" when evaluating DNA in a case where a mixture is present. 3 App. 558. As the Quarles case, it would be expected that between 40 and 130 people in the Las Vegas valley would have the same profiles as those attributed to Flowers and Brass. 3 App. 558. It is not possible to determine from DNA how long a sperm sample has been present or in which order two sperm samples were deposited. 3 App. 558. Other clothing could have been examined to establish a timeline as to when the semen was introduced. 3 App. 559.

a psychiatrist and drove her to the two appointments she attended. 2 App. 379.

Debra stated that Flowers did not ever tell her that he had a sexual relationship with Sheila or that they went out. 2 App. 379. Debra believed that Sheila did not like older men. 2 App. 379. She did not ever see Flowers and Sheila together. 2 App. 379. On cross examination, Debra acknowledged that Sheila did not tell her about the sexual relationships she had with with Qunise Toney or George Brass. 2 App. 380. Qunise also testified that she had never met or talked with Sheila's mother, despite the fact that Qunise and Sheila were in a relationship for several months. 2 App. 412.

Brass also contacted Debra and her family at their new apartment following Sheila's death. 2 App. 381. He did not ever tell Debra that he had been having a sexual relationship with Sheila. 2 App. 382. Robert Lewis, who is Brass's uncle, saw Brass at the apartment at lunch time on the day that Sheila was killed. He thought he saw Brass around 11:20 or 11:30. 2 App. 387.

Brass testified that he knew the whole Quarles family and was good friends with Sheila's brother Ralph. 2 App. 493. Brass claimed that he had a sexual relationship with Sheila. 2 App. 494. He lived with his mom in Sheila's apartment complex. 2 App. 494. He claimed that he had vaginal sex on the living room floor with Sheila between 10:30 a.m. and 11:15 a.m. 2 App. 494-96. They were together for twenty minutes, at the most. 2 App. 495. Sheila did not receive any phone calls while Brass was there. 2 App. 496. His uncle was outside of Sheila's apartment when he left. 2 App. 496.

Brass claimed he then went to work at Super Wal-Mart, at Craig and Clayton. 2 App. 494. He usually swiped his ID badge when he arrived and when he left. 2 App. 494. He believed that he took a lunch break that day. 2 App. 495. He usually had lunch with his grandma, about seven blocks away from Wal-Mart. 2 App. 495. His mother called him at work that day and he also received a call from Ralph. 2 App. 495. He left work and went to his mother's apartment. 2 App. 495. He did not clock out when he left. 2 App. 496. Gabriel Ubando, an assistant manager at Wal-Mart, identified Brass's time records for March 24, 2005. 2 App. 498. The records indicated that George clocked in at 12:04 p.m., went to

lunch at 4:04 p.m., came back at 5:03 p.m. and left work at 7:45 p.m. 2 App. 488. It's possible that another employee could have clocked him in and out and its also possible that an associate manger could change the times in the system. 2 App. 498. There was no indication that anyone changed Brass's time record. 2 App. 498.

Police officers asked Brass a few questions on the day Sheila was killed. 2 App. 495. They did not record the conversation. 2 App. 495. Others present were his uncle, mother, sister, grandmother, and his father. 2 App. 496.

Some time after Sheila's death, about two or three years later, the police talked to Brass about his sexual relationship with her and the fact that he had sex with her the morning she was killed. 2 App. 497. He did not tell them about that fact the day she was killed because they did not question him about it, and it did not occur to him that it would be helpful to the police to know that information. 2 App. 497. Upon determining that George Brass was not a suspect, the location of his sexual intercourse with Quarles was no longer relevant to the detectives. 2 App. 404. Police officers did not compare Brass's fingerprints to prints found at the scene. 2 App. 421. Ameia Fuller, Sheila's cousin, testified that she talked with Sheila by telephone shortly before Sheila died. 2 App. 492. Sheila told her that she was friends with Chicken (Brass). 2 App. 493. Ameia provided this information to a detective who called her. 2 App. 493.

Other suspects and leads were not thoroughly explored by the detectives. For example, a stereo was stolen from the Quarles' apartment on the day Sheila was killed.[3] 2 App. 374, 492. Detectives were aware that another burglary took place in the apartment complex on the day that Sheila was killed. 2 App. 406, 481. No suspect was arrested for that offense. 2 App. 406, 482. Fingerprint samples from other possible suspects were not requested. 2 App. 421.

Debra informed the detectives that there was an older man who had just moved into

[3]As noted above, Flowers was charged with robbery based upon the theft of the stereo. The jury acquitted him of this offense.

the apartment complex who had just gotten out of prison. 2 App. 380. There was an occasion, about a month prior to Sheila's death, when the old man knocked on their apartment door and asked Debra's daughter Miracle to get Sheila. 2 App. 380. Debra told the old man Sheila's age and told him to stay away from her house. 2 App. 380. She gave police officers the name of "Darnell" and gave them a description of the man. 2 App. 381-82. The detectives were unable to determine who this person was based upon their interviews with neighbors. 2 App.483. Detective Sherwood claimed that Detective Long investigated this lead and it turned out to be nothing. 3 App. 522.

Robert Lewis voluntarily gave a DNA sample and talked to police officers for about an hour, but they did not take a handwritten statement from him. 2 App. 386-87, 480-81; 3 App. 531. The detective did not check Robert's name with pawn shops to see if he had pawned any items. 3 App. 532. Robert saw a nephew, Anthony Culverson at Sheila's apartment on the day she was killed. 2 App. 387. Culverson, who was in custody of the state prison at the time of trial, testified that he is Brass's cousin and was aware that Brass and Sheila saw each other on and off. 2 App. 474.

Detective Sherwood talked with Debra a number of times and asked if she knew of Sheila having any boyfriends. 3 App. 532. No male names were given. 3 App. 532. There was a letter to William Kinsey on a bed in the apartment. 3 App. 532. Several months prior to trial, Sherwood met with Kinsey. 3 App. 532. Sherwood opined that Kinsey was not cooperative. 3 App. 532. The detective was aware that the letter was addressed to Kinsey and was from "Sheila Kinsey." 3 App. 533. Kinsey was in custody when Sheila was killed and was therefore not a suspect. 3 App. 536. He testified that Sheila was his girlfriend. 3 App. 584. He has been in custody since December, 2004. 3 App. 584. Sheila visited Kinsey and wrote to him while he was in custody. 3 App. 584.

Natalia Sena lived in the Palm Village Apartments in March of 2005. 3 App. 565. She told officers that she saw a tall, skinny man in a flannel shirt near Quarles' apartment on the day she was killed. 3 App. 566. She also saw Chicken (Brass) that day and believed she saw him both before and after 12:00 p.m.. 3 App. 566. Chicken was with the tall, skinny

man. 3 App. 566. They were at Quarles' apartment. 3 App. 566. He was creeping around and looking to see who was around. 3 App. 566. On the day Sheila was killed, Jesse, the cousin of the father of Sena's child, was living with Sena. 3 App. 567. Sena was arrested that day and when she returned two or three days later she saw Jesse outside with a radio. 3 App. 567. She recalled that the radio had detachable speakers and she asked him where he got it. 3 App. 567. Jesse told her he got it from the girl's downstairs apartment. 3 App. 567. Drugs were missing from her apartment when she returned from jail. 3 App. 567. On cross-examination, Sena acknowledged that she used crystal meth every day in March, 2005. 3 App. 568. Sena was sure that she saw Chicken at about noon. 3 App. 568. She believed that she heard the deceased girl's mom scream about an hour or less later. 3 App. 569. She did not see the man in the girl's apartment or see him walk out of the apartment. 3 App. 569. She saw the man in the girl's doorway. 3 App. 570. It was possible that she was coming from the apartment next door. 3 App. 570.

Veronica Sigala, the assistant manager of the Palm Village Apartments, testified that she worked at the apartment complex in March, 2005. 3 App. 571. Flowers did not ever work in the maintenance department while she was there. 3 App. 571. He did not work in any other capacity at the complex. 3 App. 572. She identified the photograph of another man, Mr. Nararo, who stayed with people in the apartment complex. 3 App. 572-73. She saw that man break into apartments. 3 App. 572. She called the police regarding the man three or four times and she also told the man to leave seven or eight times. 3 App. 572. She did not see him in Quarles' apartment. 3 App. 573.

Martha Valdez testified that she moved into the Palm Village apartments near the end of March 2005. 3 App. 573. On the first or second day that she moved into her apartment, a man entered into her apartment. 3 App. 574. She saw him in the doorway of her bedroom, told him she was going to call the police, and he ran out of the apartment. 3 App. 574. She identified a photograph of the man. 3 App. 575. The next day she saw police at her apartment complex and learned they were investigating the death of the girl. 3 App. 575

Extensive evidence was presented concerning the murder of Merilee Coote.

Following an admonition by the district court, the jury heard evidence from Monica Ramirez. 2 App. 422. She worked at an apartment complex at 6650 Russell, which was not the complex where Sheila was killed. 2 App. 422. On May 3, 2005, she conducted a welfare check on one of her residents, Merilee Coote. 2 App. 422. Ramirez and her assistant Michelle Craw went to the apartment and found Coote on the living room floor. 2 App. 422. She was not wearing any clothing. 2 App. 422. They contacted 911. 2 App. 423.

Officers responded to Coote's apartment. 2 App. 424. They found that the lights were on and the television was tuned to a pay per view information channel listing pornographic movies. 2 App. 424. Coote's legs were spread, she was wearing one earing and another was on the floor, some of her public hair was burned, and there was an incense stick in her belly button. 2 App. 424, 439. There were some ashes between her legs, under her vaginal area. 2 App. 424. Some of the carpet was burned and there was an area of apparent blood adjacent to the burned carpet. 2 App. 431. Biological fluids were found only in the carpet area in front of a love seat. 3 App. 507. Officers saw a reaction on the carpet near the burned area, which had a floral type odor, similar to fabric softener. 2 App. 431, 436. It appeared that someone had placed a contaminant in the area in an attempt to hide evidence. 2 App. 431. Inside of a washing machine, officers found a purse and its contents, a knife, a daily planner, ice cube trays and other items. 2 App. 424, 430. In the master bedroom, the bathtub was full of water. There were some makeup items, jewelry, clothing and newspaper in the tub and it was all covered up with a blue towel. 2 App. 424, 429. It appeared that the shower and washing machine were wiped down. 2 App. 432. Photographs of the crime scene were admitted. 2 App. 428. There was no forced entry. 2 App. 429, 439. The cause of death was not immediately apparent to the police as there were no gunshot or stab wounds or injuries of that nature. 2 App. 440.

An autopsy was performed on Marilee Coote by Dr. Knoblock.[4] 2 App. 355. He did

[4]Flowers objected to testimony concerning this matter. 2 App. 355. The district court noted the continuing objection. 2 App. 355.

not testify at trial. Instead his findings were presented by Lary Simms. 2 App. 355-56.

Sims testified that Knoblock found that Coote was 45 years old at the time of her death. 2 App. 355. There were signs of asphyxiation and she had some contusions on her arms. 2 App. 355. There were also areas of superficial burning and thermal injury on her pubic hair and on the skin around her genitals and buttocks. 2 App. 355. It appeared that a hot object was applied to the skin. 2 App. 355. It appeared that the burns occurred at about the time of death. 2 App. 356. He could not determine whether the burns were pre-mortem or post-mortem. 2 App. 356. There was a small abrasion behind her ear, superficial tears on the opening of the vagina, a tear on the opening of the anus and some hemorrhages on her skull and neck. 2 App. 356. Coroner Sims believed the tears to be consistent with sexual assault. 2 App. 356. The hemorrhaging on the anus indicated pre-mortem penetration. 2 App. 356. The hemorrhages on the skull indicated blunt trauma that was contemporaneous with Coote's death. 2 App. 356. The injuries to her neck indicated there was manual strangulation. 2 App. 357. The cause of death was strangulation. 2 App. 359, 440.

Officers returned to the apartment the following day and learned that Coote's son had broken the crime scene barrier tape and had been inside of the apartment. 2 App. 441. They had carpeting removed to test for DNA evidence. 2 App. 441. Officers learned that Coote's car was missing. 2 App. 441. The car was recovered but the keys were not located. 2 App. 442. The car was processed for fingerprints but no prints were found. 2 App. 443.

During the course of their investigation, officers learned that Flowers' girlfriend lived in the same apartment complex as Coote and her apartment was across the porch or walkway from Coote's apartment, 2 App. 442. A DNA sample was collected from Flowers. 2 App. 442. DNA samples were also recovered from Coote and the carpet. 2 App. 442.

A fingerprint examiner testified that he attempted to develop tests on numerous items recovered from Coote's apartment, including items found in the washing machine and tub, but he was unable to recover any latent prints from these items. 2 App. 452. He recovered numerous prints from Coote's car and examined them against exemplars from Flowers and several other people. No prints were identified as belonging to Flowers. 2 App. 453. Three

prints did not match any of the exemplars submitted. 2 App. 453.

Consuelo Silva Henderson, a long time friend of Coote's, did not believe that Coote would have put ice cube trays or the contents of her purse in a washing machine, or put bills or other items in a bathtub. 2 App. 444. She did not know Coote to watch pornography. 2 App. 444. Coote did not have a boyfriend while living in Las Vegas. 2 App. 444.

Juanita Curry, a neighbor of Coote's, testified that while emergency personnel were coming downstairs from Coote's apartment, Flowers knocked on her door and indicated that he wanted to come into her apartment. 3 App. 509. She had met him before through a mutual friend and had helped Curry move items into her apartment. 3 App. 509. He said that the police made him nervous. 3 App. 509.

Linda Ebbert reviewed the autopsy report concerning Coote. 2 App. 447. She found three lacerations, between five and seven o'clock, and concluded that they were consistent with non-consensual sexual intercourse. 2 App. 447. She believed the evidence was consistent with non-consensual penetration of the anus. 2 App. 448.

Over a hearsay objection, Paulette testified concerning a DNA report concerning Merilee Coote's vaginal sample.[5] 3 App. 551-52. She testified that another DNA analyst, Thomas Wahl, found that the source of the semen found in Coote's sample was Flowers. 3 App. 551-52. She testified that she could state the identity because there was a single source or a major profile in the sample. 3 App. 552. She testified that the profile generated was rarer than one in 650 billion. 3 App. 552. Flowers was also identified as the source of a rectal sample collected from Coote and of a stain on the carpet of her apartment. 3 App. 552. After examining Wahl's findings, she looked at the carpet stain and found that there was some sort of detergent on the carpeting. 3 App. 553. She concluded that the stain on the carpet was from Flowers' semen. 3 App. 553.

[5]In a voir dire examination, Flowers' counsel elicited testimony that the records were kept as business records with her lab. 3 App. 551.

As noted above, based upon this evidence the jury found Flowers guilty of first-degree murder under a felony-murder theory. The jury also found him guilty of burglary and sexual assault. He was acquitted of the robbery charge.

V. ARGUMENT

A. The district court violated Flowers' constitutional rights by allowing the State to introduce unrelated prior bad act testimony.

Flowers's state and federal constitutional rights to due process and right to a fair trial were violated because the district court allowed the State to introduce prior bad act evidence of another murder which was not relevant and which was highly prejudicial. Flowers' constitutional rights were further violated because the State presented bad act evidence in excess of that permitted by the district court's order. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

"A district court's decision to admit or exclude [prior bad act] evidence under NRS 48.045(2) rests within its sound discretion and will not be reversed on appeal absent manifest error." Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006). See also Fields (John) v. State, __ P.3d __ (Nev. 2009). Flowers submits that the admission of propensity evidence violates his state and federal constitutional rights of due process. See Estelle v. McGuire, 502 U.S. 62, 75 n.5 (1991) (recognizing but reserving the issue). Constitutional error is evaluated under the harmless error standard. Erroneous admission of evidence in violation of the Due Process Clause is harmless only when "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 23-24 (1967).

2. The district court abused its discretion in admitting prior bad act evidence.

The district court allowed the State, over a continuing defense objection, to introduce evidence concerning the murder of Marilee Coote. The State alleged that Flowers killed Coote and claimed that the Coote evidence was relevant to proving the identity of the person who killed Sheila Quarles. In support of its motion to introduce this evidence, the State

noted that Sheila died two months prior to Coote; DNA belonging to Flowers was found among the DNA identified on Quarles' vaginal sample, and DNA identified to Flowers was found in Coote's vaginal and rectal swabs. 1 App. 12-13.

> NRS 48.045(2) prohibits the use of "other crimes, wrongs or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). "To be deemed an admissible bad act, the trial court must determine, outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). In assessing "unfair prejudice," this court reviews the use to which the evidence was actually put – whether, having been admitted for a permissible limited purpose, the evidence was presented or argued at trial for its forbidden tendency to prove propensity. See Rosky v. State, 121 Nev. 184, 197-98, 111 P.3d 690, 699 (2005). Also key is "the nature and quantity of the evidence supporting the defendant's conviction beyond the prior act evidence itself." Ledbetter, 122 Nev. at 262 n.16, 129 P.3d at 678-79 n.16.

Fields, __ P.3d at__. Flowers submits that the State failed to establish the admissibility of the Coote murder under these three prongs.

First, there were substantial differences between the two incidents: Sheila was 18 years old at the time of her death, while Coote was 45 years old. 2 App. 355, 373. Coote had superficial burning and thermal injury on her pubic hair and on the skin around her genitals and buttocks, while Sheila did not have any such injuries. 2 App. 355. Coote had injuries to her anus, while Sheila did not. 2 App. 356. Sheila drowned to death while Coote's cause of death was strangulation. 2 App. 359, 440. Coote's car was missing, while no similar item belonging to Sheila was taken. 2 App. 441. In Coote's apartment, police officers found unusual items in the washing machine and tub, while no similar evidence was found in Sheila's apartment. 2 App. 452. Pornography was playing on the television in Coote's apartment, but not in Sheila's apartment. 2 App. 444. In Coote's case, police officers found detergent on a stain on the carpet, but did not find anything similar in Sheila's apartment. 3 App. 553. Flowers was seen near Coote's apartment on the day Coote was killed, while no one testified that Flowers was present at Sheila's apartment on the day Sheila was killed.

3 App. 509. Finally, the evidence established that Flowers knew Sheila, but there was no testimony that Flowers knew Coote. 2 App. 378. The lack of similarities in the two cases negates the relevance of the evidence concerning the Coote case. Under these circumstances, the district court abused its discretion in finding the Coote evidence to be relevant to the State's charges against Flowers in which Sheila was identified as the victim.

Second, the probative value of the evidence from the Coote case was substantially outweighed by the danger of unfair prejudice to Flowers. Presentation of evidence concerning the Coote case was a substantial portion of the evidence presented at trial. The State presented evidence from the apartment manager who discovered her body, officers who responded to the scene, a medical examiner concerning the autopsy, a fingerprint examiner, an expert in DNA, Coote's friend, and Coote's neighbor. In essence, the State presented a second trial concerning Coote within the trial concerning Sheila. Further, extensive argument about the Coote case was made during closing arguments. 3 App.597-98, 611-12. By its very nature, evidence of another murder is highly prejudicial. Under these circumstances, the district court abused its discretion in finding that the probative value of the evidence was not outweighed by the danger of unfair prejudice to Flowers.

Finally, the nature and quantity of the evidence supporting Flowers' conviction beyond the prior act evidence is incredibly weak. A simple comparison of the evidence concerning Flowers and Brass reveals that the State's case against Flowers was not strong. Both men were identified as having semen inside of Sheila's vagina; neither man was known by Sheila's mother to be in a relationship with Sheila; and neither man immediately told police officers investigating the case that they had a sexual relationship with Sheila. Brass had work records which indicated that he was at work when Sheila was killed, but no witness testified that he was at work and it was acknowledged that someone else could have signed him in and out at work. Finally, Brass was seen near Sheila's apartment on the day she was killed while Flowers was not. Thus, the prejudice to Flowers was great as there is a substantial likelihood that he would not have been convicted had evidence concerning the Coote case not been introduced. The judgment of conviction should therefore be reversed.

3. The district court erred in allowing the State to present evidence beyond that provided for by the district court's order.

In ruling on the Flowers' motion to exclude evidence of other bad acts, the district court ruled that the State could present evidence from a detective about similarities between the two cases, from the nurse and coroner/medical examiner about the way Coote died, and DNA evidence, but other evidence concerning the case was found to be inadmissible. 2 App. 318. Specifically, the district court ruled:

> You can put on the Coote case to show intent to and to show identity by talking to the detective about the similarities in the case, the nurse and the coroner/medical examiner about the way she died, the similarities in vaginal tearing, and the DNA profile person, and then that's as far as the State is going.

2 App. 318-19. Despite this order, the State presented evidence from the apartment manager who found Coote's body, 2 App. 422-23; a neighbor of Coote's who claimed to have seen Flowers while police officers were at Coote's apartment, 3 App. 509; and a friend of Coote's who testified that Coote did not watch pornography and did not have a boyfriend. 2 App. 444. Flowers made a continuing objection to all of the evidence concerning the Coote case, albeit not on the ground that the district court abused its discretion in allowing the State to introduce evidence beyond that provided for in the district court's order. 2 App. 334.

The district court made a firm ruling on the scope of the evidence which could be presented by the State concerning the Coote case. The State was obligated to follow this ruling. The district court abused its discretion in allowing the State to present this additional evidence. Flowers was prejudiced by the introduction of this evidence as it further emphasized the prejudicial evidence suggesting the Flowers was involved in another murder.

B. The district court violated Flowers' constitutional rights by allowing testimony to be introduced in violation of Crawford v. Washington and Commonwealth v. Melendez-Diaz.

Flowers's state and federal constitutional rights to due process, confrontation and cross-examination were violated because the district court allowed the State to introduce testimonial hearsay evidence. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

This Court generally reviews a district court's evidentiary rulings for an abuse of discretion. Chavez v. State, 213 P.3d 476, 484 (Nev. 2009) (citing Mclellan v. State, 124 Nev. __, 182 P.3d 106, 109 (2008)). "However, whether a defendant's Confrontation Clause rights were violated is 'ultimately a question of law that must be reviewed de novo.' Id. (quoting U.S. v. Larson, 495 F.3d 1094, 1102 (9th Cir. 2007)). The federal courts follow this same standard. Alleged violations of the Sixth Amendment's Confrontation Clause are reviewed de novo. See Lilly v. Virginia, 527 U.S. 116, 136-37 (1999). Confrontation Clause violations are subject to harmless error analysis. See U.S v. Nielsen, 371 F.3d 574, 581 (9th Cir. 2004). That is, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Chapman, 386 U.S. at 23-24.

2. Flowers' rights of confrontation and cross-examination were repeatedly violated as the State presented the findings of experts who conducted examinations for the prosecution without calling those experts as witnesses.

Flowers' constitutional rights were violated as the district court allowed the State to present the findings of expert witnesses who did not testify at trial. Specifically, Dr. Knoblock, the medical examiner who performed the autopsies on Sheila and Coote did not testify at trial. Instead, Dr. Knoblock's findings were presented by medical examiner Lary Simms. 2 App. 350-62. Also, DNA expert Paulette testified about a DNA examination conducted by another DNA analyst, Thomas Wahl. 2 App. 551-53. No explanation was provided for the absence of either Knoblock or Wahl and no effort was made to establish that they had previously been subject to cross-examination and confrontation by Flowers.

The district court erred in allowing the State to present the findings of expert witnesses without requiring those experts testify at trial. In doing so, the district court violated Flowers' rights under Crawford v. Washington, 541 U.S. 36 (2004), as this was testimonial hearsay evidence and inadmissible under these circumstances. See also City of Las Vegas v. Walsh, 121 Nev. 899, 906, 124 P.3d 203, 208 (2005).

This issue was recently considered by the United States Supreme Court. In

Commonwealth v. Melendez-Diaz, 129 S.Ct. 2527 (2009), the Supreme Court found that admission of a laboratory analysts' affidavits violated the defendant's right of confrontation:

> In short, under our decision in Crawford the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "be confronted with" the analysts at trial.

Id. at 2532 (alteration in original) (quoting Crawford, 541 U.S. at 54).

As in Melendez-Diaz, evidence of the autopsy and DNA tests allegedly conducted here were admitted, even though the experts who performed the examinations did not testify at trial. Flowers was denied the opportunity to question these experts about their methodology, competence as experts, and other factors relevant to the weight and admissibility of the testimony provided via Sims and Paulette. As set forth at length in Melendez-Diaz, findings by expert witnesses must be subject to confrontation:

> Nor is it evident that what respondent calls "neutral scientific testing" is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, "[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency." National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 6-1 (Prepublication Copy Feb. 2009) (hereinafter National Academy Report). And "[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." Id., at S-17. A forensic analyst responding to a request from a law enforcement official may feel pressure -- or have an incentive -- to alter the evidence in a manner favorable to the prosecution.
>
> Confrontation is one means of assuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant, post, at 10, the same cannot be said of the fraudulent analyst. See Brief for National Innocence Network as Amicus Curiae 15-17 (discussing cases of documented "drylabbing" where forensic analysts report results of tests that were never performed); National Academy Report 1-8 to 1-10 (discussing documented cases of fraud and error involving the use of forensic evidence). Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony. See Coy v. Iowa, 487 U.S. 1012, 1019 (1988). And, of course, the prospect of confrontation will deter fraudulent analysis in the first place.
>
> Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that "[t]he

> legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics." Metzger, Cheating the Constitution, 59 Vand. L. Rev. 475, 491 (2006). One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases. Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 14 (2009). And the National Academy Report concluded: "The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country." National Academy Report P-1 (emphasis in original). Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.

Melendez-Diaz, 129 S. Ct. at 2537 (footnote omitted). Under this authority, there can be no question that Flowers was entitled to cross-examine the expert witnesses and it was constitutional error to admit hearsay statements of these examinations.

The violation of Flowers' constitutional right of confrontation having been established, it is the State's obligation to prove that the error was harmless beyond a reasonable doubt. See Idaho v. Wright, 497 U.S. 805, 827 (1990). The State cannot do so as this evidence was crucial to the State's case. The judgment must therefore be reversed.

C. The district court violated Flowers' constitutional rights by admitting as evidence a statement given by Flowers to detectives following invocation of his right to remain silent and right to counsel.

Flowers's state and federal constitutional right to due process, right to a fair trial, rights to remain silent and right to counsel were violated because the district court allowed the State to introduce evidence of statements made by Flowers at a time when he was represented by counsel, and had invoked his right to remain silent, in a case for which the conviction here serves as an aggravating circumstance. His constitutional and statutory rights were also violated because the district court prohibited Flowers from introducing his whole statement to the police after the State had introduced a portion of the statement. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

A trial court's decision to admit or suppress a statement that may have been obtained in violation of Miranda is reviewed de novo. See U.S. v. Rodriguez-Rodriguez, 393 F.3d

849, 855 (9th Cir. 2005). In considering a Sixth Amendment claim, this Court reviews under the clearly erroneous standard with respect to the underlying factual issues but de novo with respect to the ultimate constitutional issue. U.S. v. Johnson, 4 F.3d 904, 910 (10th Cir. 1993).

2. The district court erroneously allowed the State to introduce evidence of Flowers' statements to the police which were obtained in violation of Miranda and Massiah.

The district court erred in admitting evidence of Flowers' statement to police officers because he was in custody, had been formally charged, and was represented by counsel for a murder charge in the case involving Coote, at the time he was interrogated by police officers in this case. While Flowers recognizes the general rule that police officers may interrogate a person who is in custody for an offense which has not yet been charged, he submits that this general rule does not apply in a case such as this because the conviction for murder in this case is an aggravating circumstance in the other case.

Outside the presence of the jury, Flowers objected to the State's introduction of his statement to detectives. 3 App. 505. His counsel noted that Flowers was in custody on the other case and counsel represented him on that case. 3 App. 505. Counsel was unaware that the detectives planned to interrogate Flowers. 3 App. 505-06. The State informed the district court of its intent to introduce a portion of the statement for the purpose of showing that Flowers was evasive and that he knew Sheila only by her nickname, Pooka. 3 App. 506. The State noted that charges in this case had not been filed. 3 App. 506. Flowers contended that the State's recitation of the law "may be the status of the law now, but I think we need to make a record that that isn't what it should be." 3 App. 506. The district court noted the objection and found the statement to be admissible. 3 App. 506.

The relevant procedural history of the two cases was provided in Flowers' opposition to the State's motion to consolidate. 1 App. 206. Flowers was charged in the Coote case on June 7, 2005. 1 App. 206. Counsel was appointed for Flowers and he entered a plea of not guilty at his arraignment on August 30, 2005. 1 App. 207. On November 8, 2005, Flowers received a Notice of Intent to See Death Penalty, which included an aggravating

circumstance for two or more convictions for murder. 1 App. 207. He was interrogated by police officers in this case on August 24, 2006. 3 App. 524, 665. The detective informed Flowers that "we're not going to discuss your case at all" but did not inform him that evidence obtained concerning the murder of Sheila could be used to establish a conviction for that case and that such a conviction could be used as an aggravating circumstance in the pending case involving Coote. The State introduced evidence of Flowers statement to the detectives. It is reproduced as an Exhibit to this brief at pages 1-4.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." In McNeil v. Wisconsin, 501 U.S. 171 (1991), the Supreme Court explained when this right arises:

> The Sixth Amendment right [to counsel] . . . is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

Id. at 175 (citations and internal quotations omitted). Accordingly, the Court held that a defendant's statements regarding offenses for which he had not been charged were admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses. See id. at 176. See also Maine v. Moulton, 474 U.S. 159, 180 (1985); Texas v. Cobb, 532 U.S. 162 (2001); Dewey v. State, 123 Nev. __, 169 P.3d 1149, 1152 (2007).

_____It does not appear that this Court, the United States Supreme Court or any other court has considered this issue in the context presented here, which involves an interrogation on a second case for which the defendant has not been charged, but for which it is easily foreseeable, that a conviction in the second case would serve as an aggravating circumstance in the first case for which the defendant has been charged. In other words, because the second case is part of the first case, in that a conviction from the second case can be used as an aggravating circumstance in the first case, the general rule established in McNeil, Moulton, and Cobb does not apply.

Support for this argument is found in the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 482-85 (2000) (any fact that increases the penalty for a crime

beyond the statutory maximum must be submitted to a jury) and Ring v. Arizona, 536 U.S. 584 (2002) (extending Apprendi to capital cases). In essence, the conviction obtained here, which was based in part upon Flowers' statements to the detectives, is an element of the capital charge pending in the Coote case. Accordingly, this case is an essential part of the Coote case, the detectives were wrong in informing Flowers that their interrogation did not in fact involve the Coote case, and the district court erred in allowing the State to present evidence of Flowers' statements to the detectives without first conducting a full hearing as to their admissibility under Massiah v. U.S., 377 U.S. 201 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966).

3. The district court abused its discretion in prohibiting Flowers from introducing his entire statement after the State introduced a portion of his statement.

As noted above, the State elicited evidence about a portion of Flowers' statement to the detectives. On cross-examination, Flowers attempted to elicit testimony about additional statements made by Flowers during the interrogation. 3 App. 534; Appendix pg. 4. Specifically, in response to the State's questions on direct implying that Flowers was not cooperative and was evasive with the detectives, Flowers counsel asked the detective whether Flowers advised the detective that he may want to speak with the detective in the future. 3 App. 534; Appendix pg. 4. The State objected to this testimony, there was a discussion off the record, and the district court sustained the objection. 3 App. 534; Appendix page 4. Later, a record was made concerning the court's ruling. 3 App. 540. The State noted that it stopped its examination at page five of the transcript of the statement, prior to Flowers statement that he had to talk with his lawyer before he did anything and that maybe his lawyer would let him talk to the detectives. 3 App. 541. Flowers' counsel noted that he wished to elicit this testimony to counter the implication from the State's examination that Flowers was evasive and unwilling to cooperate. 3 App. 541. The district court held that it "was trying to protect the defendant is all" and that "there is a potentially negative inference that can be drawn against the defendant for doing something he's absolutely entitled to do. And I think that it's in the defendant's best interest [not] to let it in and that's

why I said you couldn't bring it in." 3 App. 541.

NRS 47.120(1) provides that "when any part of a writing or recorded statement is introduced by a party, he may be required at that time to introduce any other part of it which is relevant to the part introduced, and any other party may introduce any other relevant parts." See also Domingues v. State, 112 Nev. 683, 694, 917 P.2d 1364, 1372 (1996) (district court abused its discretion in limiting a detective's testimony regarding his interview of the defendant by prohibiting the defendant from introducing other relevant parts of the interview).

The State elicited testimony from a detective that Flowers was evasive and uncooperative. Flowers' counsel made a strategic decision that the best way to contest the State's evidence was to elicit testimony from the detective that Flowers stated he might be willing to talk to the detectives, but he wished to consult with his counsel before doing so. Flowers had a constitutional right to confront the State's evidence, and a statutory right to introduce the relevant portions of his statement to the detective after the State introduced part of the statement. Chambers v. Mississippi, 410 U.S. 284, 294 (1973); NRS 47.120. The State improperly interfered with the strategic decision of Flowers' counsel by objecting to this evidence. The district court erred in substituting its own judgment for that of Flowers' counsel as to whether this testimony should be presented, and erred in refusing admission of this important evidence.

Flowers was prejudiced by the district court's decision because the jury was precluded from hearing Flowers' statement that he might be willing to discuss Sheila's death, but he wanted to talk with his attorney before doing so. 3 App. 669-71. He was further prejudiced because during closing arguments the State repeatedly emphasized Brass's cooperation with the detectives and it contrasted Flowers lack of cooperation and evasiveness with police officers, 3 App. 595, 612, 613. Had Flowers been allowed to introduce the entirety of his statement, these arguments would have had far less impact upon the jury. As a matter of fundamental fairness, Flowers was entitled to present this evidence and the district court's exclusion of this evidence warrants reversal of the conviction.

D. The district court violated Flowers' constitutional rights by admitting gruesome photographs from the autopsy.

Flowers's state and federal constitutional rights to due process and right to a fair trial were violated because the district court allowed the State to introduce gruesome photographs of body parts dissected by the medical examiner during the autopsy. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

This Court reviews the district court's decision to admit photographs, over objection, for an abuse of discretion. Turpen v. State, 94 Nev. 576, 577, 583 P.2d 1083 (1978). The admission of gruesome photographs may so infect the proceedings with unfairness that there is a denial of the federal constitutional right of due process. Spears v. Mullin, 343 F.3d 1215, 1226 (2003). In such cases, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Chapman, 386 U.S. at 23-24.

2. The district court abused its discretion in allowing the State to admit evidence of photographs from the autopsy which showed the deceased's tongue after it had been cut out of her body by the medical examiner and gruesome photographs of other body parts.

Gruesome photographs are admissible if they ascertain the truth, such as when used to show the cause of death, the severity of wounds, and the manner of injury. Doyle v. State, 116 Nev. 148, 160, 995 P.2d 465, 473 (2000). This Court has found that the mere fact that the defendant does not dispute the cause of death does warrant exclusion of autopsy photographs. Id. at 161, 995 P.2d at 473. In Dearman v. State, 93 Nev. 364, 369-70, 566 P.2d 407, 410 (1977), this Court approved of a district court's admission of photographs after the district court reviewed the offered photographs outside the presence of the jury, sustained the defense's objection to some of the photographs, heard testimony by the pathologist that the photographs would be helpful to him in explaining the cause of death, and considered the admissibility of the photographs outside the presence of the jury. Upon finding that the district court exercised caution and considered the prejudicial effect of the evidence, this Court found the admission of the photographs not to be an abuse of discretion. Id.

The probative value of these photographs is very slight especially in light of their

gruesome nature. Some of the photographs graphically depict Sheila's tongue after it had been removed from her body by the medical examiner during the autopsy. 3 App. 699-704. Her tongue and body were not in this condition at the crime scene, but rather the act of cutting the organ from Sheila's throat occurred during the medical examination. These photographs are extremely disturbing as the tongue is rarely viewed in such state and the sight is shocking. The probative value of the photographs is minimal as the cause of death was not contested and the medical examiner could have given a verbal explanation of hemorrhages without use of the photographs. In the alternative, the photographs could have been cropped to show only the hemorrhages instead of the entire tongue. See e.g. 3 App. 697-98 (showing only a portion of the tongue with hemorrhages). The district court abused its discretion in overruling Flowers' objection to these photographs. 2 App. 353.

Likewise, the district court abused its discretion in introducing, over objection, other graphic photographs from the autopsy. 2 App. 353; 3 App.705-13. For example, an exhibit shows Sheila's neck after it has been sliced open and the skin is peeled back and held in place by two gloved hands. 2 App. 354; 3 App. 707. The point of this photograph was to show hemorrhages to the neck, but this same point could have been established by showing a cropped photograph which focused on the hemorrhages rather than the two hands placed inside of the neck and other body tissues.

Unlike the district court in Dearman, the district court judge here did not review the offered photographs outside the presence of the jury, did not carefully review the proposed photographs individually to determine if they were unduly prejudicial, did not hear testimony by the pathologist outside the presence of the jury as to why the photographs would be helpful, and did not consider the admissibility of the photographs outside the presence of the jury. In other words, the district court here did not exercise any of the caution exercised by the judge in Dearman and instead abandoned his decision making role to the witness as he asked the simple question of "Doctor, did you go through all of the photos that were available and pick out a minimum number that could demonstrate each of the points you needed to make." 2 App. 353. Upon the medical examiners summary statement that "Yes, I did do

that, sir", the district court overruled the objection. 2 App. 353.

A review of the medical examiner's testimony reveals that admission of several of the photographs was entirely unnecessary. For examples, exhibits 104 and 105 show the tongue after it was removed from the body. 3 App. 699-704. Neither of these photographs was discussed by the medical examiner during his testimony. 2 App. 354.

This highly inflammatory evidence fatally infected the trial and deprived Flowers of his constitutional right to a fair trial. His judgment must therefore be reversed.

E. The district court violated Flowers' constitutional right to present evidence by precluding Kinsey from testifying that the victim told him she was seeing someone named "Keith."

Flowers's state and federal constitutional right to due process, right to a fair trial, and right to present evidence were violated because the district court prohibited Flowers from introducing evidence that Sheila's boyfriend knew of her relationship with Flowers. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

This Court reviews a district court's determination of whether proffered evidence fits an exception to the hearsay rule for abuse of discretion. See Harkins v. State, 122 Nev. 974, 980, 143 P.3d 706, 709 (2006). The erroneous exclusion of a defendant's proffered evidence violates a defendant's right to present evidence. Chambers v. Mississippi, 410 U.S. 284, 294 (1973). In such cases, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Chapman, 386 U.S. at 23-24.

2. Flowers was entitled to present evidence in support of his defense.

During the State's case-in-chief, it elicited testimony from Debra that Sheila did not like older men, Debra talked about everything with her daughter, and Debra did not ever see Sheila talking to Flowers, having contact with him or anything like that. 2 App. 379. The State also elicited testimony that Debra was aware of Sheila's friendship with Quinse, though she did not know of their sexual relationship. 2 App. 382-83. The State also elicited testimony from Sheila's cousin, Ameia Fuller, about the fact that she had telephone conversation with Sheila prior to her death and Ameia knew that Sheila was involved with

Chicken (Brass). 2 App. 492-93. Ameia told the detectives that Sheila told Ameia that she was friends with Chicken. 2 App. 493. Flowers attempted to elicit similar testimony from William Kinsey, who was one of Sheila's boyfriends. 3 App. 541. Specifically, Flowers wished to elicit testimony from Kinsey that he was aware of the fact that Sheila was dating someone named Keith (which is Flowers' middle name and the name he used). 3 App. 541. The district court sustained the State's hearsay objection to this testimony after noting that Kinsey did not ever personally observe Sheila and Keith together as Kinsey was incarcerated during the relevant time. 3 App. 541-43.

Due process requires that the "minimum essentials of a fair trial" include a "fair opportunity to defend against the State's accusations" and the right "to be heard in [one's] defense." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). When a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense, the exclusion of that statement may rise to the level of a due process violation. Id. at 302. The erroneous exclusion of critical, corroborative defense evidence may violate both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense. DePetris v. Kuykendall, 239 F.3d 1057, 1062 (9th Cir. 2001) (citing Chambers, 410 U.S. at 294).

"The Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690 (1986). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers, 410 U.S. at 294.

The testimony Flowers sought to introduce from Kinsey was no different than that elicited by the State from Ameia Fuller and was similar to the testimony that the State elicited from Debra. The State opened the door to testimony about knowledge of Sheila's relationships based upon conversations of the State's witnesses with Sheila, so Flowers was entitled to elicit similar testimony from his witness. Under these circumstances, Flowers was prejudiced by the district court's refusal of evidence which would have contradicted the evidence presented by the State concerning Sheila's relationships. This evidence was essential to explaining the presence of Flowers' semen, which was in turn crucial to

establishing that Flowers did not sexually assault and kill Sheila. The judgment of conviction must therefore be reversed.

F. The prosecutor committed misconduct by commenting on Flowers' right to remain silent.

Flowers's state and federal constitutional rights to due process, equal protection, and right to a fair trial were violated because of extensive prosecutorial misconduct. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

"When considering claims of prosecutorial misconduct, this court engages in a two step analysis. First, [this court] must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, [this court] must determine whether the improper conduct warrants reversal." Valdez v. State, 124 Nev. __, 196 P.3d 465, 476 (2008) (citing U.S v. Harlow, 444 F.3d 1255, 1265 (10th Cir. 2006)). "With respect to the second step of this analysis, this court will not reverse a conviction based on prosecutorial misconduct if it was harmless error. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. If the error is of a constitutional dimension, then we apply the Chapman v. California standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. If the error is not of constitutional dimension, we will reverse only if the error substantially affects the jury's verdict." Id. (citing Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001); Harlow, 44 F.3d at 1265).

"Determining whether a particular instance of prosecutorial misconduct is constitutional error depends on the nature of the misconduct." Valdez, 196 P.3d at 477. "For example, misconduct that involves impermissible comment on the exercise of a specific constitutional right has been addressed as constitutional error." Id. (citing Chapman, 386 U.S. at 21, 24; Bridges v. State, 116 Nev. 752, 764, 6 P.3d 1000, 1009 (2000)). "Prosecutorial misconduct may also be of a constitutional dimension if, in light of the proceedings as a whole, the misconduct so infected the trial with unfairness as to make the

resulting conviction a denial of due process." Id. (internal quotations to Darden v. Wainwright, 477 U.S. 168, 181 (1986) and Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) omitted).

"Harmless-error review applies, however, only if the defendant preserved the error for appellate review." Valdez, 196 P.3d at 477 (citing Olano, 507 U.S. at 731-32). "Generally, to preserve a claim of prosecutorial misconduct, the defendant must object to the misconduct at trial because this 'allow[s] the district court to rule upon the objection, admonish the prosecutor, and instruct the jury.'" Id. (quoting Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1109 (2002)). "When an error has not been preserved, this court employs plain-error review." Id. (citing Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). "Under that standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice. Id. (internal quotation omitted) (citing Green, 119 Nev. at 545, 80 P.3d at 95 and Olano, 507 U.S. at 734).

2. The prosecutor commented on Flowers's right not to testify and to remain silent.

The State made numerous direct and indirect comments concerning Flowers' decision not to testify and not to talk with detectives:

> When Christina Paulette tested the swabs that were taken from Sheila's vagina and from her panties, whose DNA did she find? She found George Brass, the person who came in here, swore to tell the truth, and told you yeah, I had sex with Sheila that day. I had sex with her in the morning, and then I went to work. He didn't have to tell you that, but he did.
>
> . . .
>
> Now, George Brass was spoken to by the police. He could have said no, I'm not talking, I have nothing to say. Remember he's in custody. But he voluntarily spoke to the police and said, yeah, I had sex with her and then I went to work. George Brass who was in custody could have said hell, no, I'm not giving you a DNA sample, but he did. He voluntarily gave a DNA sample.
>
> If he had not told them, yeah, I had sex with her that day, if he had not given a sample, we would be in the same place we were six months ago, a year ago, two years ago, three years ago and have no idea who the other sample was.
>
> George Brass who has nothing to gain by being cooperative and basically everything to lose because the truth, and in fact, his DNA is found in the vagina of a girl who had just been murdered.

> He voluntarily gives a statement, gives a sample and then comes in here to testify. He had nothing to hide. He told us that he was at the apartments that morning, he told us that he was living there, but he saw Sheila that morning, he went into her apartment and he had sex with her he thought between 10:30, 11 o'clock and then he went to work.

3 App. 595.

> Well, what happens when the police finally show up on George Brass's door step? He tells them, yeah, I've had a sexual assault with Sheila that's been going on a long time. He doesn't ask for a lawyer, he doesn't ask to remain silent. he's sitting in custody, but when the police come and ask him, he gives it up. He says I had this relationship.....
>
> . . .
>
> And certainly when you have Brass's demeanor and his willingness to cooperate with the police, you can pretty much disregard that as rank speculation, which you're not supposed to do in this case.

3 App. 612.

> By contrast, what was Mr. Flowers' response to the police when they started asking him about Sheila Quarles' murder. Mr. Flowers, do you know someone by the name of Debra Quarles? No response. They shows him a photo. Mr. Flowers, do you know Debra. Do you know this woman. I'm not saying.
>
> MR. PIKE: Objection, Your Honor.
>
> THE COURT: What's the objection?
>
> MR. PIKE: Edwards versus State, post-Miranda silence.
>
> THE COURT: Well, he wasn't silent. He was cooperative with the police and he was discussing the matter with him. He just didn't say anything as to that particular question. If he exercised his right to remain silent, of course you would have that right. Go ahead.

3 App. 613. See also 2 App. 386-87, 480-81; 3 App. 531 (testimony that Robert Lewis voluntarily gave a DNA sample and talked to police for about an hour).

A prosecutor's direct comment on a defendant's failure to testify, violates the defendant's constitutional right against self-incrimination. Bridges, 116 Nev. at 764-64, 6 P.3d 1008-09 (citing Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991)). See also Griffin v. California, 380 U.S. 609, 613-14 (1965) (comment on the refusal to testify is a remnant of the inquisitorial system and violates the Fifth Amendment); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (the Fifth Amendment applies to the states through the Fourteenth Amendment). Even if the remark was an indirect reference, it would be impermissible if "the

language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify." Id. (citing Harkness and U.S v. Lyon, 397 F.2d 505, 509 (7th Cir. 1968)).

Although Flowers's trial counsel did not object to the indirect commentary on the fact that Flowers did not testify or talk with the police, as they emphasized Brass's decision to talk and to testify, this issue should be considered as a matter of plain error. See Harkness, 107 Nev. at 803, 820 P.2d at 761. "Where, as here, appellant presents an adequate record for reviewing serious constitutional issues, we elect to address such claims on their merits." Id. (citing Edwards v. State, 107 Nev. 150, 153 n.4, 808 P.2d 528, 530 (1991)). The jury would naturally and necessarily take this to be a comment on Flowers's failure to testify. Under the facts of this case, which are far from overwhelming, Flowers was prejudiced and the judgment should be reversed. See Herrin v. U.S., 349 F.3d 544, 546 (8th Cir. Mo. 2003).

Additionally, the admission of just a portion of Flower's statement regarding this case also evolved into an improper comment on Flowers' silence in violation of the Fifth Amendment. See Miranda v. Arizona, 384 U.S. 436 (1966); Neal v. State, 106 Nev. 23, 787 P.2d 764 (1980); Doyle v. Ohio, 426 U.S. 610 (1976).

The State's improper commentary on Flowers' lack of cooperation, refusal to talk with the police about this case, and failure to testify was highly prejudicial as it contrasted Flowers with Brass and suggested that Brass was not guilty because he gave a statement and testified. As the other evidence equally inculpated both men, Flowers was greatly prejudiced by this argument. The judgment of conviction must therefore be reversed.

G. There is insufficient evidence to support the conviction.

Flowers' state and federal constitutional rights to due process and conviction only upon presentation of proof beyond a reasonable doubt were violated because there is insufficient evidence to support the conviction. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

Claims of insufficient evidence are reviewed de novo. See U.S. v. Shipsey, 363 F.3d

962, 971 n.8 (9th Cir. 2004), U.S. v. Naghani, 361 F.3d 1255, 1261 (9th Cir. 2004). There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979). When determining whether a verdict was based on sufficient evidence to meet due process requirements, this Court will inquire whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This Court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact. Mitchell v. State, 124 Nev. __, 192 P.3d 721, 727 (2008).

2. There is insufficient evidence that Flowers sexually assaulted and murdered Sheila.

The evidence supporting Flowers' conviction fails to establish beyond a reasonable doubt that he sexually assaulted and murdered Sheila. As noted above, a simple comparison of the evidence concerning Flowers and Brass reveals that the State's case against Flowers was not strong. Both men were identified as having semen inside of Sheila's vagina; neither man was known by Sheila's mother to be in a relationship with Sheila; and neither man immediately told police officers investigating the case that they had a sexual relationship with Sheila. Brass had work records which indicated that he was at work when Sheila was killed, but no witness testified that he was at work and it was acknowledged that someone else could have signed him in and out at work. Finally, Brass was seen near Sheila's apartment on the day she was killed while Flowers was not. Also as set forth above, the evidence concerning the Coote case fails to establish Flowers guilt in this case. There were substantial differences between the two cases so the probative value of the Coote evidence is weak. As there is insufficient evidence to support the conviction, it must be vacated.

H. The judgment should be vacated based upon cumulative error.

Flowers's state and federal constitutional rights to due process, equal protection, and right to a fair trial were violated because of cumulative error. U.S. Const. amend. V, VI,

XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Butler v. State, 120 Nev. 879, 900, 102 P.3d 71, 85 (2004); U.S. v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993) (although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so prejudicial as to require reversal"). "The Supreme Court has clearly established that the combined effect of multiple trial errors violates due process where it renders the resulting criminal trial fundamentally unfair." Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers v. Mississippi, 410 U.S. 284 (1973); Montana v. Egelhoff, 518 U.S. 37, 53 (1996)). "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." Id. (citing Chambers, 410 U.S. at 290 n.3).

Each of the claims specified in this appeal requires reversal of the judgement. Flowers incorporates each and every factual allegation contained in this appeal as if fully set forth herein. The cumulative effect of these errors demonstrates that the trial deprived Flowers of fundamental fairness and resulted in a constitutionally unreliable verdict. Whether or not any individual error requires the vacation of the judgment, the totality of these multiple errors and omissions resulted in substantial prejudice. The State cannot show, beyond a reasonable doubt, that the cumulative effect of these numerous constitutional errors was harmless beyond a reasonable doubt. In the alternative, the totality of these constitutional violations substantially and injuriously affected the fairness of the proceedings and prejudiced Flowers. He requests that this Court vacate his judgement and remand for a new trial.

VI. CONCLUSION

For each of the reasons set forth above, Flowers is entitled to a new trial. In the alternative, there is insufficient evidence to support his conviction and his judgment should be vacated.

DATED this 19th day of December 2009.

Respectfully submitted,

By: /s/ *JoNell Thomas*

JONELL THOMAS
State Bar No. 4771

CERTIFICATE OF COMPLIANCE

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, N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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 19th day of December, 2009.

By: /s/ *JoNell Thomas*

JoNell Thomas

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 26th day of October, 2009 a copy of the Appellant's Opening Brief was served as follows:

BY ELECTRONIC FILING TO

District Attorney's Office
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Las Vegas, NV 89155

Nevada Attorney General
100 N. Carson St.
Carson City NV 89701

/s/ JONELL THOMAS
_____
JONELL THOMAS

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MR. PIKE: Thank you.
BY MS. LUZAICH:
Q. It was an individual that she knew and was very familiar with it appeared?
A. Yes.
Q. Did she also tell you about, without telling me what she said, did she tell you about things that that individual did after the death of Sheila?
A. Yes.
MR. PIKE: Objection, hearsay.
THE COURT: Well, they haven't said what she said.
MS. LUZAICH: And I specifically said that, without telling me what she said.
MR. PIKE: I understand. I just want to make a record in case I bring up the same questions.
THE COURT: The next question is gonna be though.
MS. LUZAICH: No, it's not.
THE COURT: Let's hear it.
BY MS. LUZAICH:
Q. So you were you aware of that information as well?
A. Yes.

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Q. Okay. Now, did you go see this person after speaking with Debra?
A. Yes, I did. On August 24th.
Q. Okay. Now, when you went and saw this person, did you read him -- who did you go see?
A. I went and saw Mr. Flowers.
Q. You're looking over there. Do you see him here in court today?
A. Yes, I do.
Q. Can you describe where he's sitting and what he's wearing?
A. He's wearing a black suit and a maybe blew or greenish tie.
THE COURT: The record will reflect identification of the defendant Norman Keith Flowers.
MS. LUZAICH: Thank you.
BY MS. LUZAICH:
Q. Does the defendant look the same today as he did in August of 2006?
A. Yes, he does.
Q. Or at least very similar?
A. Yes.
Q. When you spoke with the defendant, you read him his rights?

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A. Yes, did.
Q. When you do that, do you do it from memory or from a card?
A. From a card.
Q. Do you happen to have that card with you today?
A. Yes, I do.
Q. Can I have that card? May I have it marked?
MR. PIKE: It's okay. You can just read it in.
MS. LUZAICH: I'm gonna move it in actually. I am about to show defense counsel who has a copy of it, but defense counsel the actual card. State's proposed 135.
MR. PIKE: No objection.
THE COURT: It will be admitted.
MS. LUZAICH: Thank you.
BY MS. LUZAICH:
Q. When you -- well, actually could you read into the record the rights that you read to the defendant on that day?
A. Yes. The adult advisement since Mr. Flowers was an adult at the time and still is, is number one, you have the right to remain silent.

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Number two, anything you say can and will be used against you in a court of law. Number three, you have the right to the presence of an attorney. Number four, you cannot -- if you cannot afford an attorney, one will be appointed before questioning. Do you understand these rights.
Q. Did he indicate to you that you understood the rights?
A. Yes.
Q. And did he actually sign the card in your presence?
A. Yes, he did.
MS. LUZAICH: Move it into evidence.
THE COURT: It's already been admitted.
MS. LUZAICH: Thank you.
BY MS. LUZAICH:
Q. When you saw the defendant and spoke with him, did you first tell him that you were not there to talk to him about his case?
A. Yes.
Q. Did you kind of just talk to him about hey, how are you doing, what's your name, what should I call you?
A. A little bit. Not a whole lot. He was, he was in custody. I just wanted, you know, I was

basically down there to have a talk with him.
Q. Did you -- you were aware that his name was Norman Keith Flowers.
Did he indicate that he goes by the name Norman or another name?
A. He indicated to me that he goes by Keith.
Q. And when you spoke to him, was it August 24th of 2006 at 8:30 in the morning?
A. Yes.
Q. Did you tell him that -- well, did you tell him why you were there right away?
A. I basically told him that I was conducting an investigation and I was seeking his cooperation.
Q. The interview that you conducted with him, was it tape recorded?
A. Yes.
Q. Was it then transcribed?
A. Yes.
Q. And do you have a copy of that transcript with you?
A. Yes, I do.
Q. Could you open it up just so that we can get the words correct? Okay. On page two, did you ask him the first thing I want to talk to you about,

Keith, is I'm trying to find out who a friend of yours is. Maybe a friend of yours, maybe not a friends of yours. He's a black guy, he's got like a skin condition on his arms. Does that ring a bell of anybody.
Did you ask him that?
A. Yes.
Q. How did he respond to that?
A. You're giving me limited information was his --
MR. PIKE: Objection. It's in correct.
BY MS. LUZAICH:
Q. Well, was there an answer before that?
A. What's the point -- I'm sorry, yeah. What's the point of trying to find him. Why are you trying to find him for.
Q. Did you tell him because I need to ask him some questions on a case I'm investigating and your name, Keith, the defendant's name, came up in the case that he's a friend of yours?
A. Yes. And he replied you, you're giving me limited information.
Q. Did you try and fix that a little bit and say okay, how about I start and give you some more information. Do you know Debra Quarles?

A. And there was no verbal response.
Q. None at all?
A. No.
Q. So he didn't say yeah, I know her, I dated her or anything like that?
A. No.
Q. So what did you then do?
A. I told Mr. Flowers that I wanted to show him a picture of her and asked him if it would help.
Q. How did he respond to that?
A. Yeah.
Q. So he wanted to actually see a picture of her before he would talk further?
A. Yes.
Q. Did you then show him a picture of Debra Quarles?
A. Yes, I did.
Q. And did you ask him if he knew her?
A. Yes.
Q. How did he respond to that?
A. I'm not saying.
Q. Okay. Not a lot of cooperation thus far?
A. No.
Q. Did you ask him if he thinks he knows her?

A. Yes.
Q. And did you actually tell him because she told you that she knew him?
A. Yes.
Q. How did he respond to that?
A. Again, he said I'm not saying. I mean until I know what's it about, I'm not saying anything.
Q. So then what did you say to him?
MR. PIKE: Your Honor, I move for admission of the tape recording of this, the best evidence.
THE COURT: Well, it doesn't have to, but do you have any objection?
MS. LUZAICH: Well, two. One, can we approach?
THE COURT: Yeah.
(Whereupon, an off-the-record discussion was had at the bench.)
THE COURT: All right. Go ahead. Go ahead. Page and line number, Ms. Luzaich, and you read the question Detective Sherwood asks and Detective Sherwood can read the answer that Mr. Flowers gave.
BY MS. LUZAICH:

Q. Thus far, Detective Sherwood, have you been reading exactly the responses that the defendant was giving you?
A. Yes.
Q. I for the most part was reading the questions you gave, but now we're on page three and I'm gonna read questions that you asked if that's okay with you, and if you could respond exactly the way he did.
A. Yes.
Q. Okay. I'm on page three for the record. Did you say to him after he said I'm not saying anything to you, okay, here's what I'm investigating. I'm investigating the, the death of her daughter. It's possible that someone you know may have been involved in it. And I just, I'm trying to find out who that person is, so I can go and talk to him.

I mean, Debra tells me that she's a good friend of yours and that you would probably help me, and I wanted to come talk to you and appeal to you because Debra can't rest in peace because her daughter's killer hasn't been caught.

And the reason I think it's the guy with the skin condition is just prior to Sheila

being found, there was a guy hanging out, outside the, that matches the description of him wearing like a long-sleeved shirt which it wasn't extremely cold that day. It was a long sleeved flannel shirt and I'm thinking, you know, maybe this guy is trying to hide his skin condition or something like that.
A. I don't understand what makes you guys think a person would even have a skin condition -- because they have the long shirt.
Q. Well, here's why. Because this guy, this guy that I'm looking for I was told is a friend of yours. And I was told that you gave Debra rides home from work. So maybe, maybe he saw Debra and maybe he saw Sheila and maybe he got interested in Sheila?
A. Who is Sheila?
Q. Sheila is Debra's daughter.
A. Oh, only knew her by her nickname.
Q. Pooka? Okay. So you didn't really know her well?
A. No verbal response.
Q. Okay. Anyway, you know, I'm just -- I'm trying to solve a crime that happened. And I mean, I know, I know you're probably not real anxious to cooperate with the police, but I wanted to appeal to

you as a friend of Debra's, you know, to maybe just point me in the right direction.
A. Can't do it, no. I'm not. I don't want to be involved.
Q. Okay. Well, I understand that. And I mean, you know, I can, I can find out. How well do you know Debra?
A. No, I won't answer no questions about any of that.
Q. Okay. Well, could I ask you a couple, just a couple more things, then we'll be done.
A. No. I got my own problems to deal with so I don't want to get involved in anybody else's matters.
Q. So you don't want to help Debra at all? You don't want to, you don't want to like try and help catch who killed her daughter?
A. No verbal response.
Q. Uh, really?
A. I'm not saying yes, I'm not saying no. I'm just -- I don't want to be involved in anybody else's problems. I have my own case to deal with.
Q. Okay. So as he is talking to you at this point, you're not getting any cooperation from him?
A. No.

Q. At the time of this particular conversation, were you still under the impression that there may be two suspects?
A. Yes.
Q. And is that why you're trying to find out who his friends might be?
A. Yes.
Q. And are you kind of incorporating information that you got from just a bunch of different sources?
A. Yes.
Q. Not just Debra?
A. Right.
Q. When you saw the defendant that day, how old was he?
A. 31.
Q. Do you know about how tall he was?
A. 5'7".
Q. Weight?
A. A hundred and 85, 90 pounds.
Q. After you spoke with him, were you still trying to identify the other source of semen in Sheila?
A. Yes.
Q. And in fact, did you shortly thereafter

information, that's one technique.
A. Yes.
Q. You may get somebody angry and try and get them to also give you information because they're angry?
A. Yes.
Q. That's another technique. You can go through and ask them questions that are completely unrelated to the crime that you're investigating to verify how cooperative they're going to be and that's another technique?
A. Yes.
Q. You also have been trained and informed that you can actually give them false information or lie to them about facts that you may or may not have and use that as an interrogation technique?
A. Yes.
Q. And you can also go through and appeal to their sense of humanity?
A. Yes.
Q. And in fact, you did attempt to appeal to his -- on page five. You wanted to appeal to his human decency?
A. Yes, sir.
Q. At that time in fact, Mr. Flowers advised

you that he may want to speak with you in the future, going to page seven?
MS. LUZAICH: Well, objection.
MS. WECKERLY: I object.
MS. WECKERLY: Your Honor, can we approach?
THE COURT: Yes.
(Whereupon, an off-the-record discussion was had at the bench.)
THE COURT: Objection's sustained.
BY MR. PIKE:
Q. And based upon the collection of evidence just very recently in this case, that is the nature of your work in the cold cases is that things can come to life in the future and you reinvestigate and retalk to people and that in this case and in other cases may be a very effective investigative tool?
A. I'm not sure -- I'm sorry. I'm not real sure of the question.
Q. It was kind of rambling. Let me just put it this way: It never hurts to go back and talk to potential witnesses?
A. No.
Q. And in fact, you would, would say that that constant recontact with the witnesses, the

re-evaluation what they remember often will and often times will, will bring forth that item which then opens the case wide open?
A. Yes, sir. In some cases.
MR. PIKE: All right. Thank you very much, detective.
THE WITNESS: Thank you.
THE COURT: Anything else, Ms. Luzaich?
MS. LUZAICH: Just briefly.
REDIRECT EXAMINATION
BY MS. LUZAICH:
Q. In all these times that you went back to talk to Debra knowing that there were two different sources of DNA, once you had identified the defendant Norman Flowers, were you trying to determine whether or not Debra knew who his friends were?
A. Yes.
Q. And is that because often times when people commit criminal offenses if they have somebody with them it is because it's their friend that's with them?
A. Yes.
Q. And when you talked to the defendant about the guy with the skin condition, is that

because Debra Quarles told you he had a friend with a skin condition, just couldn't remember his name?
A. Yes.
Q. Now, when, when people -- in addition, to working homicide and cold case you were a detective for many years?
A. Yes.
Q. And you were on patrol for many years?
A. No, not on patrol for very long.
Q. Well, you've been a police officer for a long time?
A. Yes.
Q. Investigated lots of different kinds of offenses?
A. Yes.
Q. You worked narcotics for quite some time?
A. Yes.
Q. People who use drugs often steal, people who steal often use drugs?
A. Yes.
Q. Now, when people steal things, do they always pawn them?
A. No.
Q. Do they often keep them themselves?
A. Yes. Or in some cases they give them to

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN KEITH FLOWERS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 53159

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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NORMAN KEITH FLOWERS, Appellant, v. THE STATE OF NEVADA, Respondent.	)	Case No. 53159

RESPONDENT'S ANSWERING BRIEF

STATEMENT OF THE ISSUE(S)

1. Whether the district court erred in allowing evidence of other bad acts committed by the Defendant.
2. Whether the admission of testimony referencing Dr. Knoblock's and Wahl's expert findings amount to plain error.
3. Whether the district court erred in allowing in to evidence statements made by the Defendant to the police while he was in custody for a different offense.
4. Whether the district court erred in allowing certain autopsy photographs into evidence.
5. Whether the district court erred in ruling that part of William Kinsey's proposed testimony was inadmissible hearsay.
6. Whether the State committed prosecutorial misconduct during closing arguments.
7. Whether there was sufficient evidence presented at trial to convict the Defendant.
8. Whether the district court committed cumulative error.

STATEMENT OF THE CASE

On December 13, 2006, Defendant Norman Keith Flowers aka Norman Harold Flowers, III ("Defendant") was charged via a Grand Jury Indictment of committing the following crimes against Sheila Quarles: Count 1- Burglary; Count 2- Murder; Count 3- Sexual Assault; and Count 4- Robbery. Volume 1 Appellant Appendix ("AA") page 1-7.

On December 26, 2006, the State filed a Motion to Consolidate seeking to consolidate this case with district court case C216032. 1 AA 8. In C216032, Defendant was charged with two (2) counts of murder (and other charges) for the deaths of Marilee Coote and Rena Gonzales. 1 AA 21-22. The Defendant filed an Opposition on January 2, 2007. 1 AA 21-29. On January 8, 2007, District Court Judge Joseph Bonaventure, sitting judge for case C216032, denied the State's motion. 1 AA 37.[1]

On January 11, 2007, the State filed a Notice of Intent to Seek Death Penalty in this matter. 1 AA 30-34.

On January 23, 2007, Defendant filed a Motion-In-Limine to Preclude Evidence of Other Bad Acts and Motion to Confirm Counsel. 1 AA 35-46. In his motion, the Defendant sought to keep out evidence of the Gonzales and Coote murders and to confirm attorney Brett Whipple as his counsel. 1 AA 35-46.[2] The State filed an Opposition on February 2, 2007. 1 AA 48-63. On February 5, 2007, the district court denied Defendant's motion to confirm counsel. 3 AA 642. On April 13, 2007, District Court Judge Donald Mosley stated that he believed the cases should be consolidated and wanted to wait to see what District Court Judge Michael Villani did before making a ruling on Defendant's bad act motion. 2 AA 261.[3] Judge Mosley found the motion moot. 3 AA 644.

Due to judicial retirements and shifting caseloads, this case was transferred to District Court Judge Stewart Bell's department. On November 5, 2007, the State filed a Motion for Clarification of Court's Ruling seeking to clarify if they could introduce evidence of C216032 at trial in this matter. 1 AA 64-75. The Defendant filed an Opposition on November 6, 2007. 1 AA 77-81. On November 15, 2007, the district court ordered a Petrocelli hearing on the bad acts that State wanted to introduce at trial. 3 AA 646.

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[1] See Blackstone Minutes for hearing on 01/08/2007 in Case C216032.

[2] Mr. Whipple was originally retained by the Defendant for charges pertaining to Coote. 1AA 56.

[3] Judge Villani was in the process of taking over Judge Bonaventure's case load, the judge who originally denied the State's motion to consolidate. 2 AA 261.

On August 1, 2008, a Petrocelli hearing was conducted for this matter. 3 AA 649. The State sought to introduce evidence from Case C216032. 3 AA 649. The district court found that the murder and sexual assault of Coote was sufficiently similar in nexus and time to Quarles murder. 3 AA 649. The court also found that there was clear and convincing evidence that the Defendant sexually assaulted and murdered Coote. 3 AA 649. Finally, the district court found that probative value for purposes of intent and identity was not outweighed any unfair prejudice. 3 AA 49. Therefore, the district court held that evidence regarding the similarities between Coote and Quarles was to be allowed at trial. 3 AA 649. However, the district court denied admission of evidence of the Rena Gonzales murder at trial. 3 AA 649.[4]

A Motion to Reconsider the Ruling on Defendant's Motion-In-Limine to Preclude Evidence of Other Bad acts was filed on September 29, 2008. 1 AA 120-123. The district court denied Defendant's motion on October 15, 2008. 3 AA 653.[5]

The jury trial began on October 15, 2008. 3 AA 654. On October 22, 2008, the jury found the Defendant guilty of Burglary, Murder and Sexual Assault. 3 AA 657. The jury found the Defendant not guilty of Robbery. 3 AA 657. Per the Special Verdict form, the Defendant was found guilty of Felony-Murder. 3 AA 183. On October 23, 2008, the penalty hearing began for the first degree murder conviction. 3 AA 658. The jury found several mitigating circumstances for the Defendant. 3 AA 184-85. On October 24, 2008, the jury returned a verdict of Life in the Nevada State Prison Without the Possibility of Parole. 3 AA 659.

On October 30, 2008, the Defendant filed a Motion for a New Trial. 1 AA 187-190. The State filed an Opposition on November 10, 2008. 1 AA 236-247. On November 12, 2008, the district court denied Defendant's Motion. 1 AA 248-249.

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[4] The State had argued that the Rena Gonzalez murder should come in because Ms. Gonzalez was murdered the same day in the same apartment complex as Ms. Coote. 1 AA 67. Like the other murders, Ms. Gonzales was sexually assaulted and strangled. 1 AA 67. Additionally, personal property was taken from her apartment. 1 AA 67. However, unlike Ms. Coote and Quarles, DNA evidence did not directly connect the Defendant to Ms. Gonzalez's murder. 1 AA 69; 2 AA 649.

[5] Several other pretrial motions were filed in this matter but since they are not contested in Defendant's brief they were not included in the Statement of Case.

On January 13, 2009, Defendant was sentenced to the Nevada Department of Corrections as follows: Count 1- a maximum of one hundred twenty (120) months with a minimum parole eligibility of forty-eight (48) months; Count 2- Life without the possibility of parole, to run consecutive to Count 1; and Count 3- Life without the possibility of parole with a minimum parole eligibility of one hundred twenty (120) months to run consecutive to Count 2. 3 AA 661. Defendant received seven hundred sixty one (761) days credit for time served. 2 AA 250-51. A Judgment of Conviction was filed on January 16, 2009. 2 AA 250-51. An Amended Judgment of Conviction was filed on February 12, 2009, amending the Defendant's sentence as to Count 3 to Life with the possibility of parole with a minimum parole eligibility of one hundred twenty (120) months. 2 AA 254-55.

STATEMENT OF THE FACTS

In March of 2005, Sheila Quarles ("Sheila") was living with her mother Debra Quarles ("Debra") in a modest, one-bedroom apartment located at 1001 North Pecos ("Pecos Apartment"). 2 AA 373, at 5-6. At the time Sheila was working at Starbucks at the convention center and Debra worked at a family food market. 2 AA 373, at 6.

As a very social 18 year old, Sheila had a lot of different social contacts. She was involved in a sexual relationship with a young man named George Brass ("Brass"). 2 AA 494, at 81. Brass was a friend of the family. 2 AA 373, at 8. His mother was friends with Debra and Brass was also a close friend of Sheila's older brother, Ralph. 2 AA 373-74, at 8-9. Sheila was also involved in a sexual relationship with a young woman named Qunise Toney ("Qunise"). 2 AA 408, at 145-147.

On March 23, 2005, Sheila spent the night over at Qunise's apartment. 2 AA 374-75, at 12-13. Sheila came back to the Pecos Apartment around 6:30 AM on March 24, 2005. 2 AA 375, at 14. Debra was preparing for work, when Sheila walked into their apartment. 2 AA 375, at 14-16. Sheila stayed home from work on March 24. 2 AA 375 at 15. Once Debra left for work, Sheila was alone in the Pecos Apartment. 2 AA 375, at 15.

Throughout the day, Sheila conversed with people on her cell phone. She talked to Qunise while Qunise was at work. 2 AA 409, at 152. Qunise noticed music playing in the

background during the conversation, which was not surprising because Debra recently purchased a new stereo system for the apartment. 2 AA 374, at 10-11, 2 AA 410, at 155. Sheila also talked to her mother several times that day. 2 AA 375, at 16. During her last phone conversation with Sheila around 1:00 PM, Debra testified that the phone went dead. 2 AA 375, at 16. Qunise testified that she received a phone call from Sheila's cell phone at 1:35 PM but no one responded when she answered. 2 AA 410, at 154. Qunise tried to call Sheila back several times but ended up only getting Sheila's voicemail. 2 AA 410, at 155.

Debra returned to the Pecos Apartment around three in the afternoon. 2 AA 376, at 19. Debra honked her horn to get Sheila out of the apartment to help carry grocery bags upstairs. 2 AA 376, at 19. One of Debra's neighbors, Robert Lewis ("Robert") came downstairs and helped Debra with her grocery bags. 2 AA 376, at 19.

When Debra reached the front door of her apartment, she noticed that the door was closed but not locked. 2 AA 376, at 19-20. Robert followed Debra into the Pecos Apartment with some grocery bags and waited in the living room as Debra searched for Sheila. 2 AA 376-77, at 20-21. Debra walked into the apartment and noticed that her new stereo was missing. 2 AA 376, at 20. Debra called out for her daughter but received no response. 2 AA 376, at 20. She noticed that her bed was "messed up" and heard a water dripping sound emanate from the bathroom. 2 AA 376, at 20. Eventually, Debra made her way to the bathroom to turn the water off. 2 AA 376, at 20.

Inside the bathroom, Debra noticed that the shower curtains were pulled shut. 2 AA 377, at 21. Debra pulled the curtain back to find her daughter Sheila submerged in the bathtub with part of her face sticking out of the water. 2 AA 377, at 21-22. Debra noticed that the water in the bathtub was still very hot. 2 AA 377, at 22. Debra became hysterical. 2 AA 385, at 56. Robert lifted Sheila out of the bathtub. 2 AA 377, at 23. A friend or family member covered up Sheila's naked torso area before the police arrived at the scene. 2 AA 383, at 85-86.

Robert went next door, his mother's apartment, and told his family members that Sheila needed help. 2 AA 368, at 122-22. Someone from that apartment called 9-1-1. 2 AA 369, at 125-26. Hysterical, Debra left the scene to get her son Ralph, who lived close to the Pecos

Apartment. 2 AA 377, at 23-24 Robert's niece and other stayed at the Pecos Apartment on the phone with the 9-1-1 operator until police got to the apartment. 2 AA 368-9. Paramedics arrived at the Pecos Apartment it was too late for them to render any aid or revive Sheila. 2 AA 365, at 111.

Several pieces of personal property were missing from the Pecos Apartment. Debra testified that Sheila's cell phone and bank card were missing. 2 AA 378, at 26. Additionally, Debra noticed that some jewelry and pillow case from her bed were missing from the apartment. 2 AA 378, at 26. Debra also reported that her new stereo systems along with all her compact discs were missing. 2 AA 378, at 26. Detectives theorized that the pillow case was used to transport stolen property. 3 AA 517-18, at 52-53.

Sheila's body had no major external injuries. 3 AA 520, at 61. There was also no sign of forced entry into the apartment. 2 AA 478, at 20. Some items in the bathroom were knocked over but there were no obvious signs of a struggle or fight. 2 AA 393, at 86-87; 2 AA 479, at 21. However, the Las Vegas Metropolitan Police Department ("LVMPD") detectives noticed that Sheila's jeans and underwear were positioned in a way that was not consistent with someone taking off their own clothes to take a bath. 2 AA 394, at 90-91. Sheila had two superficial injuries to her body. 2 AA 353, at 64. She had a bruise on her left abdomen and she had a scrape on her knee. 2 AA 353, at 64.

Dr. Lary Simms ("Dr. Simms"), a forensic pathologist at the Clark County coroner's office testified at trial that Sheila suffered several internal injuries. 2 AA 349-360. Sheila had two hemorrhages on her right scalp. 2 AA 351, at 56. This indicated that Sheila suffered some a blunt force injury to her head around the time of her death. 2 AA 351-52, at 56-57. Sheila also had several injuries to her neck area. 2 AA 351, at 53-56. The injuries to her neck indicated that Sheila was manually strangled. 2 AA 351, at 54-55. The injuries were consistent with someone applying pressure with his hands with the intent to cause injury. 2 AA 352, at 57-58. Additionally, small hemorrhages in Sheila's eyes indicated that pressure was applied to her neck which led to a build up of blood in the veins that burst. 3 AA 351, at 53-54. Furthermore, Dr. Simms testified that Sheila had fluid in her lungs, which was a sign of drowning. 2 AA 352, at 60.

Dr. Simms also testified that Sheila had multiple lacerations in her vaginal area which indicated that Sheila was sexually assaulted. 2 AA 350, at 51-52. The doctor also noted that there was no swelling associated with these injuries, which indicated that Sheila was sexually assaulted very close to the time of her death since swelling takes about 20 to 30 minutes to become visible. 2 AA 350-51, at 52-53. Linda Ebbert, a sexual assault nurse examiner, testified at trial that photographs of injuries to Shelia's vaginal area were more consistent with non-consensual sex. 2 AA 447, at 82-83. The coroner's office found that Sheila's cause of death was from drowning with strangulation as a contributing factor and the matter was a homicide. 2 AA 354, at 68.

At the autopsy, DNA samples from semen were collected from Sheila's vaginal area. 2 AA 483, at 38-39. Kristina Paulette ("Paulette"), a forensic scientist for the LVMPD forensic lab was able to generate a DNA profile of two unknown males from the vaginal swabs and extracts taken from Sheila's underwear. 3 AA 548, at 36. Paulette testified at trial that over 99.99% of the world's population could be excluded as one of the contributors of DNA found in Sheila's vaginal swabs. 3 AA 550, at 42. Paulette excluded Robert Lewis as possible source of the DNA collected from Sheila. 3 AA 549, at 37-38. She entered the DNA profiles into CODIS, a data base for DNA information. 3 AA 549, at 38-39.

The case went cold for several weeks. Detective George Sherwood ("Detective Sherwood") was the lead detective in Sheila's homicide case. 2 AA 477, at 16. He investigated an alleged burglary that took place around the same time in the same apartment complex, but it was determined to be unrelated to Sheila's murder. 2 AA 481-82, at 31-33. Instead, the burglary was intoxicated individual who attempted to get into an apartment where he used to reside. 3 AA 522, at 69. With no suspects, Sheila's murder remained unsolved. However, in May 2005, Detective Sherwood learned about an event that provided him with information regarding the identity and intent of Sheila's murderer.

Less than three months later after Sheila's murder, on May 3, 2005, Marilee Coote ("Marilee"), a 45 year woman who lived in an apartment located on East Russell was found dead in her apartment. 2 AA 422, at 202-204. Similar, to Sheila's case there were no signs of forced

entry. 2 AA 439, at 52. Marilee was found laying in her living room completely naked. 2 AA 410, at 210. Similar to Sheila, Marilee had no outward signs of injuries besides a thermal injury to Marilee's pubic hair and inner thighs caused by application of heat to the area. 2 AA 355, at 72. Additionally, several items of personal property were submerged in water in a bath tub and other items appeared to have been put through a machine wash in the apartment. 2 AA 424, at 211-12; 2 AA 429, at 12.[6]

Dr. Simms testified at trial about Marilee's autopsy. Marilee suffered several injuries to her neck, similar to Sheila, which indicated that she was manually strangled. 2 AA 355, at 71. The neck injuries were consistent with someone applying pressure to inflict injury. 2 AA 357, at 77. Also similar to Sheila, Marilee suffered injury to her head from blunt trauma contemporaneous with the time of her death. 2 AA 356, at 76. Moreover, again like Sheila, Marilee had injuries to her vaginal area indicating that she was sexually assaulted. 2 AA 356, at 75. The police collected DNA samples from semen collected in Marilee's vaginal area. 2 AA 442, at 63. The coroner's office concluded that Marilee's death was caused by strangulation and the manner of death was homicide. 2 AA 359-60, at 88-89.

Juanita Curry ("Juanita"), Marilee's downstairs neighbor, testified at trial that on morning of May 3, 2005, she noticed emergency personal going up and down the stairs to Marilee's apartment. 3 AA 508, at 14-16. While emergency personnel were still in the apartment complex, the Defendant came to Juanita's door. 3 AA 509, at 17-18. Juanita knew the Defendant through her friend Mawusi Ragland. 3 AA 509, at 18. Ms. Ragland lived in the apartment next door to Marilee. 2 AA 442, at 62. The Defendant attempted to come into Juanita's apartment when emergency personnel came downstairs from the apartment above. 3 AA 509, at 18. Defendant told Juanita that police made him nervous. 3 AA 509, at 19.

Through the investigation of Marilee's murder, the police requested and received a DNA sample from the Defendant through a buccal swab. 2 AA 442, at 62. The police compared the Defendant's DNA profile with the DNA profile created from DNA evidence collected from

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[6] A latent print examiner expert testified that when items are wet or been submerged in water it is difficult to obtain latent prints off of them. 2 AA 451, at 98-99.

Marilee and a carpet stain located under Marilee's legs. 3 AA 552, at 50. The police learned that Defendant's DNA profile matched the DNA found in Marilee and on the carpet beneath her. 3 AA 553, at 53. The frequency of the profile is rarer than one in 650 billion people. 3 AA 552, at 51-52. So to a scientific certainty, the Defendant was identified as the source of DNA found in Marilee and on the carpet stain. 3 AA 552, at 52.

Defendant's DNA profile was entered into CODIS and it was revealed that Defendant's profile was consistent with one of the contributors of DNA taken from the vaginal swabs at Sheila's autopsy. 3 AA 522, at 71. Paulette testified at trial that Defendant could not be excluded as the DNA source unlike 99.99% of the population. 3 AA 550, at 42. After receiving notification of the CODIS hit, Detective Sherwood focused on defendant as a possible suspect in Sheila's murder. 3 AA 523, at 73-75.

The police talked to Debra and found out that the Defendant actually dated Debra in the past. 2 AA 378, at 27-28. Debra told police that the Defendant had met Sheila before as well. 2 AA 378, at 28. She testified that the last time she saw the Defendant while Sheila was alive was two weeks before Sheila's death. 2 AA 379, at 29. Sheila and Debra were outside their Pecos Apartment when they spotted the Defendant. 2 AA 379, at 29. Defendant noted that Debra had changed apartments in the complex. 2 AA 379, at 29. Debra asked the Defendant what he was doing at the apartment complex and the Defendant told her that he was working at the apartment complex as a maintenance man. 2 AA 379, at 30. At trial, the property manager for the apartment complex testified that Defendant never worked at the complex. 3 AA 571-72, at 128-29.

Debra also testified that after Sheila's murder, the Defendant was very interested in helping her cope with the grief of her daughter's loss and even drove her to appointments to see a psychologist. 2 AA 379, at 31-32. Defendant asked Debra for updates regarding the investigation of Sheila's case. 2 AA 379, at 32. The Defendant asked Debra if the police ever found out what happened to Sheila or who killed her. 2 AA 379, at 32. At no point did the Defendant ever claimed or mentioned to Debra that he had any type of sexual relationship with Sheila. 2 AA 379, at 32.

With the new DNA information, the police re-investigated Sheila's murder. 2 AA 483, at 40. The police questioned Sheila's friends about other possible sexual relationships she may have had with men. 2 AA 483-84, at 40-41. The police discovered that Sheila also had a casual sexual relationship with George Brass. 2 AA 494, at 81-82. The police questioned Brass and he volunteered that he had a sexual encounter with Sheila the morning on the day she was murdered. 2 AA 484, at 42-43; 2 AA 494, at 82. Brass told police that after the sexual encounter with Sheila he left to go to work at Wal-Mart. 2 AA 494, at 82-83. DNA testing showed that Brass could not be excluded as the second DNA contributor to the mixture of male DNA collected from Sheila. 3 AA 551, at 47-48.

The police investigated Brass's alibi. They found out that on March 24, 2005, Brass checked into work at noon, went to lunch at 4 PM, returned to Wal-Mart at 5 PM and finally left work at 7:45 PM on March 24, 2005. 2 AA 498, at 99. There was no indication that anyone changed Brass's time record. 2 AA 498, at 99-100. Moreover, the Wal-Mart where Brass worked at was located good distance away from the Pecos Apartment with no convenient driving route. 3 AA 527-28, at 92-93. Thus, Brass checked into work before Sheila's murder and left for lunch after Sheila body was discovered.

On August 26, 2006, Detective Sherwood interviewed the Defendant about Sheila's murder. 3 AA 524, at 78. At the time, the Defendant was incarcerated in the Clark County Detention Center due to the Marilee Coote murder. 3 AA 666. Detective Sherwood told the Defendant that he was not going to question him about his pending case but about a separate matter. 3 AA 524, at 80. The detective read the Defendant his Miranda rights from a card and the Defendant acknowledged that he understood his rights. 3 AA 524, at 79-80. The Defendant signed the card in Detective Sherwood's presence. 3 AA 524, at 80. Detective Sherwood asked the Defendant if he knew Debra. 3 AA 525, at 82-83. The Defendant did not respond to the question. 3 AA 525, at 83. He then told the detective that he was not going to tell him if he knew Debra until the detective told him why he was being interviewed. 3 AA 525, 83-84. Detective Sherwood informed the Defendant that he was investigating Sheila's death. 3 AA 526, at 85-86. Defendant told the detective he did not know a Sheila. 3 AA 526, at 86. After

Detective Sherwood told the Defendant that Sheila was Debra's daughter, the Defendant told the detective that he only knew Sheila by her nickname. 3 AA 526, at 86. Defendant told the detective that he had his own problems and that he did not want to be involved in someone else's problems. 3 AA 526, at 87-88.

Eventually, Defendant was arrested and charged with Murder, Sexual Assault, Burglary and Robbery relating to Sheila.

ARGUMENT

I

THE COOTE MURDER EVIDENCE WAS PROPERLY ADMITTED

Defendant contends that the trial court improperly allowed the State to introduce bad act evidence, namely the Coote murder. However, the district court considered the matter in a Petrocelli[7] hearing and found that it was admissible with an admonishment to the jury. Defendant fails to show why the district court was "manifestly wrong" in its reasoning. Therefore, the Defendant's conviction should not be reversed.

NRS 48.045(2) provides that evidence of other crimes may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. To be deemed an admissible bad act, the trial court must determine, outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-1065 (1997).

Ultimately, the decision to admit or exclude evidence lies within the discretion of the court. Salgado v. State, 114 Nev. 1039, 1043, 968 P.2d 324, 327 (1998). This Court has held that the trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and will be given great deference. Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). Once the trial court makes it's determination, his or her decision

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[7] Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

will not be disturbed absent a manifest abuse of discretion. Felder v. State, 107 Nev. 237, 241, 810 P.2d 755, 757 (1991), citing Hill v. State, 95 Nev. 327, 594 P.2d 699 (1979).

On August 1, 2008, the district court held a Petrocelli hearing regarding whether the State would be permitted to introduce evidence of Defendant's murder of Marilee Coote and Rena Gonzalez. 2 AA 267-324. At the hearing, DNA analyst Paulette testified that the Defendant was identified as the source of the semen detected on the vaginal and anal swabs of Marilee. 2 AA 271. The Defendant was also identified as the source of semen found on the carpet stain removed from underneath Marilee. 2 AA 271. As for Gonzalez, Paulette testified that there was semen found but due to lack of sperm heads there was no way to identify the DNA source. 2 AA 272. Finally, Paulette testified that she was the analysis that worked on Sheila's case and 99.9934 percent of the world population could be excluded from DNA detected on the vaginal swab of Sheila, but that the Defendant could not be excluded. 2 AA 273. Once she received a CODIS hit that Defendant was not excluded as a source of DNA in Sheila's case, Paulette testified took a confirmatory step and processed her own DNA results to ensure there was a proper match. 2 AA 280-81.

At the hearing, the State argued that the evidence went to intent because it demonstrated that Sheila did not have consensual sex with the Defendant. 2 AA 288. This was especially relevant because the Defendant indicated that he was going to make a consent defense. 2 AA 288. Additionally, the State argued that it demonstrated identity because of the unique circumstances surround the murder.

The district court found that evidence of Marilee's murder would be allowed at trial in this case. 3 AA 649. The district court found that evidence of Marilee case "is sufficiently similar and nexus in time" to Sheila's case. 3 AA 318. The court also found that there was clear and convincing evidence, especially considering the DNA, that the Defendant committed Marilee's murder. 3 AA 312-13. Additionally, the court also found that the probative value was not substantially outweighed by unfair prejudice. 3 AA 649. In coming to its ruling, the district court noted that the Defendant was acquaintances of both Sheila and Marilee, meeting both women through women he used to date. 2 AA 316. It was also noted that in both cases there were signs

of violent sexual assaults and DNA evidence that directly implicated the Defendant. 2 AA 316. Additionally, it was probative because two sexual assaults with such similarities undermine the Defendant's argument that he had consensual sex with Sheila. 2 AA 318.

On October 15, 2008, the district court denied Defendant's Motion for Reconsideration. 2 AA 333, at 11. Again, the district court found that (1) it was clear that the Defendant murdered Marilee due to the DNA evidence; and (2) that it was relevant for identity and intent because the modus operandi was so similar. 2 AA 332, 7-8. The district court constantly admonished the jury with a limiting instruction regarding character evidence before all testimony about Marilee's murder was introduced and provided a limiting jury instruction. 2 AA 334, at 13; 1 AA 172 (Instruction 26).

In his brief, the Defendant does not argue and therefore concedes that there was clear and convincing evidence that the Defendant murdered Marilee. Thus, the State will only address the argument regarding the other two Tinch requirements.

A. The Coote Charges Were Relevant To Identity and Intent

The district court correctly ruled that evidence of Marilee's murder and sexual assault was relevant to identity and intent in this murder case.

In Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985), evidence of other acts was admitted to show identity, intent, motive and common plan. Gallego, 101 Nev. at 788, 711 P.2d at 861. The defendant in Gallego was charged with the 1980 kidnapping of two young women from a shopping mall, assaulting them and bludgeoning them to death with a hammer. Id. at 784, at 858. The trial court allowed the State to introduce evidence that Gallego kidnapped two young women from a shopping mall in 1978, sexually assaulted them and shot and killed them. Id. at 788-89, at 861. This Court found that the evidence was properly admitted as it was "not remote in time from the killings here considered" and that "substantial similarities" were shown to exist between the two events, indicating that the evidence was relevant to issues of identity as well as common plan. Id., at 789, at 861. Finally, this Court found that the probative value outweighed prejudice to the Defendant. Id.

Moreover, this Court has found a particular modus operandi to a crime can be relevant and admissible under NRS 48.045(2) when the identity of the perpetrator is at issue. This Court found the identity exception to NRS 48.045(2) generally involves situations where a positive identification of the perpetrator has not been made, and the offered evidence establishes a signature crime so clear as to establish the identity of the person on trial. Mortensen v. State, 115 Nev. 273, 280, 986 P.2d 1105, 1110 (1999) (citing Canada v. State, 104 Nev. 288, 756 P.2d 552 (1988)).

In this case, the State needed to demonstrate that any sexual encounter with the Defendant was non-consensual and that Brass did not commit the sexual assault and murder. The evidence was probative because it showed that the Defendant committed a similar murder and sexual assault; therefore, it was unlikely that the Defendant just happened to have two consensual sexual encounters with two women who were then murdered allegedly by someone else. It also made it less likely that Brass supposedly faked an alibi by having someone else clock in and out for him.

There were several similarities in the murders. Both Marilee and Sheila were casual acquaintances of the Defendant. They both knew the Defendant through women the Defendant had dated. Defendant chose locations where people would not find his presence suspicious.[8] Both women were killed in their apartments while they were alone during the daylight hours with no sign of forced entry. Both women's bodies were found naked face up in their apartment. Additionally, small items of personal property were taken from both women. The Defendant also attempted to destroy evidence by immersing it in water in both cases. Even more telling was that both women were violently sexually assaulted and suffered blunt trauma to their heads close in time with their murder. Manual strangulation was a factor in both deaths. While the coroner's office found that Sheila cause of death was drowning, the coroner's office also found that strangulation was a contributing factor. Finally, and possibly most important, DNA evidence obtained by vaginal swabs of both decedents directly tied the Defendant to both

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[8] At Sheila's apartment complex Defendant told people that he worked for the owners as maintenance man. At Marilee's apartment complex, he was dating one of the tenants.

murders, which occurred less than three months apart. Thus, testimony regarding details of Marilee's murder was plainly relevant to the identity and intent. Therefore, the district court was not manifestly wrong in allowing such evidence at trial

B. The Probative Value Of Marilee's Murder Outweighed The Prejudicial Effect.

As stated in Tinch, the probative value of the bad acts evidence must not be substantial outweighed by the danger of an unfair prejudicial effect. Tinch, 113 Nev. at 1176, 946 P.2d at 1064-1065. Typically, the prejudice cannot be brought on by the probative value of the evidence. United States v. Bonds, 12 F.3d 540, 572-574 (6th Cir. 1993).

This Court has affirmed previous district court's decisions to admit evidence of other murders or attempted murders in the past. See Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985); Homick v. State, 108 Nev. 127, 825 P.2d 600 (1992); Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985) *superseded by statute on other grounds* as stated in Thomas v. State, 120 Nev. 37, 83 P.3d 818 (2004). Significantly, courts have explained that evidence is not "prejudicial" simply because it is incriminating. For instance, in United States v. Harrison, 679 F.2d 942 (D.C. Cir. 1982), the court held that allowing the extrinsic evidence was permissible explaining:

> …There is nothing "unfair" in admitting direct evidence of the defendant's past acts by an eyewitness thereto that constituted substantive proof of the relevant intent alleged in the indictment. The intent with which a person commits an act on a given occasion can many times be best proven by testimony or evidence of his new acts over a period of time prior thereto….

Id. at 948

In this case, as shown in Argument I(A), the probative value of Marilee's murder is immense. The State needed to demonstrate lack of consent in order to prove the Defendant sexually assaulted Sheila. Evidence that the Defendant manually strangled and violently sexually assaulted Marilee was extremely probative because it is highly unlikely that the Defendant had consensual rough sex with both women and then someone else murdered them on the same day. Additionally, it provided strong evidence that Defendant, not Brass, committed murder. While Brass testified that he was at work during the time of the murder the Defendant attempted to place doubt in the jury's mind by suggesting that someone could have clocked Brass in at work, leaving Brass free to commit the crime. 2 AA 489.

Moreover, the State limited the testimony regarding Marilee's murder to facts necessary to demonstrate the similarities to Sheila's murder. Dr. Simms testified to coroner's findings in both murders, which were similar in both cases. Monica Ramirez testified that she found Marilee's body naked, face up (similar to how Debra found Sheila) and that she did not move Marilee's body, setting up later testimony. 2 AA 422-23, at 203. Consuelo Henderson briefly testified that Marilee did not have a boyfriend and was not prone to put random personal belongings into her washing machine. 2 AA 444. Crime Scene Analyst Jeff Smirk testified about items found in Marilee's apartment that were placed in the washing machine and the bath tub. 2 AA 429-30, at 12-15. Another crime scene analyst testified for foundation regarding the carpet stain found under Marilee's body later discovered to contain the Defendant's DNA. 2 AA 436, at 39-40. Ebbert, the SANE nurse, testified to the indications of sexual assault in both cases. 2 AA 447. Edward Guenther testified to the lack of fingerprint evidence against the Defendant found in Marilee's apartment similar to Fred Boyd's testimony of lack of fingerprint evidence found in Sheila's apartment. 2 AA 420, at 194-195; 2 AA 453, at 105. Mr. Guenther also discussed why it was difficult to obtain latent prints off wet or submerged items. 2 AA 451, at 98-99.

Detective Donald Tremmel testified at trial to circumstances surrounding Marilee's murder including the position of the body, the lack of forced entry, signs of sexual assault and how he acquired DNA from the Defendant. 2 AA 438-42. The detective did not testify at this trial about three separate occasions he interrogated the Defendant about Marilee and Rena Gonzales murder. 1 AA 101. Juanita Curry's, Marilee's neighbor and friend, brief testimony was used to demonstrate that the Defendant was at Marilee's apartment complex at the time of her murder. The State did not elicit testimony from Ms. Curry of several peculiar interactions the Defendant had with her that day including his numerous attempts to get into her apartment and his attempt to kiss her. 3 AA 99-100. Finally, Paulette testified to the DNA evidence connecting the Defendant to both murders.

Evidence of Marilee's murder and sexual assault was necessary for intent and identity purposes. The probative value of the evidence far outweighed the danger of unfair prejudice. Therefore, Defendant's conviction should be affirmed.

C. The Evidence Presented Did Not Exceed the District Court Order.

The Defendant asserts that the testimony of Ramirez, Henderson and Curry went beyond the scope of the district court's order on the matter. The Defendant admits that he did not make an objection at trial based on these grounds.

In order to preserve an issue for review, a defendant must object and distinctly state the grounds for the objection." Johnson v. Egtedar, 112 Nev. 428, 434, 915 P.2d 271, 275 (1996). Because Defendant failed to object at trial, he must establish that the alleged error was both plain and affected his substantial rights. McConnell v. State, 120 Nev. 1043, 1058, 101 P.3d 606, 617 (2004). Plain error has been defined as that which is "'so unmistakable that it reveals itself by a casual inspection of the record.'" Patterson v. State, 111 Nev. 1525, 1529, 907 P.2d 984, 987 (1995) (citing Torres v. Farmers Insurance Exchange, 106 Nev. 340, 345 n.2, 793 P.2d 839, 842 (1990)). For an error to be plain it must be clear under existing law. Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) (internal citations omitted).

The district court found that the State could put on Marilee's case to show intent and identity. 2 AA 381; 3 AA 649. Once the Defendant related a defense that he had consensual sex with Sheila as he did in his opening statement; the evidence of Marilee's murder became more relevant. 2 AA 347, at 38; 2 AA 348, at 41

As shown above, the State used all the witnesses in this fashion. Ms. Ramirez, testified to the position of the body and how the body was found, which were similar to the discovery of Sheila's body. Ms. Henderson testified that Marilee did not have boyfriend implying that she was not involved with the Defendant, similar to Debra's testimony that the Defendant was not in a relationship with Sheila. Additionally, Ms. Henderson also testified that Marilee would not typically submerge personal items in the washer or bath tub, indicating that the Defendant did such thing in attempt to spoil evidence. Finally, Ms. Curry testimony was used to demonstrate how the Defendant became a suspect in Marilee's case and then later in Sheila's case. Moreover,

considering the DNA and other evidence presented in this case, the Defendant is unable to demonstrate his substantial rights were affected by the brief testimony of these three individuals.

Therefore, the district court did not plainly err by allowing such testimony to be heard at trial.

II

DEFENDANT'S CONFRONTATION RIGHTS WERE NOT VIOLATED

Defendant alleges his confrontation rights were violated because the State presented expert findings without calling the specific expert to testify at trial. Specifically, Dr. Simms, a forensic pathologist at the Clark County Medical Examiner's Office testimony at trial included information gleaned from Dr. Ronald Knoblock's coroner's reports of Sheila and Marilee. Dr. Knoblock is a forensic pathologist that formerly worked in the Clark County Medical Examiner's Office. 2 AA 349-50, at 46-50. Dr. Knoblock authored those reports while he worked at that office. 3 AA 349, at 48; 3 AA 355, at 70. However, Dr. Simms formed his own opinions on the murders after an independent review of the materials (autopsy photographs, toxicology screen, autopsy findings) 2 AA 350, at 50; 2 AA 351, at 55-56; 2 AA 354-55, at 68-69; 2 AA 359-60, at 88-89 .

Additionally, LVMPD DNA analyst Paulette testified at trial regarding her own DNA findings in Sheila's case. She also testified about DNA report on DNA found in Marilee authored by Thomas Wahl, a DNA analyst who formerly worked in the LVMPD forensic lab. 3 AA 551, at 48.[9] However, Paulette did her own re-testing of DNA evidence in Marilee's case. 3 AA 553, at 53-54. She testified that like Wahl's testing, she found that the Defendant was the contributor to the DNA profile in the carpet stain found beneath Marilee and that the DNA profile was rarer than 1 in 650 billon. 3 AA 553, at 54-55.

The Defendant did not object at trial to the admission of Dr. Simms and DNA expert Paulette's testimony and thus waived the issue. Therefore plain error analysis should be applied to this matter.

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[9] It should be noted that both Dr. Knoblock and Wahl testified at the preliminary hearing in the Coote case. 1 AA 86-7.

The Sixth Amendment to the U.S. Constitution guarantees a defendant the right "to be confronted with the witnesses against him." United States Const. Amend. VI This protection applies to the States via the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794–95, 89 S.Ct. 2056, 2062–063 (1969).

The U.S. Supreme Court in Crawford v. Washington, 541 U.S. 36, 59, 124 S.Ct. 1354, 1369 (2004), held that statements that are "testimonial" in nature, provided by a witness who does not testify at trial, are not admissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. However, the Court failed to define the scope of "testimonial" statements. Crawford, 541 U.S. at 68, 124 S.Ct. 1354 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.").

However, the Court did describe three formulations of a "core class" of "testimonial statements": 1) Ex-parte in-court testimony or its functional equivalent, such as affidavits, custodial examinations, or similar pretrial statements that a declarant would reasonably expect to be used for prosecution; 2) Extrajudicial statements contained in formal testimonial materials such as affidavits, depositions, prior testimony, or confessions; and 3) Statements made under circumstances where it is reasonable to believe the statement will be available for later use at trial. Id. at 51–52, 124 S.Ct. 1354.

Recently, the Court had occasion to apply Crawford to notarized certificates issued by forensic analyst attesting to their findings. Melendez-Diaz v. Mass., 557 U.S. ___, 129 S.Ct. 2527, 2531 (2009). Melendez-Diaz involved a drug trafficking case in which the defendant allegedly stashed cocaine in the police vehicle on his way to jail. Id. at 2530. After forensic analysts performed tests, they submitted signed, notarized certificates reporting their findings, including identifying the substance as cocaine. Id. at 2531. The defendant objected to submission of the certificates asserting it would violate the Confrontation Clause; however, the certificates were admitted. Id. None of the analysts testified during the defendant's trial. Id. The Court held that under such circumstances—where the prosecution proved an element of

the offense by a sworn certificate, rather than by live testimony at trial (or a showing of witness unavailability and the prior opportunity for cross-examination)—the admission of the certificates amounted to error under a straightforward application of Crawford's holding. Id. at 2542.

The certificates in Melendez-Diaz were prepared "specifically for use at the [defendant's] trial . . . ." Id. at 2540. Their "sole purpose" was to provide prima facie evidence of the composition, quality, and the net weight of the narcotic analyzed. Id. at 2533. Further, the certificates contained "only the bare-bones statement that 'the substance was found to contain cocaine.'" Id. at 2537. The defendant did not know what tests were performed, whether the tests were routine, and whether interpreting the results required the exercise of judgment or the use of skills that the analysts may not have possessed. Id.

Justice Thomas, who made up the fifth vote in the five-to-four holding of Melendez-Diaz, concurred. He wrote separately, "[t]o note that I continue to adhere to my position that 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions.'" Id., 129 S.Ct. at 2543 (*citing* White v. Illinois, 502 U.S. 346, 365, 112 S.Ct. 736 (1992) (Thomas, C, concurring). He further stated he joined the majority because the certificates of analysis in question in Melendez-Diaz were "quite plainly" affidavits that fall within the core class of testimonial statements governed by the Confrontation Clause. Id. at 2543.

A. The DNA Report Was Not Testimonial

There several important difference with the DNA report and the situation Unlike in the Melendez-Diaz case. Unlike the certificate of analysis in Melendez-Diaz, the DNA report was not admitted into evidence at trial. Also unlike Melendez-Diaz, the DNA report was not an affidavit made in lieu of testimony. In this case, the State expert, Paulette, reviewed the report, testified that she agreed to its findings and was subject to cross-examination. Moreover, Paulette testified to the procedures of the LVMPD forensics laboratory, the same laboratory Wahl worked at when he authored the DNA report, and was subject to cross-examination. Finally,

Paulette re-tested the Defendant's DNA profile after she received a CODIS hit in Sheila's matter.[10]

Paulette testified to what made up a DNA profile. 3 AA 548, at 35-36. She also testified to how the forensic lab acquired DNA evidence to create a profile. 3 AA 548, at 36-37. Further she explained how she compared DNA profiles to see if she found a match. 3 AA 549, at 38-40. She even used a chart, stipulated to by the Defendant, to aid the jury with the DNA evidence. 3 AA 548, at 34. Moreover, she explained how DNA material is preserved in her laboratory. 3 AA 548, at 40. Finally, she also discussed the statistics of the DNA findings and what it meant per lab policy. 3 AA 551, at 46; 3 AA 552, at 51-52.

During cross-examination, Paulette testified to why testing was done over a period of time instead of all at once. She also testified regarding possible DNA mixtures. Finally, she answered questions about the CODIS database. 3 AA 553-54, at 55-59.

In People v. Johnson, 394 Ill.App.3d 1027 (Ill. App. 2009), the defendant challenged an expert's testimony regarding DNA test results, arguing that he had no opportunity to cross-examine the analysts who conducted the testing. The court distinguished Melendez-Diaz, noting that "[i]n contrast with certificates presented at trial" there, the DNA expert in the case before it "testified in person as to [her] opinion based on the DNA testing and [was] subject to cross-examination." Johnson, 394 Ill.App.3d at 1037. The court noted that experts are permitted to disclose underlying facts and data to the jury in order to explain the basis for their opinions. It concluded that the DNA report at issue was offered as part of the basis for the expert opinion, so there was no confrontation violation.

The California Supreme Court has found that a DNA report is not testimonial hearsay. People v. Geier, 41 Cal.4th 555, 593-94, 161 P.3d 104, 131 (Cal. 2007). In Geier, the defendant alleged a violation of his confrontation rights under Crawford because the opinion of the prosecution's DNA expert was based on testing she did not personally conduct. The Geier court

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[10] Additionally, Defendant's own DNA expert did not dispute LVMPD's forensic laboratory method of extracting DNA and agreed with the statistical calculations made by Paulette in both Sheila's and Marilee's cases. 3 AA 580-81, at 83-85

extensively reviewed different opinions from several jurisdictions before concluding that "scientific evidence memorialized in routine forensic reports is not testimonial." Geier, 41 Cal.4th at 606, 161 P.3d at 139, 61 Cal.Rptr.3d at 621. The court went on to point out that the DNA analyst's notes during testing were not themselves "accusatory, as DNA analysis can lead to either incriminatory or exculpatory results." Geier, 41 Cal.4th at 607, 161 P.3d at 140, 61 Cal.Rptr.3d at 622. In contrast, the accusatory statements, that the defendant's DNA matched that taken from the victim's vagina and that such a result was very unlikely unless the defendant was the donor, the California Supreme Court noted, came from the live testimony of the DNA expert. Geier, 41 Cal.4th at 607, 161 P.3d at 140.

While the Melendez-Diaz Court noted this Court's ruling in Las Vegas v. Walsh, 121 Nev. 899, 124 P.3d 203 (2005), as one of those cases in compliance with the rule set forth in Melendez-Diaz that case does not apply here. In Walsh, 121 Nev. at 906, 124 P.3d at 208, this Court held that affidavits specified in NRS 50.315 are testimonial because while they may document standard procedures, they are made for use at a later trial or legal proceeding. Thus, their admission, in lieu of live testimony, would violate the Confrontation Clause. Walsh, 121 Nev. at 906, 124 P.3d at 208. The DNA report in this case was not an affidavit or formalized testimonial material made in lieu of testimony as was the case in Walsh. Moreover, DNA report was not done for the purposes of litigation but was an analysis of physical evidence to locate a possible suspect in a routine police investigation made in the ordinary course of the laboratory's business. Such reports are just as likely to be exculpatory.

In this case, the report was not read into evidence as a sworn affidavit. Indeed, they were not read into evidence at all. Instead, Paulette was testifying about the results of DNA testing in a lab where she was employed as a DNA analyst. Additionally, Paulette even re-tested some of the DNA evidence found in Marilee's case. She also reworked the Defendant's DNA sample and created her own DNA profile for the Defendant. 3 AA 549, at 40. Paulette's testimony about the test results performed by someone else is not akin to the affidavit-like certificates of analysis used in Melendez-Diaz. Whereas the certificates of analysis in Melendez-Diaz were "functionally identical

to live, in court testimony," the test results here served as a partial basis for the opinion of a testifying expert.

B. The Coroner's Reports Were Not Testimonial.

The Defendant erroneously proposes that Melendez-Diaz should apply to the coroner's reports of Sheila and Marilee. However, the instant case is distinguishable from Melendez-Diaz. First, as stated above, the Defendant had an opportunity to cross-examine the medical examiner who independently reviewed both cases and gave his own opinion regarding the victims' injuries and causes of death. 2 AA 354, at 68; 2 AA 359, at 88. Additionally, the Dr. Simms worked in the same office in the same position as Dr. Knoblock and therefore could testify to the office procedures and was subject to such cross-examination. Finally, unlike the materials in Melendez-Diaz, the coroner's reports were not admitted into evidence.

Like DNA report, the coroner's reports were not formalized documents read into testimony and acting as "functionally identical to live, in court testimony," but instead were documents that served as a partial basis for the opinion of a testifying expert.

C. Dr. Simms' And Paulette's Testimony Were Properly Admitted.

Melendez-Diaz also does not apply in the circumstances as related above because Dr. Simms and Paulette formed their own independent opinion at least to the victims' injuries and DNA. The fact that they used non-testifying expert's reports or examinations in forming such an opinion does not violate Melendez-Diaz.

Expert witnesses can testify "within the scope of [their specialized] knowledge," NRS 50.275, based on facts or data "made known to (them) at or before the hearing," NRS 50.285(1), that are "of a type reasonably relied upon by experts in forming opinions or inferences" and therefore "need not be admissible in evidence," NRS 50.285. Pursuant to NRS 50.285, experts are allowed to base their opinion on otherwise inadmissible information, if that information is reasonably relied upon by others in the field. Estes v. State, 122 Nev. 1123, 1141, 146 P.3d 1114, 1126 (2006). In addition, Nevada law allows an expert to testify as to the basis of her opinion. NRS 50.305 ("The expert may testify in terms of opinion or inference and give his reasons therefore…").

In this case, both Dr. Simms' (2 AA 349) and Paulette's (3 AA 547) testimony constituted expert testimony because they were experienced and qualified to make such opinions. Dr. Simms and Paulette properly relayed in part on information found in other expert's reports in reaching their opinion. Thus, in accordance with Estes and NRS 50.305, Dr. Simms and Paulette properly gave the basis of their opinion, even if the reports were arguably inadmissible.

Dr. Simms reviewed Dr. Knoblock's reports, toxicology screens and the autopsy photographs and subsequently agreed with Dr. Knoblock's findings as stated in the coroner's reports. Moreover, Paulette reviewed Wahl's DNA reports and conducted her own DNA testing on some of the evidence and found with the same statistical likelihood that the DNA found on Marilee was generated by the Defendant.

D. The Coroner's Reports and DNA Report Are Exceptions to the Hearsay Rule

Pursuant to NRS 51.035, hearsay evidence is evidence of a statement made other than by a testifying witness which is offered to prove the truth of the matter asserted. The general rule is that hearsay is inadmissible. NRS 51.065. Pursuant to NRS 51.135, business records are an exception to the hearsay rule and thus are admissible.

In Melendez-Diaz, the Court reiterated its position in Crawford that, "Most of the hearsay exceptions covered statements by their nature were not testimonial—for example, business records . . . ." Business records are exempt because they have been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. Melendez-Diaz, 129 S.Ct. at 2539–40. Documents, such as the affidavits prepared by the analysts, created specifically for use at trial, are considered testimony against a defendant; therefore the analysts were subject to confrontation under the Sixth Amendment. See Melendez-Diaz, 129 S.Ct. at 2540. The Court held in Melendez-Diaz, 129 S.Ct. at 2538, that the notarized certificates at issue were not exempt under the business record exception because, like police reports, they were generated by law enforcement officials ***and*** created essentially for use in court.

To qualify as a business record, it must: 1) Be a memorandum, report, record or compilation of data; 2) of Acts, events, conditions, opinions or diagnoses; 3) Made at or near the time by, or from information transmitted; 4) Made by a person with knowledge; 5) All in the course of a regularly conducted activity; and 6) As shown by the testimony or affidavit of the custodian or other qualified person. NRS 51.135.

The coroner's report in the instant case is a report of an act, event, condition, opinion or diagnosis, made near the time of the decedent's death by a person with knowledge, in the course of a regularly conducted activity, as shown by the testimony of a qualified person. Accordingly, the coroner report is admissible under the business records exception.

This Court would not be alone in holding that coroner's reports qualify as business records, in fact, several courts have held that autopsy reports fall under the business record exception to hearsay. See, *e.g.*, United States v. De La Cruz, 514 F.3d 121, 132–134 (1st Cir. 2008) (holding an autopsy report was a business record noting "[c]ertainly it would be against society's interests to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case); United States v. Feliz, 467 F.3d 227 (2nd Cir. 2006) (holding that autopsy reports are admissible as both business records and public records).

Here, the coroner's report was not created for use in court. Conducting a medical examination to determine the cause of death is part of the duties of a medical examiner. See Clark County Code §2.12.250 (1967); see also NRS 259.050(1). State and County laws make it the duty of the Clark County Coroner to inquire into and determine the cause and manner of death that occurs under several other circumstances such accidental, suspicious, unattended and overdose. Investigating the "cause and manner of death" entails an initial investigation and a medical examination, i.e., an autopsy. As such, an autopsy report is not created in anticipation of prosecution, it is a portion of the overall process followed by the Clark County Coroner's office in its investigations of several types of deaths—not just those that might lead to prosecution.

Finally, Pursuant to NRS 51.165, records or data compilations, in any form, of death, are admissible under the hearsay rule if the report was made to a public office pursuant to

requirements of law. Accordingly, a coroners' report is also exempt under the public records exemption.

Application of Melendez-Diaz to autopsy reports was contemplated by the dissenting Justices. The Justices were concerned about the range of other scientific tests that *may* be affected by the Court's holding set forth in Melendez-Diaz citing a law review article, Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement, 96 Cal. L.Rev. 1093, 1094, 1115 (2008) (noting that every court post-Crawford has held that autopsy reports are not testimonial, and warning that a contrary rule would "effectively functio[n] as a statute of limitations for murder"). Melendez-Diaz, 129 S.Ct. at 2546 (Kennedy, A., dissenting) (emphasis added).

As for the DNA report, Paulette testified that Wahl's report was kept in the course of business for the forensic lab. 3 AA 551, at 48. Paulette testified that she was qualified as a custodian of record to review Wahl's report. 3 AA 551-52, at 48-49. She testified that as manner of course she entered the DNA information obtained in Sheila's case into a database that stores DNA information. 3 AA 549, at 38-39. After she received a notification that the DNA matched the Defendant she reworked Defendant's DNA sample and came to the same result.

Considering Justice Thomas narrow concurrence in Melendez-Diaz it is unlikely the majority of United States Supreme Court Justices would hold the coroner's reports or Wahl's DNA report to be applicable to the rule announced in Melendez-Diaz, therefore this Court should affirm Defendant's conviction and sentence.

E. Error Analysis

Even if this Court found that Paulette's testimony regarding Wahl's findings was improper, such an error would have been harmless. In considering whether a Confrontation Clause violation is harmless, this Court looks to "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, . . . and, of

course, the overall strength of the prosecutor's case." Hernandez v. State, 124 Nev. 60, 188 P.3d 1126, 1135–36 (2008).

As stated above, Paulette retested some of the DNA evidence and thus independently found, like Wahl, that the Defendant's DNA profile matched the profile found in Marilee's case. Moreover, Paulette also did the DNA testing in Sheila's case. Therefore, any error in introducing Wahl's findings would not affect the Defendant's substantial rights and any case would be harmless. The State had a strong case, independent of Wahl's findings, to convict the Defendant of murder and sexual assault of Sheila as shown in Argument I(c) and VII. Thus, the any error would have been harmless.

III

DEFENDANT'S STATEMENT WAS PROPERLY ADMITTED

Defendant claims that his constitutional rights were violated because Detective Sherwood interviewed him about Sheila's case after he was in custody for another matter. However, it is well established law that law enforcement officials may discuss a matter with a defendant who is in custody for other unrelated charges. In this case, the Defendant was advised of his Miranda rights and purposefully chose to waive them and even signed a Miranda card. Thus, Defendant's claim is without merit.

A. Defendant's Sixth Amendment Right To Counsel Was Not Violated.

The Sixth Amendment right to counsel prevents admission at trial of a defendant's statements which police have deliberately elicited after the right has attached and without obtaining a waiver or providing counsel. Kaczmarek v. State, 120 Nev. 314, 326, 91 P.3d 16, 24 (2004) (citing Fellers v. United States, 540 U.S. 519, 124 S.Ct. 1019, 1022-23, (2004)). Once a defendant invokes the Sixth Amendment right to counsel, the government must cease further attempts to obtain his statements until he has been provided counsel, unless he initiates the conversation and waives his rights. Kaczmarek, 120 Nev. at 327, 91 P.3d at 25 (citing McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991)).

However, the Sixth Amendment right to counsel is offense specific and does not require suppression of statements deliberately elicited during a criminal investigation merely because the right has attached and been invoked in an unrelated case. Kaczmarek, 120 Nev. at 327, 91 P.3d at 25 (citing McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991)).

In his Opening Brief, the Defendant acknowledges that the rule allows police officers to interview a person in custody about an offense unrelated to his custody without violating the Defendant' Sixth Amendment rights. Thus, the Defendant Sixth Amendment rights were not violated.

B. Redacting References To Defendant's Attorney Was Not Error

Defendant argues that the district court erred in not allowing him to introduce into evidence the portion of his statement where he requested to talk to his attorney.

It is within the trial court's discretion to admit or exclude evidence and that determination will not be disturbed unless manifestly wrong. Walker v. State, 116 Nev. 670, 674-75, 6 P.3d 477, 479-480 (2000).

In this case, the Defendant attempted to cross-examine Detective Sherwood about that portion of the interview where the Defendant indicated would not decided whether to answer questions until he spoke to his attorney. 3 AA 534, at 117-118. Prior to Detective Sherwood's testimony, the Defendant sought to exclude the introduction of Defendant's statement on Sixth Amendment grounds and was denied. 3 AA 505-6, at 3-6. However, the district court agreed references to the attorney should not be made. Therefore when the Defendant appeared to open the door to this issue, the State objected to point out that possibility. 3 AA 534, at 118. After a bench conference, the district court sustained the objection. 3 AA 534, at 118. Later, Defendant's counsel made a record stating that he intended, for strategic reasons, to bring in testimony that the Defendant wanted to talk to his attorney before deciding to answer questions. 3 AA 540, at 4. The district court stated that it believed such testimony would imply that the Defendant, by exercising his right to counsel, had something to hide and that a negative inference can be drawn against the Defendant for doing something he was entitled to do. 3 AA

541, at 5-6; See Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976); Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229 (1965); Diomampo v. State, 185 P.3d 1031, 1039-40 (2008). The State noted for the record that it stopped questioning Detective Sherwood about the Defendant's statement right before the Defendant told the detective that he wanted to talk to his attorney. 3 AA 541, at 5-6. Thereafter, Defendant's responses continually contained something about wanting to talk to his attorney. 3 AA 541 at 5.

While its true that NRS 47.120 generally permits all of a statement to be admitted if the opposing party so desires, the statute cannot cure a Griffin or Doyle problem. Thus the district court, balancing between the constitutional problems and the statute, did not err.

The defendant cites Domingues v. State, 112 Nev. 683, 917 P.2d 1364 (1996) in support of his claim. In Domingues, the State introduced portions of Domingues's admissions to police. Domingues, 112 Nev. at 694, 917 P.2d at 1372. The district court prohibited defense counsel from cross-examining the detective regarding other portions of the statement that were arguably favorable to Domingues. This Court found that the portion of the interview was relevant and thus the trial court erred in denying it. Id. However, this Court found the trial court's error harmless because there was overwhelming evidence that Domingues's committed the murders.

In this case, the excluded statement portion was not directly exculpatory and allowing such questioning would have left a false impression with the jury. Unlike, Domingues where the excluded statement directly aided the defendant's defense and included exculpatory statements, the excluded portions in this matter did not help the Defendant's case. Instead, as pointed out by the district court, it made the Defendant look even less cooperative with police.

Finally, even if the district court did err, *in arguendo*, the Defendant was not prejudiced by the error. As stated above, the Defendant does not make any statements that are remotely exculpatory in the excluded portion. Additionally, despite Defendant's assertions, it is unlikely that Defendant's claims that he needed to talk to attorney would have been seen as cooperative. Especially, since there were no future statements made by the Defendant to the police. Moreover, the evidence against the Defendant was overwhelming. See Arguments VII. Therefore, Defendant's conviction should be affirmed and his sentence upheld.

IV

AUTOPSY PHOTOGRAPHS WERE PROPERLY ADMITTED

Defendant asserts the district court erred in allowing the State to admit cumulative and gruesome autopsy photographs at trial.

The admissibility of evidence is within the trial court's sound discretion; this Court will respect the trial court's determination as long as it is not manifestly wrong. Byford v. State, 116 Nev. 215, 231 994 P.2d 700, 711 (2000). Additionally, this Court has previously held that gruesome photographs are admissible at trial if they aid in ascertaining the truth. Scott v. State, 92 Nev. 552, 556, 554 P.2d 735, 738 (1976). Such photos have been deemed appropriately admitted when they depict the crime scene, the severity of the wounds and the means of infliction. Byford, 116 Nev. at 231, 994 P.2d at 711. Despite the Defendant's apparent reliance on Dearman v. State, 93 Nev. 364, 566 P.2d 507 (1977), nothing in that case mandates the district court review each proposed photograph outside the presence of the jury. Dearman, 116 Nev. at 369-70, 566 P.2d at 410.

In this case, the Defendant objected to the use of some of the autopsy photographs during Dr. Simms testimony. 2 AA 353, at 62. It is never mentioned on the record, which photographs in particular were objected to by the Defendant. The district court asked Dr. Simms if he "went through all of the photos that were available and pick out a minimum number that could demonstrate each of the points you needed to make." 2 AA 353, at 62. Dr. Simms told the district court that he had. 2 AA 353, at 62. Thereafter, Defendant's objection was overruled. 2 AA 353, at 62. The Defendant renewed the objection during testimony about Marilee's autopsy. 2 AA 357, at 80. The district court asked Dr. Simms the same question and Dr. Simms responded that he had picked out the minimum number to demonstrate the points he was making with the jury. 2 AA 357-58, at 80-81. The State noted that there were hundreds of photographs taken at each autopsy and only a few of them were used at trial. 2 AA 358, at 81.

The autopsies photographs were especially necessary in this case because the State was attempting to prove the identity and intent of the Defendant by demonstrating that he murdered Sheila in the same manner that he had murdered Marilee. The State presented several

photographs depicting the severity of the internal wounds and the means of infliction. The photographs that were used in conjunction with the testimony of Dr. Simms, helped the jury understand the basis of his findings. Additionally, the timing of Sheila's injuries was critical due to Brass's alibi. As its members are without medical training, the jury might otherwise be incapable of understanding the extent of the victims' injuries without the visual assistance of photographs to coincide with the expert testimony. For example, the pattern of injuries to Sheila's and Marilee's neck indicated that the Defendant had manual strangled them probably with the use of his hands. 2 AA 352, at 57-58. Cropped photographs of the hemorrhages in the neck would not have been as informative because it would not have shown the full pattern of injuries found within the victims' neck.

In light of Dr. Simms' testimony that he used the minimum amount of autopsy photographs necessary to make his points to the jury and the State's attempt to demonstrate the similarities in Sheila's and Marilee's murders in order to establish identity and intent, the district court did not abuse its discretion in admitting the photographs.

V

DISTRICT COURT PROPERLY EXCLUDED IMPROPER HEARSAY

Defendant asserts that the district court erred in not allowing him to elicit testimony from inmate William Kinsey that he thought Sheila was dating someone named "Keith" around the time of her death. However, it was undisputed that Kinsey was incarcerated during this period of time and therefore had no personal knowledge regarding who Sheila was dating. The district court heard the matter outside the presence of the jury and correctly ruled that such testimony from Kinsey was inadmissible hearsay.[11]

As stated above, it is within the trial court's discretion to admit or exclude evidence and that determination will not be disturbed unless manifestly wrong. Walker, 116 Nev. at 674-75, 6

[11] The Defense opened with testimony it should have known was hearsay and would not have been admissible. 2 AA 347, at 38-39. The State believes they should have been admonished for this since the State would have been.

P.3d at 479-480 (2000). Hearsay statements are inadmissible at trial unless they fall under an exception. NRS 51.065. Hearsay is defined as an out of court statement used to prove the truth of the matter asserted. NRS 51.035. The policy behind excluding hearsay is that it becomes difficult or impossible to test the credibility of the declarant, since cross-examination to ascertain a declarant's perception, memory, and truthfulness is not available. See Deutscher v. State, 95 Nev. 669, 684, 601 P.2d 407, 417 (1979).

In this case, William Kinsey was set to testify for the Defense. 3 AA 584. However, the State objected to Kinsey's testimony as hearsay since he had been in State custody since December of 2004, several months before Sheila's murder. 3 AA 584, at 6. The State specifically objected to Kinsey's proposed testimony that he was allegedly aware that Sheila was dating someone named "Keith". 3 AA 541, at 6. The district court found that Kinsey did not have personal knowledge that Sheila was dating someone named Keith because he was incarcerated. 3 AA 541, at 8. Sheila never visited him with a man named Keith. 3 AA 542, at 10. Defendant's counsel admitted that Kinsey did not know the Defendant. 3 AA 542, at 9. Thus, the only way Kinsey would know that Sheila was dating someone named Keith was if someone told him. Therefore, Kinsey's comments were hearsay and the district court did not err in excluding it.

The Defendant claims that it was necessary present Kinsey's testimony to counter testimony by Debra and Ameia Fuller that Sheila had a relationship with Brass. However, unlike Kinsey testimony, Fuller testimony was not used to demonstrate the truth of the matter- that Sheila had a sexual relationship with Brass- but how the police found out about Sheila's relationship with Brass. Fuller testified that she told police that Sheila had a relationship with Brass. 2 AA 493, at 77-78.

Moreover, other testimony about Brass's and Sheila's relationship was based on personal knowledge. At trial, Debra testified that Sheila lived with her. 2 AA 373, at 5-6. She further testified that Sheila and Brass were close friends but was unaware that they had a sexual relationship. 2 AA 374, at 9-10. Brass testified at trial that he had a sexual relationship with Sheila. 2 AA 484, at 81. Finally, Defendant's witness Anthony Culverson, a member of Brass's family, testified that he knew Brass and Sheila were "seeing each other off and on." 2 AA 475, at

5-6. Thus, there was a substantial amount of personal knowledge presented at trial that Brass had a relationship with Sheila that was sometimes sexual. There was no such evidence introduced about the Defendant.

Defendant cites to DePetris v. Kuykendall, 239 F.3d 1057 (9th Cir. 2001) in his brief for support of his position.[12] However, that case is easily distinguishable from this matter. In DePetris, the defendant killed her husband with shotgun while he was sleeping and presented evidence at trial of an imperfect self-defense. Defendant wanted to introduce handwritten journals authored by the deceased, which detailed extreme acts of violence and cruelty against his first wife and others. DePetris, 239 F.3d at 1060-63. The defense involved Defendant's fear of her husband and a belief that he would harm her as he had others. DePetris, 239 F.3d at 1063. The Ninth Circuit ruled the exclusion of the journal was improper because it went to the "heart of the defense" and there was also a strong indicia of reliability because the journal was in the deceased own handwriting. DePetris, 239 F.3d at 1062.

Kinsey testimony does not have any indicia of reliability. Kinsey never told police this information when they interviewed him and he did not send a letter stating this and only allegedly mentioned this in a not taped interview with the Defense. 3 AA 541, at 7. Unlike DePetris, the information was not in the victim's handwriting. Kinsey was in prison during the relevant timeframe and had no personal knowledge on the matter. There was no corroborating evidence introduced at trial that Sheila was dating a person named "Keith" much less that "Keith" was the Defendant, her mother's former boyfriend.

Moreover, if this Court finds that Kinsey's testimony was improperly excluded it was harmless error. There was overwhelming proof of Defendant's guilt as set forth in Argument VII. Given the overwhelming evidence, Defendant's conviction should be affirmed.

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[12] Defendant also relies on Chambers v. Mississippi, 410 U.S. 284 (1973) in arguing that the trial court's barring of the hearsay statements constituted a denial of a fair trial in violation of constitutional due process requirements. However, the Court specifically confined its holding to the 'facts and circumstances' presented in that case. United States v. Scheffer 523 U.S. 303, 316, 118, S.Ct. 1261, 1268 (1998) (internal citations omitted).

VI

THERE WAS NO PROSECUTORIAL MISCONDUCT

Defendant claims that he was denied a fair trial because of prosecutorial misconduct. Specifically, the Defendant claims that the prosecutor made improper indirect remarks about Defendant's silence. When addressing these claims, this Court engages in a two-step analysis. Valdez v. State, 124 Nev. 97, 196 P.3d 465, 476 (2008). First, this Court must determine if the conduct was improper, and second, if it is does whether it warrants a reversal. Id. Regarding the second step, a conviction will not be overturned if the conduct amounts to harmless error. Id. To determine if a harmless-error review is appropriate, this Court needs to determine if "the prosecutorial conduct is of a constitutional dimension." Id.

Determining whether misconduct is of a constitutional dimension depends on its nature. Id. If the conduct impermissibly comments on a specific constitutional right then it is considered a constitutional error. Id. Misconduct may also be of a constitutional dimension if in light of the proceedings the misconduct so infected the proceedings with unfairness that due process was denied. Id. If there is no constitutional dimension this Court shall apply a harmless-error review only if the defendant properly preserved his/her objection for appellate review. Id. If not preserved, it shall be reviewed for plain error. Id.

In this case, the Defendant acknowledges that his counsel failed to object regarding the alleged indirect references to Defendant's silence and that this Court should only consider this matter for plain error. See Defendant's Opening Brief, pg. 36.

Defendant claims that in prosecutor's closing and rebuttal "made numerous direct and indirect comments concerning" the Defendant's decision not to talk to the detectives or testify at trial citing to remarks made at 3 AA 595 and 3 AA 612-13. However, it is clear from the transcripts that the prosecutor was not indirectly commenting on Defendant's right to remain silent but instead she was commenting on the evidence. Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (citation omitted) (a prosecutor's comments should be considered in context).

The State, in order to demonstrate beyond a reasonable doubt that the Defendant murdered Sheila, needed to show that George Brass could not have been her murderer since both men's DNA was found on the victim. The remarks referenced by the Defendant in his Opening Brief show the State's attempt to persuade the jury that George Brass could not be the murderer. The State argued that the evidence showed that Brass had sexual intercourse with Sheila before he went to work, several hours before Sheila was murdered. 3 AA 595, at 51-52. Moreover, the State cited many other reasons why George Brass would not harm Sheila such as he was already in a relationship with her, was good friends with her brother and Sheila's brother was dating Brass's sister. 3 AA 596, at 53-54. The prosecutor simply compared Brass's lack of reasons to murder Sheila with that of the Defendant. 3 AA 596, at 54. The Defendant was not young like Brass or Sheila's other boyfriend William Kinsey, in fact he use to date Sheila's mother, and it was unlikely Sheila would want to have sexual intercourse with him. 3 AA 596, at 54. The State pointed out that the evidence showed that both Brass and the Defendant were questioned about Sheila's murder while in custody. However, Brass was cooperative while the Defendant pretended, at first, not to know Sheila and Debra and was uncooperative.

Defendant did make objection during the State's rebuttal based on the State's reference to Defendant's statement during his interrogation, claiming that it was an improper comment on post-Miranda silence. However, the Defendant voluntarily waived his rights and therefore statements he made after he was advised of his Miranda rights were properly admitted. The district court correctly pointed out that Defendant was not silent. 3 AA 613, at 121. In fact, it was undisputed at trial that the Defendant was read his Miranda rights and even signed the Miranda card. 3 AA 524, at 79-80. Thus, it was entirely proper for the State to comment on Defendant's answers or lack of answers provided during his police interview.

VII

SUFFICIENT EVIDENCE SUPPORTS SEXUAL ASSAULT AND MURDER

The standard of review for sufficiency of the evidence upon appeal is whether the trier of fact, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In reviewing a claim focused on sufficiency of the evidence, the relevant inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984); (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979)) (emphasis in original). "Where there is substantial evidence to support a jury verdict, it will not be disturbed on appeal." Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

The evidence supports the jury's determination that the Defendant was guilty of sexual assault and murder. Dr. Simms testified that an autopsy of Sheila's body showed that she suffered blunt trauma to her head shortly before she died, was manually strangled and violently sexually assaulted. Moreover, Sheila was sexually assaulted very close in time with her death. Therefore, the person who murdered Sheila was likely the person who sexually assaulted her. Paulette testified that a mixture of DNA was found on Sheila's body through a vaginal swab and that the Defendant could not be excluded as a source when over 99.99 percent of the population could be excluded. She also testified that George Brass could not be excluded as the other source of the other DNA found on Sheila. George Brass testified that he had a sexual relationship with Sheila and that he had sexual intercourse with her the day that she had died. He further testified that he went to work after he had sexual intercourse with Sheila. Time records from Brass's work indicate that he was at work at the time of Sheila's death. Debra, Sheila's mother, testified that she used to date the Defendant and that she had seen the Defendant near her apartment two weeks before Sheila's murder. The Defendant told Debra he was working as a maintenance man for apartment complex. This turned out to be false.

Additionally, evidence was presented that Defendant committed a very similar murder just a few weeks after Sheila's death. Like Sheila, Marilee was found naked in her apartment face up with no sign of forced entry. Marilee was also an acquaintance of the Defendant like Sheila. Also like Sheila, Marilee was violently sexually assaulted. The Defendant was identified as the source of the DNA found on Marilee's body. Marilee, like Sheila, experienced blunt trauma to her head shortly before she died and was manually strangled. In both cases, the Defendant took personal property and used water in attempt to spoil forensic evidence. The evidence of Marilee's murder helped prove the identity and intent of the Defendant regarding Sheila's case.

Thus, the jury had sufficient evidence that the Defendant was guilty of Sheila's sexual assault and murder.

VIII

NO CUMULATIVE ERROR EXISTS

The Nevada Supreme Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986)); see also Big Pond v. State, 101 Nev. 1, 2, 692 P.2d 1288, 1289 (1985). The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." Big Pond, 101 Nev. at 3, 692 P.2d at 1289. The doctrine of cumulative error "requires that numerous errors be committed, not merely alleged." People v. Rivers, 727 P.2d 394, 401 (Colo. App. 1986); see also People v. Jones, 665 P.2d 127, 131 (Colo.App 1982). Evidence against the defendant must therefore be "substantial enough to convict him in an otherwise fair trial" and it must be said "without reservation that the verdict would have been the same in the absence of the error." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1998).

Insofar as Defendant failed to establish any error which would have entitled him to relief, there is and can be no cumulative error worthy of reversal. Notably, a defendant "is not

entitled to a perfect trial, but only a fair trial…" Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (citing Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974)). Here, Defendant received a fair trial. All the errors alleged here are without merit. Therefore, Defendant's conviction must stand.

CONCLUSION

For the foregoing reasons, Defendant's conviction and sentence should be affirmed.

Dated this 19th day of February 2010.

Respectfully submitted,

DAVID ROGER
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BY /s/ Nancy A. Becker
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CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 19th day of February 2010.

Respectfully submitted

DAVID ROGER
Clark County District Attorney
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BY /s/ Nancy A. Becker
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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on this 19th day of February, 2010. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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FILED
MAR - 5 2010
CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

NORMAN FLOWERS,

Defendant,

CASE NO. C228755
DEPT. NO. VII

MOTION FOR NEW TRIAL BASED UPON NEWLY AVAILABLE EVIDENCE, SPECIFICALLY THE CONVICTION OF GEORGE BRASS FOR MURDER

DATE OF HEARING:
TIME OF HEARING:

COMES NOW, Defendant NORMAN KEITH FLOWERS, by and through his attorneys, DAVID M. SCHIECK, Special Public Defender, RANDALL H. PIKE, Assistant Special Public Defender, and CLARK W. PATRICK, Deputy Special Public Defender, and hereby moves this Court pursuant to NRS 176.515 for a new trial based upon the conviction of GEORGE BRASS, an alternate suspect in this case for a Murder.

This Motion is made and based on the pleadings and papers on file herein; the Points and Authorities and Affidavit of Counsel attached hereto; and the argument of counsel at the hearing of the Motion.

RECEIVED
MAR - 5 2010
CLERK OF THE COURT

SPECIAL PUBLIC DEFENDER
CLARK COUNTY NEVADA

NOTICE OF MOTION

TO: THE STATE OF NEVADA, Plaintiff; and

TO: DISTRICT ATTORNEY'S OFFICE, Plaintiff's attorneys:

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion for new trial based upon available evidence, specifically the conviction of George Brass for murder on for hearing before the above-entitled Court on the 17 day of March 2010, at the hour of 8:45 a.m.

POINTS AND AUTHORITIES

FACTUAL BACKGROUND

The State's initial theory in this case, as evidenced in it's Motion to admit other bad acts, was that there was a confederate of the Defendant, and that he was the source of the unknown DNA. The State, shortly prior to trial and after the disclosure of George Brass's contact with Ms. Quarles prior to her death appropriately amended its Information regarding the presence or involvement of a third party. The Court also heard the evidence regarding Jesse Nava, who was in possession of the stereo or "a stereo" after the death of Ms. Quarles. The Jury found did not convict the Defendant of the Robbery Count.

On October 20, 2009, after the trial of the Defendant Flowers, George Brass was convicted by a jury verdict of Murder in the First degree, Attempt murder, Robbery and other charges in case no. 09-C-253756-C. This conviction, if available for impeachment, certainly would have been a significant factor in the jury's deliberations and, based upon this information, it is more than arguable that the jury may have not found defendant Flowers guilt beyond a reasonable doubt.

As the Court will recall, After the Court issued it's ruling on the Defendant's motion in limine wherein the Court determined that the matters involving Marilee Coote would be admissible, the State of Nevada identified the source of the second DNA, a George Brass. Mr. Brass provided the allowed statement to Detective Sherwood. A crime scene analyst collected 21 samples for fingerprint examinations. 2 App. 414.Prints were found on nine of those items. 2 App. 420. None of the prints belonged to Keith Flowers.

This information and the additional information from Mr. Brass about the length of his relatior ship with Ms. Quarles directly contradict the State's announced premiss at the time of the hearing that Ms. Quarles was strictly involved with women. Mr. Brass's relationship was not known to Ms. Quarles mother. It took over 3 years and additional investigation based in part on the information provided at the arguments for the Detectives to confront Mr. Brass and do the necessary DNA work. Mr. Brass was not in CODIS, due to his not yet being convicted on his pending armed robbery and murder charges. The fingerprints located at the scene that did not match Flowers were not compared to Mr. Brass. Items taken from the apartment, including a stereo and cell phone, were never found by police officers. 3 App. 517, of course, Mr. Brass' residence or vehicle was never searched as he was not identified until shortly before trial.

ARGUMENT

NRS 176.515 states that:

> "1. The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.

FLOWERS asserts, that the where, as here, identity is a crucial issue and the evaluation of testimony by the jury relating to it is a matter of constitutional magnitude, specifically invoking due process rights. Lee v. United States, 388 F.2d 737 (9th Cir. 1968). Cited in State v. Crockett, 84 Nev. 516, 519 (Nev. 1968). In determining whether or not the newly available evidence is sufficient to require the granting of a motion for a new trial, the Court, indicated that the evidence, as required under State v. Stanley, 4 Nev. 71 (1868), and State v. Orr, 34 Nev. 297, 122 P. 73 (1912), the evidence is not one of "mere impeachment, but goes to the essence of [the defendant's] guilt or innocence." Under this a murder conviction would certainly be of the nature that exceed "impeachment". This is something that seems so significant that it would be appropriate to determine that a new trial is required. As the Court stated in State v. Crockett, 84 Nev. 516, 519 (Nev. 1968). for new trial to be granted, "the trial judge must review the circumstances in their entire light, then decide whether the new evidence goes to the **essence** of the defendants

finding of guilt by the jury. The Court disapproved of the "semantic distinction between *might* and *probably*".

This information, when juxtaposed with the admission of just a portion of the Defendant's statement (see defendants motion for a new trial exhibit D) regarding this case involving what the defendant feels evolved into an improper comment on Flowers invocation of right to counsel, and his silence in violation of the Fifth Amendment, and Brass' silence for almost three years further evinces the necessity for a new trial.

CONCLUSION

It is respectfully requested that based on the foregoing argument, this Court grant Mr. Flowers a new trial.

DATED this 5th day of March 2010.

RESPECTFULLY SUBMITTED:

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- NORMAN FLOWERS, #01179383 Defendant.	CASE NO: C228755 DEPT NO: VII

OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL

DATE OF HEARING: 3/17/10
TIME OF HEARING: 8:45 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through PAMELA WECKERLY, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion For New Trial.

This opposition 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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STATEMENT OF FACTS

Marilee Coote

On May 3, 2005, Silver Pines Apartments employees discovered 45 year old Marilee Coote lying on her living room floor. Ms. Coote was a reliable employee of the Andre Agassi Center. When she did not arrive at work by 7:30 a.m., a co-worker became concerned and asked the apartment workers to do a welfare check. After the apartment employees discovered the body, they contacted the police.

Initially, paramedics arrived, but Ms. Coote was already deceased. Police followed. Ms. Coote was found lying on her living room floor, facing up and completely nude. Inside her belly button were ashes from burnt incense. The skin between her upper thighs and her pubic area was burned. Coote's apartment was locked, but her purse and keys were missing. Inside Coote's washing machine, police found personal photos, bills, and identification belonging to Coote. The items appeared to have been washed because they had a soap residue on them. In the bathtub, under ten inches of water, police found other items of paperwork, a phone book, and jewelry boxes covered with a towel. The apartment was otherwise very neat and undisturbed.

The detectives initially did not view this incident as a homicide. Therefore, they documented the scene, but did not collect evidence. After conducting an autopsy, however, Dr. Knoblock concluded the Coote died as the result of strangulation. He also noted tearing of Coote's labia and anal area. Dr. Knoblock concluded that these tears were sustained ante-mortem. Coote also had contusions on her arms and forearms.

Ms. Coote was an acquaintance of defendant Norman Flowers's girlfriend, Mawusi Ragland, who also lived in the Silver Pines complex.

Juanita Curry

While various officers were in Coote's apartment during the morning of May 3, 2005, another resident of the complex, Juanita Curry, came in contact with the defendant, Norman Flowers. This occurred between 7:00 and 10:00 a.m. Curry also was an acquaintance of Flowers's girlfriend, Mawusi Ragland. Curry lived two floors below Coote. Curry noticed

the police and paramedics going in and out of Coote's apartment. From apartment employees, Curry believed that Coote died of natural causes. Sometime that same morning, defendant Flowers knocked on Curry's door. He asked if he could use her phone. He said he was supposed to meet up with Mawusi that morning. She agreed and gave him the phone.

Curry is physically disabled and sometimes walks with a cane. Because of her compromised physical state, she was not comfortable allowing Flowers in her apartment, so she let him use her cordless phone in the doorway. After Flowers used the phone, he came back a few times later, each time with a new request. He asked to use the phone again. He asked for water. At one point, he asked to use her bathroom. She agreed, but when he went in the bathroom, she stepped out of the apartment. As she did so, he asked her to come in and help him find the bathroom light. She refused. When Flowers was at her doorstep, she also noticed that when the police walked back and forth, he would turn his head away. He commented, "the police make me nervous." During the final conversation in Curry's doorway, Flowers leaned down and tried to kiss Curry on the mouth. She turned away.

Curry observed Flowers walk across the parking lot to the doorway of resident Rena Gonzalez's apartment that morning. Curry left the complex a little before 11:00 in the morning. When she returned, she learned that the police also had discovered the body of resident Rena Gonzalez. She gave a statement to police and identified Mawusi's boyfriend as someone she saw in the area of Rena Gonzalez's apartment.

Rena Gonzalez

Officers learned of the homicide involving Rena Gonzalez at approximately 4:00 p.m. that same day. Rena Gonzalez's two daughters, the oldest of whom is seven years old, came home from school and found their mother on her knees leaning against her bed in her master bedroom. She was unresponsive. They ran and got their friend, Shayne. Shayne returned with them. They tried to remove a phone cord around Gonzalez's neck and called 911.

Gonzalez's apartment was clean and undisturbed with the exception of the following: a broken blue plastic hair comb and a single green sandal were both in the front hallway. Officers could not locate Gonzalez's purse or keys.

Gonzalez was at the foot of her bed, with her body bent at the waist. Her upper torso was on the bed with her face down and arms outstretched. A black phone cord and black lanyard were around her neck. She was dressed in shorts, which were slightly pulled down, and a shirt. She had the matching blue hairclip hanging from her hair and blood coming from her ear.

At autopsy, Dr. Simms noted extensive bruising to Gonzalez's breast, right arm and right leg. Dr. Simms concluded that Gonzalez died as a result of strangulation. He also noted tearing to her vaginal and anal area. Dr. Simms concluded that these injuries took place post-mortem.

Detectives learned that Rena Gonzalez was a close friend of Mawusi Ragland. In fact, the two women would trade off watching each other's children. They determined that Gonzalez had walked her daughters to the school bus the morning of the 3rd and would have returned home around 8:30 a.m. Rena Gonzalez did not work.

Mawusi Ragland

Mawusi Ragland also lived at the Silver Pines Apartments. She lived in the apartment across from Coote. She told detectives that approximately three weeks before the homicide, she and Flowers had gotten into an argument and had not spoken since. In the argument, Mawusi implied that she would socialize with other men. Mawusi had discussed Flowers with her friend Rena Gonzalez as well, although Flowers and Gonzalez had not met. According to Mawusi, Gonzalez advised her not to date Flowers.

When Mawusi returned home on the evening of May 3, she saw police vehicles. She was told her friend, Rena, had been murdered and that her other friend, Marilee, had died of natural causes. On her apartment door, Mawusi noticed a note. It was from Flowers. It stated that he tried to catch her before she went to work, but that it looked like he picked a bad day because "big shit is happening over here." He also asked if she had dated other men since their argument. Flowers called Mawusi that evening. She was very emotional and explained that both Marilee and Rena were dead. Flowers did not appear to be shocked upon hearing this news. She asked him to come over and help her through this difficult time. He

told her he'd be right over. When Flowers did not arrive in the next 90 minutes, Mawusi called him to ask where he was. He said he had not left home because when tried to call her, she did not answer her phone. He also mentioned that he had seen Rena that morning and had a short conversation with her. Mawusi asked him what time he was at the complex and Flowers responded, "I didn't kill her."

Subsequently, Flowers's DNA sample was compared with swabs from Marilee Coote's sexual assault kit. Both vaginal and rectal swabs matched to Flowers. In addition, DNA was collected from the carpet area where Coote was laying, specifically, the carpet beneath her upper thighs. That sample also matched to Flowers.

DNA was found in Rena Gonzalez's rectal swabs. Flowers is excluded as the source of this DNA. In addition, DNA was found on the phone cord around Gonzalez's neck. He is excluded as the source of that DNA as well. The partial profiles obtained from Gonzalez's rectal swabs and the phone cord are consistent with a single male source and appears to be the product of laboratory transfer or contamination. Upon retesting, no indication of the partial male profile was present in the rectal swabs.

B. Facts of Case C228755: Sheila Quarles

Less than two months prior to the murders of Marilee Coote and Rena Gonzalez, on March 24, 2005, Debra Quarles returned home from grocery shopping to her residence at 1001 North Pecos, Las Vegas, Clark County, Nevada, and found her eighteen year old daughter, Sheila Quarles, unresponsive in a bathtub containing very warm water. Debra had returned home at 2:30 in the afternoon. She was able to remove Sheila from the tub with the help of a neighbor who had helped her carry in groceries. Debra immediately called 911.

An autopsy later revealed that Sheila died from drowning. However, strangulation was a significant contributing factor to her death. Sheila also had multiple vertical lacerations on her introitus, evidence of a violent sexual assault.

Investigation revealed that Sheila spoke to her mother, Debra, at approximately 12:30 p.m. and her mother arrived home to find her dead at approximately 2:30 p.m. A stereo was

also missing from the residence. In addition, detectives learned that Sheila was involved in a lesbian relationship with an individual named Qunise Toney.

At autopsy, investigators collected samples from Sheila's vagina. Those swabs contained a mixture of DNA which included semen. Qunise Toney was excluded as being a source of any of this DNA. Sheila Quarles was the major component of the DNA. The male portion of the DNA was entered into a DNA database. When Flowers's DNA sample was collected in connection with the May murders (Coote and Gonzalez), his profile was entered into the DNA database as well. After this entry, investigators were notified that Flowers's profile was consistent with part of the minor component DNA from Sheila Quarles's vaginal swabs. In fact, 99.9934 percent of the population is excluded as being a source of that DNA, but Flowers is not. There was an additional, unknown male contributor to the vaginal swabs of Sheila Quarles as well.

After detectives were notified of the DNA match, they recontacted Debra Quarles. Quarles explained that she knew and had actually dated Norman Flowers several months before the murder. She also explained that he would occasionally give her a ride home from her work at the time and that he knew her family members. Quarles said that just prior to the murder, she saw Flowers at her apartment complex. At that time, he explained that he was working in maintenance at the complex. After her daughter's murder, Quarles suffered from depression. Flowers offered to drive her to appointments with her therapist. On several occasions, Flowers inquired to Debra whether the police had figured out who had murdered her daughter.

Detectives contacted Flowers at the Clark County Detention Center on August 24, 2006. Detectives informed Flowers of his Miranda rights and he agreed to speak with them. During the interview, Flowers said that before he would do anything to assist detectives, "I have to talk to my lawyer first . . .". Upon Flowers's vague comment, conversation continued for about another minute and the interview was terminated. The State admitted Flowers's statement up until he stated, "I have to talk to my lawyer first. . ." in the trial before Judge Bell.

In subsequent investigation, police identified the second DNA source from Quarles's vaginal swabs. The DNA was identified to a boyfriend of hers named George Brass. Brass was a friend of Quarles' brother, Ralph Quarles. Sheila Quarles's friends knew she had been having sex with Brass and told the detectives about him. Detectives then spoke to Brass, while he was in custody on unrelated murder charges. Brass voluntarily spoke to detectives and explained that he had sex with Sheila the morning of her murder and then went to work at Wal-Mart. Employment records established that Brass was at work prior to the last conversations Sheila had with her mother and Qunise, meaning Sheila was alive after Brass clocked in at work.

At the time of trial before Judge Bell, George Brass was in custody, awaiting trial, on robbery and murder charges. The attorneys representing Defendant Flowers were quite familiar with the case against Brass because their office represented Brass's co-defendant, Eugene Nunnery.

Defendant Flowers' attorneys made no motion before Judge Bell under NRS 48.045(2) to admit evidence of Brass's conduct in his charged murder and robbery in Flowers' trial. Instead, Flowers' attorneys announced ready for trial and Brass testified for the State while he was awaiting his own trial. It was quite clear to the jury that Brass was in custody when he testified. It was also apparent that it was the State of Nevada who had charged Brass in another crime. Several months after a jury convicted Flowers, Brass proceeded to trial and was convicted.

Now, Defendant Flowers moves this Court for a new trial based on alleged newly discovered evidence. The State opposes. Not only is the evidence not newly discovered, it does not amount to a proper legal basis upon which to grant a new trial.

ARGUMENT

Defendant misleadingly claims that the State's "initial theory" was that Flowers killed Quarles with a confederate. This is incorrect. Well before the time of trial, the State identified Brass as the second DNA source. The State also knew that Brass had an alibi at the time of the murder: he was at Wal-Mart working. Thus, at the time of trial, the State

theorized that Quarles voluntarily had sex with Brass before he went to work. Thereafter, Defendant Flowers sexually assaulted and murdered Sheila Quarles. The State's theory was bolstered by the fact that Sheila spoke on the phone after Brass reported to work. The theory was further proven by Dr. Simms's testimony that the sexual assault and murder of Sheila occurred contemporaneously. At trial, the defense sought to blame Quarles's murder on an assortment of other individuals, including Brass. Not surprisingly, blaming Brass was not successful because Brass had an alibi for the sexual assault and murder.

A district court may grant a new trial based on newly discovered evidence. NRS 176.515(1). The grant or denial of a new trial will not be reversed absent an abuse of discretion. Funches v. State, 113 Nev. 916, 944 P.2d 775 (1997). In order to meet the requirements for a grant of a new trial, the defense must establish the following:

> [T]he evidence must be newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; such as to render a different result probable upon retrial; not only an attempt to contradict, impeach, or discredit a former witness, unless the witness is so important that a different result would be reasonably probable; and the best evidence of the case admits.

Id. at 923-24, 944 P.2d at 779-80.

A. The Fact that Brass Was Involved in An Unrelated Murder is Not New Evidence.

At the time of Flowers's trial, George Brass was in custody. As the defense was well aware, Brass was awaiting trial on an unrelated robbery and murder case. Flowers's attorneys were quite familiar with this case because the Office of the Special Public Defender actually represented Brass's co-defendant, Eugene Nunnery. Although aware of Brass's pending case, Flowers's attorneys opted to proceed with trial rather than wait for the outcome of Brass's trial. Thus, at the time Brass testified in the Flowers trial, he was not convicted of robbery and murder. Significantly, had Flowers's attorneys truly believed that the facts of Brass's case were relevant to Quarles's murder, they had the option of filing a motion under 48.045(2) to explain how Brass's conduct in his own case related to the Quarles murder. No motion was ever filed. This is likely because the facts underlying Brass's charges concerned a robbery/murder quite unlike the sexual assault/murder inflicted

on Quarles. Flowers had the option of requesting a continuance of his own trial to see if Brass was, indeed, convicted in his case in order to ask him about the charge and year of conviction when he testified in the Flowers case, but he opted not to. See NRS 50.095. Nevertheless, both of these options were readily apparent and existed at the time of Flowers's trial. Thus, the later conviction of Brass is not new evidence. He fails to satisfy the requirements that the evidence must be newly discovered and such that the exercise of reasonable diligence would not have made the evidence known to the defense at the time of trial.

2. Brass's Conviction is Not a Sufficient Basis Upon Which to Grant a New Trial. In addition to not being newly discovered evidence, Brass's subsequent conviction would not have changed the outcome at trial. At the time of trial, two male sources of DNA were found in Sheila Quarles's vaginal swabs. One DNA profile was consistent with George Brass. The other was consistent with Defendant Flowers. The State produced lay witnesses who spoke to Sheila after Brass had clocked in at work. The State produced Brass's time card from the day of the murder. In addition, due to a pretrial motion filed by the State, the trial court permitted the State to introduce evidence that Flowers's DNA was found in the vaginal swabs and on the carpet beneath another woman who had been sexually assaulted and murdered: Marilee Coote. The evidence was admitted under 48.045(2).

At trial, Brass testified that he was acquainted with Sheila and her family. Brass said that he had sex with Sheila in the morning before she was killed and that he later reported to work that afternoon. Defendant Flowers is not contending that he has any new evidence to dispute Brass's testimony. Thus, it falls short of what is required to warrant a new trial. See Hennie v. State, 114 Nev. 1285, 1290, 968 P.2d 761, 764 (1998) (holding that new information which directly contradicted testimony by key witnesses and which could not have been discovered pretrial was sufficient to justify a new trial).

Instead, Defendant Flowers argues that Brass's subsequent conviction for murder may have been helpful to him at trial because the jury would have heard that he had been convicted of murder. Only evidence of Brass's conviction and the year it was sustained

could have been admitted by the defense. The defense would have been precluded from arguing that Brass was someone of violent character or that his subsequent conduct related to the murder of Sheila Quarles. See NRS 48.045(1). In addition, Brass's own testimony was not the critical testimony in the case. Dr. Simms testified that the sexual assault and murder were contemporaneous and the State produced lay witnesses who spoke to Sheila after her contact with Brass. The State eliminated Brass as a suspect without Brass's testimony. Thus, Defendant Flowers fails to establish that a different result was probable. See United States v. Steel, 759 F.2d 706, 713 (9th Cir. 1985) (noting that requirement that the newly discovered evidence would probably result in an acquittal is a stringent standard requiring more than mere speculation).

CONCLUSION

Based on the foregoing, the State respectfully asks the Court to deny the instant motion.

DATED this 9th day of March, 2010.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/PAMELA WECKERLY
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the above and foregoing, was made this 9th day of March, 2010, by Electronic Filing to:

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. NORMAN FLOWERS, Defendant.	CASE NO. C228755 DEPT. NO. VII

NOTICE OF APPEAL

DATE: N/A
TIME: N/A

TO: THE STATE OF NEVADA, Plaintiff;

TO: DAVID ROGER, DISTRICT ATTORNEY; and

TO: DEPARTMENT VII OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

NOTICE is hereby given Defendant NORMAN FLOWERS, presently incarcerated in the Nevada State Prison, appeals to the Supreme Court of the State of Nevada from the denial of his

. . .

. . .

. . .

Motion for New Trial on March 17, 2010.

DATED this 1 day of April, 2010.

DAVID M. SCHIECK
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By _____
RANDALL H. PIKE
DEPUTY SPECIAL PUBLIC DEFENDER
NEVADA BAR #4771
330 S. THIRD ST., STE. 800
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CERTIFICATE OF MAILING

The undersigned employee with the Clark County Special Public Defender's Office, hereby certifies that on the 1st day of April, 2010, a copy of the Notice of Appeal was deposited in the United States mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to District Attorney's Office, 200 Lewis Ave., 3rd Floor, Las Vegas NV 89155; the Nevada Attorney General's Office, 100 N. Carson, Carson City, NV 89701; and Norman Flowers, No. 39975, High Desert State Prison, P.O. Box 650, Indian Springs, Nevada 89070; that there is a regular communication by mail between the place of mailing and the place so addressed.

DATED: 4-1-2010

_____
KATHLEEN FITZGERALD
An employee of The Special Public Defender

ORDR

DAVID ROGER
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FILED

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NORMAN FLOWERS,
#01179383

Defendant.

Case No. C228755
Dept No. VII

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

DATE OF HEARING: 03/17/2010
TIME OF HEARING: 8:45 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 17th day of March, 2010, the Defendant not being present, REPRESENTED BY RANDALL H. PIKE, Deputy Special Public Defender the Plaintiff being represented by DAVID ROGER, District Attorney, through PAMELA WECKERLY, Chief Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

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///

IT IS HEREBY ORDERED that the DEFENDANT'S MOTION FOR NEW TRIAL, shall be, and it is DENIED.

DATED this 10th day of ~~March~~ April, 2010.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

Pamela Weckerly

PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

jh/MVU

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN K. FLOWERS

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 53159

Direct Appeal From A Judgment of Conviction,
Amended Judgment of Conviction and Order Denying Motion for New Trial
Eighth Judicial District Court
The Honorable Stewart Bell, District Judge
District Court No. 52733

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant Flowers is entitled to a new trial based upon the numerous violations of his constitutional rights that took place at his trial. Each of the violations is set forth at length in the Opening Brief. The State's Answering Brief fails to establish the validity of the judgment. Flowers is therefore entitled to relief.

II. REPLY TO THE STATE'S ARGUMENT

A. The district court violated Flowers' constitutional rights by allowing the State to introduce unrelated prior bad act testimony.

Flowers contends that his rights to due process and right to a fair trial were violated because the district court allowed the State to introduce prior bad act evidence of another murder which was not relevant and which was highly prejudicial. His rights were further violated because the State presented bad act evidence in excess of that permitted by the district court's order. In response, the State argues that evidence of the Marilee Coote murder was properly admitted because the two murders were sufficiently similar and that the probative value of the Coote murder was not outweighed by its prejudicial effect as such evidence was needed to prove the absence of consent in Sheila's murder. Answering Brief at 13-15.[1] The State also contends that the evidence produced at trial did not exceed the bounds allowed by the district court's order. Answering Brief at 17-18.

The State's argument that the evidence of Coote's murder was properly admitted under the identity exception to NRS 48.045(2) is without merit. Despite some marginal similarities, the State failed to show any unique or signature similarities between the two murders sufficient to satisfy the identity exception. The identity exception to NRS 48.045(2) generally involves situations where a positive identification of the perpetrator has not been made, and the offered evidence establishes a signature crime so clear as to establish the

[1]The State also contends that Flowers has conceded there was clear and convincing evidence to establish he committed the Coote murder because he did not argue so in the Opening Brief. Answering Brief at 13. This is untrue. Flowers cited the three pong test for admissibility and stated, "Flowers submits that the State failed to establish the admissibility of the Coote murder under these three prongs." Opening Brief at 19. Flowers' intent is to challenge admissibility on all three prongs but focused his arguments on the last two prongs.

identity of the person on trial . Mortensen v. State, 115 Nev. 273, 280, 986 P.2d 1105, 1110 (1999) (citing Canada v. State, 104 Nev. 288, 756 P.2d 552 (1988)).

> When the purpose for which such evidence is offered is that of identifying the defendant as the perpetrator of the charged offense through showing a modus operandi common to the charged and uncharged offenses, particular care must be exercised to insure that the inference of identity, upon which probative value depends, is of significant force. It is apparent that the indicated inference does not arise from the mere fact that the charged and uncharged offenses share certain marks of similarity, for it may be that the marks in question are of such common occurrence that they are shared not only by the charged crime and defendant's prior offenses, but also by numerous other crimes committed by persons other than defendant. On the other hand, the inference need not depend upon one or more unique or nearly unique features common to the charged and uncharged offenses, for features of substantial but lesser distinctiveness, although insufficient to raise the inference if considered separately, may yield a distinctive combination if considered together. Thus it may be said that the inference of identity arises when the marks common to the charged and uncharged offenses, considered singly or in combination, logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses. The important point to be made is that, when such evidence is introduced for the purpose of proving the identity of the perpetrator of the charged offense, it has probative value only to the extent that distinctive "common marks" give logical force to the inference of identity. If the inference is weak, the probative value is likewise weak, and the court's discretion should be exercised in favor of exclusion.

Mayes v. State, 95 Nev. 140, 142, 591 P.2d 250, 251-52 (1979) (quoting People v. Haston, 444 P.2d 91, 99-100 (Cal. 1968)).

When crimes of a certain type are committed in much the same manner, it is essential that some distinctive characteristics be demonstrated before evidence of other crimes is admitted to prove identity. Mayes, 95 Nev. at 143, 591 P.2d at 252. In Mayes, a prostitute was charged with grand larceny for allegedly stealing the victim's valuables after having sexual intercourse with the man. Id. at 141. During the trial the State called two witnesses who claimed that the prostitute had also slept with them and stole their valuables after sex. Id. This Court held it was improper to admit evidence of the other crimes because of the lack of any similar characteristics between the three thefts the defendant allegedly committed that would differ from how any other theft by a prostitute would occur. Id. Similar to Mayes, the State failed to prove any similarities between Sheila's and Coote's murder/rapes that are distinctive from what would be expected in any other murder/rape. The State contends that

there are sufficient similarities because both victims were found face up, there was evidence of strangulation and blunt force trauma and both were victimized in their homes. Answering Brief at 14-15. There is no evidence that these characteristics are distinctive to these two murders. Many murder/rape cases could share these same similarities. Also, there were substantial differences between the two incidents. See Opening Brief at 19-20. The district court erred in admitting evidence of the Coote murder.

The State's argument that evidence regarding Coote's murder was more probative than prejudicial because it was needed to prove lack of consent is without merit. Answering Brief at 15. First, the evidence was allowed for the limited purpose of proving identity, not lack of consent. 2 App. 318-19. Second, the State's propensity argument is exactly what the rule was designed to prevent. The State cannot argue and the jury cannot convict Flowers on the idea that if he committed a crime on one occasion, he must have committed it on this occasion too. NRS 48.045(2). Lastly, the probative value of the Coote murder was substantially outweighed by the danger of unfair prejudice, even if the evidence was only used for identity purposes.

> Evidence of other crimes has a strong probative value when there is sufficient evidence of similar characteristics of conduct in each crime to show the perpetrator of the other crime and the perpetrator of the crime for which the defendant has been charged is one and the same person.

Mayes, 95 Nev. at 142, 591 P.2d at 251. The probative value of the Coote murder was very low considering there were no distinctive similarities between the two crimes. By its very nature, evidence of another murder is highly prejudicial. Under these circumstances, the district court abused its discretion in finding that the probative value of the evidence was not outweighed by the danger of unfair prejudice to Flowers.

The State's last contention is also without merit. It argues conclusory that the evidence presented during trial did not exceed the court's order. The district court ruled:

> You can put on the Coote case to show intent to and to show identity by talking to the detective about the similarities in the case, the nurse and the coroner/medical examiner about the way she died, the similarities in vaginal tearing, and the DNA profile person, and then that's as far as the State is going.

2 App. 318-19. In response, the State contends that the testimony of the apartment manager who found Coote's body, 2 App. 422-23; a neighbor of Coote's who claimed to have seen Flowers while police officers were at Coote's apartment, 3 App. 509; and a friend of Coote's who testified that Coote did not watch pornography and did not have a boyfriend. 2 App. 444, was necessary because Flowers claimed he had consensual sex with Sheila. The district court's order was clear that testimony regarding the Coote murder was to be limited to the detectives and the nurse. The State's perception of what it believes is necessary to prove a case should not be allowed to trump a clear order of the court.

The district court erred in admitting the evidence regarding the Coote murder. As stated in the Opening Brief, the evidence against Brass was as equally strong. Thus, the prejudice to Flowers was great as there is a substantial likelihood that he would not have been convicted had evidence concerning the Coote case not been introduced. The judgment of conviction should therefore be reversed.

B. The district court violated Flowers' constitutional rights by allowing testimony to be introduced in violation of Crawford v. Washington and Melendez-Diaz v. Massachusetts.

Flowers contends that his rights to due process, confrontation and cross-examination were violated because the district court allowed the State to introduce testimonial hearsay evidence. In response, the State argues that testimony presented by experts concerning the findings of other experts does not violate the Confrontation Clause. The State first argues that testimony from Dr. Simms, concerning the autopsy findings, was permissible because he formed his own independent opinion after reviewing the supporting materials. Answering Brief at 18. The record refutes this argument. Dr. Simms began his testimony by explaining the credentials of Dr. Knoblock and then testified that Dr. Knoblock conducted the autopsy on Sheila on March 25, 2005. 2 App. 350. He testified that Dr. Knoblock prepared an autopsy report, took phots, discussed extensive details of Dr. Knoblock's examination, and presented Dr. Knoblock's findings. 2 App. 350-55. For example, Dr. Simms testified that Dr. Knoblock found that Sheila had been asphyxiated, found bruising on her abdomen, and found lacerations in the vaginal area. 2 App. 350. Although Dr. Simms also testified as to

his own observations from phots, there was no foundation for the admission of these phots as Dr. Simms was not present when the phots were taken and had no personal knowledge as to whether they were actually phots of Sheila. 2 App. 350. Dr. Simms also presented direct testimony about Dr. Knoblock's conclusions. 2 App. 351, 354. Similar testimony about Dr. Knoblock's examinations and findings in the Coote case was also introduced by the State. 2 App. 355-60. Dr. Simms directly presented Dr. Knoblock's findings to the jury. 2 App. 359-60. The State also contends that DNA expert Paulette testified at trial regarding her own findings in Sheila's case and the Coote case. Answering Brief at 18. The record, however, establishes that Paulette also testified about findings by Thomas Wahl, even though Wahl did not testify at trial. 3 App. 551-53.

The State next argues that the DNA report was not testimonial. Answering Brief at 21-22. It cites to People v. Johnson, 394 Ill. App.3d 1027, 1037-39 (2009) as support. Answering Brief at 41. No other post-Melendez-Diaz authority is cited. Other post-Melendez-Diaz case authority is to the contrary and holds that DNA findings by experts who do not testify at trial are inadmissible as a violation of the defendant's right of cross-examination and confrontation. See Michigan v. Payne, 774 N.W.2d 714, 725-27 (Mich. App. 2009) (finding violation under Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009) and reversing conviction under a plain error standard); Hamilton v. Texas, 300 S.W.3d 14, 19-22 (Ct. App. Tex. 2009) (finding a confrontation violation based upon one expert's testimony as to the findings of another expert who did not testify, but the error was harmless).

The State next argues that the coroner's reports were not testimonial and that the Flowers' rights of confrontation and cross-examination were not violated by the admission of testimony as to Dr. Knoblock's findings despite the absence of his testimony at trial. Answering Brief at 23-25. These arguments are without merit. Several other courts have examined autopsy reports and testimony in light of Melendez-Diaz and have concluded that they these are testimonial reports for which Crawford v. Washington is applicable. See State v. Locklear, 681 S.E.2d 293, 304-05 (N.C. 2009); Com. v. Avila, 912 N.E.2d 1014 (Mass. 2009) (expert witness's testimony must be confined to his own opinions); Wood v. State, 299

S.W.3d 200, 212-13 (Tex. App. 2009) (finding the autopsy report at issue to be testimonial and finding that an expert could not testify about the results of an autopsy because the medical examiner who performed the autopsy did not testify and the expert could not disclose the facts supporting his opinion); Martinez v. State, 2010 WL 1067560 (Tex. App. 3/24/2010) (finding an autopsy report to be testimonial and rejecting the State's business record argument and finding that an expert could not disclose facts from the autopsy report); People v. Dungo, 176 Cal.App.4th 1388, 1398-1404 (Cal. App. 2009), cert. granted 220 P.3d 240 (Cal. 2009) (finding that an autopsy report was testimonial and that the medical examiner who testified at trial was not qualified to do so because he was not a percipient witness to the autopsy and because he based his opinion upon the contents of another doctor's report as "substituted cross-examination is not constitutionally adequate"). See also Seaman, Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony, 96 Geo. L.J. 827, 847–48 (2008) (If the expert's opinion is only as good as the facts on which it is based, and if those facts consist of testimonial hearsay statements that were not subject to cross-examination, then it is difficult to imagine how the defendant is expected to demonstrate the underlying information is incorrect or unreliable.) The courts have rejected the business record argument proffered here by the State. The authority cited the State, however, all pre-date Melendez-Diaz and is therefore of negligible worth in light of the Supreme Court's rejection of this argument. See Melendez Diaz, 129 S.Ct. at 2538-40 ("Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. . . . But that is not the case if the regularly conducted business activity is the production of evidence for use at trial.").

Finally, the State asserts that the violation of Flowers' constitutional rights was mere harmless error. Answering Brief at 27. This argument is without merit. The findings of the coroner as to the cause of death and the findings of the DNA expert concerning the presence of Flowers' DNA were crucial portions of the State's case. Indeed, had this testimony been excluded, the State would have essentially no evidence against Flowers. This evidence had a significant impact upon the jury's verdict and a new trial is therefore mandated.

C. The district court violated Flowers' constitutional rights by admitting as evidence a statement given by Flowers to detectives following invocation of his right to remain silent and right to counsel.

Flowers contends that his rights to due process, a fair trial, to remain silent and to counsel were violated because the district court allowed the State to introduce evidence of statements made by Flowers at a time when he was represented by counsel, and had invoked his right to remain silent, in a case for which the conviction here serves as an aggravating circumstance. His constitutional and statutory rights were also violated because the district court prohibited Flowers from introducing his whole statement to the police after the State had introduced a portion of the statement.

The State first argues in response that Flowers' Sixth Amendment right to counsel was not violated. Answering Brief at 27 (citing Kaczmarek v. State, 120 Nev. 314, 326, 91 P.3d 16, 24 (2004); Fellers v. United States, 540 U.S. 519 (2004)). The State also notes that the Sixth Amendment right to counsel is offense specific and does not attach to investigations of unrelated cases. Answering Brief at 28 (citing Kaczmarek and McNeil v. Wisconsin, 501 U.S. 171, 175 (1991)). The State's response fails to address the primary issue presented by Flowers: did the district court err in admitting evidence of Flowers' statement to police officers because he was in custody, had been formally charged, and was represented by counsel for murder charge in the case involving Coote, at the time he was interrogated by police officers in this case, in light of the fact that the State was seeking the death penalty against Flowers in the Coote case and the conviction in this case is alleged as an aggravating circumstance in the Coote case. Flowers recognizes the general rule stated by the State in its Answering Brief, that police officers may interrogate a person who is in custody for an offense which has not yet been charged, but he submits that this general rule does not apply in a case such as this because the conviction for murder in this case is an aggravating circumstance in the other case. The fact that this case is used as an aggravating circumstance for the Coote case distinguishes it from Kaczmarek, Fellers and McNeil.

The State next argues that the district court did not abuse its discretion by prohibiting Flowers from introducing his entire statement to detectives after the State introduced a

portion of that statement. Answering Brief at 28. The State claims that the district court properly prohibited reference to Flowers' statement that he would not decide whether to answer the detectives' question until he spoke with his attorney, 3 App. 534, because reference to his counsel implicated the Sixth Amendment. Answering Brief at 28. This decision, however, was a strategic call that properly belonged to Flowers and his counsel, not the district court. The cases and statute cited by the State, at page 29 of the Answering Brief, correctly hold that the *State* or prosecution may not introduce evidence of a defendant's silence or desire to speak with his attorney. See Doyle v. Ohio, 426 U.S. 610, 619 (1976); Griffin v. California, 380 U.S. 609, 615 (1965) (the Fifth and Fourteenth Amendments forbid comment by the prosecution on the accused's silence) ; and Diomampo v. State, 185 P.3d 1031, 1039-40 (Nev. 2008) ("the prosecution is forbidden at trial . . ."). None of these cases, however, address the issue of whether a defendant may introduce evidence that he wished to talk with his attorneys before answering additional questions presented by the detectives. It was a matter of sound trial strategy for trial counsel to conclude that this testimony was less prejudicial than allowing the evidence to simply reflect that officers attempted to question Flowers and he refused cooperation without any explanation. The district court abused its discretion by substituting its own judgment for that of defense counsel as to this matter of trial strategy. The State fails to address this issue.

The State next argues that Flowers was not prejudiced by the district court's ruling. Flowers was prejudiced by the district court's decision because the jury was precluded from hearing his statement that he might be willing to discuss Sheila's death, but he wanted to talk with his attorney before doing so. 3 App. 669-71. He was further prejudiced because during closing arguments the State repeatedly emphasized Brass's cooperation with the detectives and it contrasted Flowers lack of cooperation and evasiveness with police officers, 3 App. 595, 612, 613. Had Flowers been allowed to introduce the entirety of his statement, these arguments would have had far less impact upon the jury. As a matter of fundamental fairness under the state and federal constitutions, Flowers was entitled to present this evidence and the district court's exclusion of this evidence warrants reversal of the conviction.

D. The district court violated Flowers' constitutional rights by admitting gruesome photographs from the autopsy.

Flowers contends his rights to due process and right to a fair trial were violated because the district court allowed the State to introduce gruesome photos of body parts dissected by the medical examiner during the autopsy. The State argues that the photos were highly probative as they were necessary to show the similarities between the deaths of Sheila and Coote**.** Answering Brief at 30. This argument is without merit. First, the State fails to explain how photos of Sheila's tongue were necessary considering the fact that Dr. Simms did not mention the photos during his testimony. 2 App. 354. Second, no photos of Coote's autopsy were introduced to show any similarities of injuries which the jury could have used to compare photos. Lastly, the State fails to state why cropping the photos to reduce their inflammatory nature would have rendered them less useful. The State contends in conclusory fashion that cropping the photos would not have allowed the jurors to see the pattern of injuries. Answering Brief at 31. The photo was used to illustrate the hemorrhaging inside the neck. Cropping out Dr. Simms' hands folding back the flaps of the neck would not have prohibited Dr. Simms from testifying as to the pattern of injuries inside the neck.

Next, the State contends that nothing in this Court's opinion in Dearman v. State, 93 Nev. 364, 369-70, 566 P.2d 410 (1977) compels a judge to view the photos outside the presence of the jury before ruling on its admissibility. Answering Brief at 30. In Dearman, this Court did not explicitly state that a trial judge must review each photo before determining its admissibility. However, it is clear that this Court put a lot of weight on the trials court's careful review of the photos before ruling on admissibility.

> The trial judge exercised caution and took the intermediate step of determining whether the probative value of the proffered evidence outweighed any prejudicial effect. The trial court considered all of the objections to the photographs, rejecting several and admitting others.

Id. Common sense dictates that a judge could not properly determine if the probative value of potential evidence is outweighed by any prejudicial effect without looking at the evidence first. There is "no other way for a court to make this important decision involving prejudice and redundancy." See Curtin v. United States, 489 F.3d 935, 957 (9th Cir. 2007) (a judge

must read every line of a inflammatory story in a child pornography case in order for its weighing discretion to be properly exercised and entitled to deference on appeal).

Lastly, the State argues that the district court did not abuse its discretion in light of Dr. Simms testimony that he used the minimum amount of photos necessary to make his point. Answering Brief at 31. This argument is without merit. The State cites to no authority which supports its position that the district court may abandon his decision making role to the witness. Contrary to the State's position, the trial judge's decision to admit evidence over objection is not entitled to deference unless the trial court engages in the proper weighing process. See Seim v. State, 95 Nev. 89, 97, 590 P.2d 1152, 1157 (1979).

The district court failed to subject the autopsy photos to a proper balancing test before ruling on admissibility. Although gruesome photos which help ascertain the truth may be admissible, there is no per se rule allowing for their admissibility. See Shuff v. State, 86 Nev. 736, 739-40, 476 P.2d 22, 24-25 (1970). The district court abused its discretion by admitting the photos by abandoning his discretion to the witness. The probative value of the photos were outweighed by its prejudicial effect. This highly inflammatory evidence fatally infected the trial and deprived Flowers of his right to a fair trial. The State fails to prove such error was harmless beyond a reasonable doubt. Thus, the judgment must be reversed.

E. The district court violated Flowers' constitutional right to present evidence by precluding Kinsey from testifying that the victim told him she was seeing someone named "Keith."

Flowers contends his rights to due process, a fair trial, and to present evidence were violated because the district court prohibited him from introducing evidence that Sheila's boyfriend knew of her relationship with Flowers. Specifically, Flowers asserts the district court erred by excluding the testimony of Kinsey. Flowers wished to elicit testimony from Kinsey that he was aware of the fact that Sheila was dating someone named Keith (which is Flowers' middle name and the name he used). 3 App. 541. The district court sustained the State's hearsay objection to this testimony, after noting that Kinsey did not ever personally observe Sheila and Keith together as Kinsey was incarcerated during the relevant time. 3 App. 541-43. The decision to exclude Kinsey's testimony was an evidentiary error and also

deprived Flowers of his right to due process under the state and federal constitutions.

In his Opening Brief, Flowers noted that the testimony he was precluded from introducing was essentially the same as that which was introduced against him by the State, through witness Ameia Fuller, who testified that she was aware that Sheila and Brass had a relationship with each other. In response, the State argues that Fuller's testimony was not introduced for the truth of the matter asserted, but was instead introduced to show that Fuller told police officers about the relationship between Sheila and Brass. Answering Brief at 32. This argument is without merit. First no limiting instruction was given as to Fuller's testimony. 2 App. 493. Second, Fuller testified directly that Sheila and Brass were involved, and did not merely state that she told officers that Sheila told her she was friends with Brass. 2 App. 493. Third, the State argued in closing arguments that Brass and Sheila were involved in a relationship, and based that argument upon Fuller's testimony, thus refuting the State's claim here that the testimony was not introduced for this purpose. 3 App. 594. Finally, the fact that Fuller told officers of a relationship between Brass and Sheila was irrelevant and immaterial, so the evidence could not have been introduced for that purpose. Leonard v. State, 117 Nev. 53, 74 n.14, 17 P.3d 397, 411 n.14 (2001); Zemo v. State, 646 A.2d 1050, 1053 (Md. Ct. Spec. App. 1994)..

The State next contends that Kinsey's testimony was not admissible because it was unreliable, and in the alternate, if admissible, the decision to exclude the evidence was harmless error. Answering Brief at 31-33. These arguments are without merit. First the State argues that this case can be distinguished from DePetris v. Kuykendall, 239 F.3d 1057, 1062 (9th Cir. 2001). Answering Brief at 33. The State argues that the evidence in Deptris is different from Kinsey's proffered testimony because in Deptris, the evidence went to the heart of the defense and was reliable. Answering Brief at 33. The State misunderstands the reason for citing Depetris. Flowers cites Depetris for the purpose of illustrating when evidentiary errors rise to the level on a constitutional error. In Depetris, the admissibility of the evidence was not at issue and reliability was never discussed. Depetris, 239 F.3d at 1061-62. The State's attempt to distinguish this case is not persuasive. This contention is equally

unpersuasive to the extent it is construed as stating the error in Flowers' case does not rise to a constitutional violation. The State next argues that Chambers is not applicable to this case because Chambers was limited to the "facts and circumstances" of that case. Answering Brief at 33, n. 12. This argument is without merit. A comparison of this case indicates it is sufficiently similar to Chambers to establish a constitutional violation on Flowers' right to due process.

"[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers v. Mississippi, 410 U.S. 284, 302 (1973). In Chambers, the trial court excluded three of the defendant's witnesses who would have provided testimony that another individual confessed to the crime. Id. at 298. The testimony was excluded because, although the statements were against declarants' interest, it did not meet Mississippi's hearsay exception that the statement be against the declarant's pecuniary interest. Id. at 298-99. However, the statement did fall within the rule's rationale for admission and was therefore reliable. Id. at 300-301. In holding the statements should have been admitted, the Supreme Court reasoned that when testimony bears assurances of trustworthiness and is critical to the defense, a state cannot exclude the evidence simply because it does not technically meet the requirement of the hearsay exception. Id.

Similarly, Kinsey's proffered statement was reliable because it fell within the rationale of an exception to the hearsay rule. NRS 51.355 provides:

> A statement concerning the declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, ancestry or other similar fact of personal or family history is not inadmissible under the hearsay rule if the declarant is unavailable as a witness, even though declarant had no means of acquiring personal knowledge of the matter stated.

The excluded statement was made by Sheila concerning her own personal history of dating men. 3 App. 541. Although the statement was not about Sheila's marriage, it was regarding her own personal romantic relationships. Therefore, the same rationale that would render hearsay statements regarding the declarant's marriage reliable enough for admission should also apply to statements regarding the declarant's romantic relationships. The statement

made to Kinsey should have been admitted under the rule as it qualfies an "other similar fact of personal or family history." NRS 51.355. Also, the statements made by Sheila to Kinsey seem to have been spontaneous. Kinsey was romantically linked to Sheila and it is likely Sheila would share this intimate information with Kinsey. Furthermore, there appears to be no reason for Kinsey to fabricate this information as he and Flowers did not know each other. Kinsey had nothing to gain by testifying on behalf on Flowers. Therefore, the testimony in this case was equally reliable to the testimony in Chambers.

Kinsey's testimony was critical to Flowers defense. The State concedes that in order for it to prove Flowers was guilty beyond a reasonable doubt, it had to prove Brass was not the perpetrator because both mens' DNA was found inside the victim. Answering Brief at 35. The State achieved this in part by admitting evidence that Brass and Sheila were involved in a prior consensual relationship. At the same time, it relied on the fact that there was no evidence Flowers was in a consensual relationship with Sheila. The district court's exclusion of the only evidence which could have established Flowers had a consensual sexual relationship with Sheila deprived him of his right to present witnesses in his defense and confront the State's accusations. The judgment of conviction must therefore be reversed.

F. The prosecutor committed misconduct by commenting on Flowers' right to remain silent.

Flowers contends that his rights to due process, equal protection, and right to a fair trial were violated when the prosecutor improperly commented on his failure to talk to police or testify in his own defense. In response, the State argues that the prosecutor did not commit misconduct because he was not commenting on Flowers' right to remain silent, but was commenting on the evidence. Answering Brief at 34. The State cites to this Court's decision in Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001), to support its position. The State's argument is without merit because Leonard is easily distinguishable from this case.

In Leonard, this Court considered the issue of whether a prosecutor improperly shifts the burden of proof to the defendant by commenting on the defendant's failure to substantiate a claim made in defense of the State's allegations. Leonard, 117 Nev. at 81, 17 P.dd at 414-

15. The defendant in Leonard made a claim that another man was responsible for the crime and a piece of evidence introduced at trial belonged to that other person. Id. During closing arguments, the prosecutor commented that the defendant had a prior opportunity to question the other person about the piece of evidence but failed to do so. Id. This Court held that the prosecutor did not improperly shift the burden of proof the to the defendant. Id. This Court reasoned that although a prosecutor may not normally comment on a defendant's failure to present evidence, it can comment on the failure to substantiate a claim. Id. However, unlike the situation in this case, the prosecutor's comment in Leonard does not connote lack of a personal response by the accused himself. Therefore, Leonard is not dispositive because the defendant's right to remain silent was not at issue.

The State fails to address Flowers' assertion that the jury would have considered the prosecutor's comments to be an attack on Flowers' failure to testify. Opening Brief at 36. As this Court explained in Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991), the prosecutor commits misconduct if "the language used was manifestly intended to be *or* was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify." Id (emphasis added). In this case, the jury would have understood the prosecutor's statements to be a comment on Flower's failure to testify in his own defense. The prosecutor specifically commented on the fact that Brass did not have to testify but did anyway. 3 App. 595. The prosecutor then proceeded to compare Brass to Flowers. 3 App. 612-13. It is likely that the prosecutor intended his comments to mean Brass was more credible because he testified while Flowers did not. Even if this was not the prosecutor's intent, the jury would have naturally and necessarily took the comment to mean that if Brass did not have to testify but did anyway, Flowers should have also testified.

The State has failed to prove this error was harmless beyond a reasonable doubt. Flowers was greatly prejudiced by the prosecutor's misconduct because the other evidence equally inculpated both men. The judgment of conviction must therefore be reversed.

G. There is insufficient evidence to support the conviction.

Flowers contends that there was insufficient evidence to support his conviction. There

was an equal amount of evidence which pointed to Brass as the perpetrator. The State argues in responses there was sufficient evidence to convict Flowers because the jury heard testimony of another rape and murder Flowers allegedly committed. The State further argues that both incidents were similar enough for the jury to decide Flowers murdered and sexually assaulted Sheila. Answering Brief at 37.

In attempt to show both incidents were sufficiently similar, the State asserts that both victims were found face up and suffered blunt force trauma. The State fails to state how any of these facts are sufficiently unique as to support the inference that they were committed by the same person. In fact there were substantial difference between both incidents. See Opening Brief at 19-20. The conviction must be vacated because there is insufficient evidence to support the conviction.

H. The judgment should be vacated based upon cumulative error.

Flowers' rights to due process, equal protection, and right to a fair trial were violated because of cumulative error. The State asserts that there was no error and that Flowers' right to a fair trial was not violated. Answering Brief at 37-38. For the reasons set forth above, the State's argument is without merit. There were numerous statutory and constitutional violations at Flowers' trial. A new trial should be granted based upon each of those violations and the combined impact of all of them.

III. CONCLUSION

For each of the reasons set forth above, Flowers is entitled to a new trial. In the alternative, there is insufficient evidence to support his conviction and his judgment should be vacated.

DATED this 3rd day of May 2010.

Respectfully submitted,

By: /s/ *JoNell Thomas*

JONELL THOMAS
State Bar No. 4771

CERTIFICATE OF COMPLIANCE

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, N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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 3rd day of May, 2010.

By: /s/ *JoNell Thomas*

JoNell Thomas

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 3rd day of May, 2010 a copy of the Appellant's Reply Brief was served as follows:

BY ELECTRONIC FILING TO

District Attorney's Office
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

Nevada Attorney General
100 N. Carson St.
Carson City NV 89701

/s/ JONELL THOMAS
_____
JONELL THOMAS

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

NORMAN KEITH FLOWERS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent

CASE NO. 53159
CASE NO. 55759

MOTION TO VOLUNTARILY DISMISS APPEALS

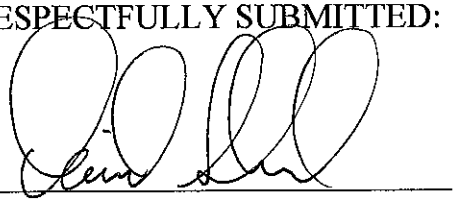
Appellant Norman Flowers, by and through his counsel David M. Schieck, Special Public Defender and JoNell Thomas, Deputy Special Public Defender, and moves this Court to dismiss his appeals docketed in this Court under Case No. 55759 and 53159 (consolidated by Order of this Court) pursuant to a Guilty Plea Agreement filed in District Court Case No. C216032.

Appellant requests that this Court dismiss this appeal on or after July 20, 2011, which is the date set for the sentencing hearing and imposition of judgment in the related district court case (Case No. C216032); and requests that this Court stay all proceedings in these two appeals (Case No. 55759 and 53159) until that date.

This request is based on the Declaration of Counsel attached hereto and the filed copy of the Guilty Plea Agreement attached hereto as Exhibit A.

Dated this 13th day of June, 2011.

RESPECTFULLY SUBMITTED:



DAVID M. SCHIECK
Special Public Defender
JONELL THOMAS
Deputy Special Public Defender
Nevada Bar No. 4771
330 S. Third St., No. 800
Las Vegas NV 89101
702-455-6270

DECLARATION OF CLARK W. PATRICK

CLARK W. PATRICK makes the following declaration:

I am an attorney duly licensed to practice law in the State of Nevada. I am one of the Deputy Special Public Defender's assigned to handle Mr. Flowers' capital trial which was set to commence June 13, 2011 (Eighth Judicial District Case No. C216032). Randall H. Pike, the other Deputy assigned, was out of town on the day of the calendar call, June 10, 2011, and therefore I appeared along with Mr. Schieck.

In addition, Mr. Schieck accompanied me when I went to meet with Mr. Flowers at High Desert State Prison on June 9, 2011, to discuss his negotiations and the consequences of waiving his appeals should he plead guilty and the consequences of dismissing the consolidated appeals in the instant matter. JoNell Thomas, appellate attorney for Mr. Flowers, wrote him a letter setting forth the issues involved with dismissing the appeal and we brought same with us to the prison and discussed its contents with Mr. Flowers at some length.

Having discussed this matter with Mr. Flowers, I believe that he fully understands the consequences of dismissing these appeals and believe that doing so is in his best interest.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 13th day of June, 2011.

CLARK W. PATRICK

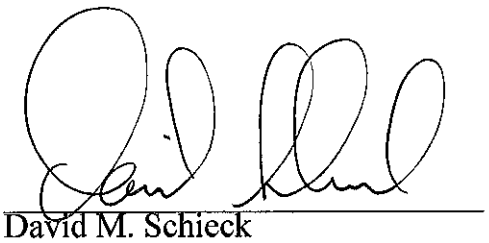
CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 13th day of June, 2011 a copy of the foregoing Motion to Voluntarily Dismiss Appeals was served as follows:

BY ELECTRONIC FILING TO

District Attorney's Office
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

Nevada Attorney General
100 N. Carson St.
Carson City NV 89701



David M. Schieck

EXHIBIT A

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

JUN 10 2011

BY, _____
KATHERINE STREUBER, DEPUTY

GPA
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NORMAN KEITH FLOWERS,
aka Norman Harold Flowers,
#1179383

Defendant.

216032

CASE NO: ~~C228755~~
DEPT NO: VIII

GUILTY PLEA AGREEMENT

I hereby agree to plead guilty, pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to: **COUNTS 1 & 2 – FIRST DEGREE MURDER (Category A Felony),** as more fully alleged in the charging document attached hereto as Exhibit "1".

My decision to plead guilty by way of the Alford decision is based upon the plea agreement in this case which is as follows:

Both parties stipulate to a sentence of life in prison without the possiblility of parole on Count 1. The parties stipulate to a sentence of life in prison with the possiblilty of parole on Count 2, Count 2 to run concurrent to Count 1. Defendant stipulates that the sentence in this case will run consecutive to C228755. Defendant agrees to withdraw his appeal in SC Case Nos. 53159 and 55759.

I agree to the forfeiture of any and all weapons or any interest in any weapons seized and/or impounded in connection with the instant case and/or any other case negotiated in whole or in part in conjunction with this plea agreement.

//

I understand and agree that, if I fail to interview with the Department of Parole and Probation, fail to appear at any subsequent hearings in this case, or an independent magistrate, by affidavit review, confirms probable cause against me for new criminal charges including reckless driving or DUI, but excluding minor traffic violations, that the State will have the unqualified right to argue for any legal sentence and term of confinement allowable for the crime(s) to which I am pleading guilty, including the use of any prior convictions I may have to increase my sentence as an habitual criminal to five (5) to twenty (20) years, life without the possibility of parole, life with the possibility of parole after ten (10) years, or a definite twenty-five (25) year term with the possibility of parole after ten (10) years.

Otherwise I am entitled to receive the benefits of these negotiations as stated in this plea agreement.

CONSEQUENCES OF THE PLEA

By pleading guilty pursuant to the Alford decision, it is my desire to avoid the possibility of being convicted of more offenses or of a greater offense if I were to proceed to trial on the original charge(s) and of also receiving a greater penalty. I understand that my decision to plead guilty by way of the Alford decision does not require me to admit guilt, but is based upon my belief that the State would present sufficient evidence at trial that a jury would return a verdict of guilty of a greater offense or of more offenses than that to which I am pleading guilty.

I understand that as a consequence of my plea of guilty by way of the Alford decision the Court must sentence me, on each count, to a term of LIFE without the possibility of parole or LIFE with the possiblity of parole, with parole eligibility beginning after twenty (20) years has been served. I understand that the law requires me to pay an Administrative Assessment Fee.

I understand that, if appropriate, I will be ordered to make restitution to the victim of the offense(s) to which I am pleading guilty and to the victim of any related offense which is being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to reimburse the State of Nevada for any expenses related to my extradition, if any.

I understand that I am not eligible for probation for the offense to which I am pleading guilty.

I also understand that I must submit to blood and/or saliva tests under the Direction of the Division of Parole and Probation to determine genetic markers and/or secretor status.

I further understand that if I am pleading guilty to charges of Burglary, Invasion of the Home, Possession of a Controlled Substance with Intent to Sell, Sale of a Controlled Substance, or Gaming Crimes, for which I have prior felony conviction(s), I will not be eligible for probation and may receive a higher sentencing range.

I understand that if more than one sentence of imprisonment is imposed and I am eligible to serve the sentences concurrently, the sentencing judge has the discretion to order the sentences served concurrently or consecutively.

I also understand that information regarding charges not filed, dismissed charges, or charges to be dismissed pursuant to this agreement may be considered by the judge at sentencing.

I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the Court within the limits prescribed by statute.

I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the Court, the Court is not obligated to accept the recommendation.

I understand that if the State of Nevada has agreed to recommend or stipulate a particular sentence or has agreed not to present argument regarding the sentence, or agreed not to oppose a particular sentence, or has agreed to disposition as a gross misdemeanor when the offense could have been treated as a felony, such agreement is contingent upon my appearance in court on the initial sentencing date (and any subsequent dates if the sentencing is continued). I understand that if I fail to appear for the scheduled sentencing date or I commit a new criminal offense prior to sentencing the State of Nevada would regain the full right to argue for any lawful sentence.

//

//

I understand if the offense(s) to which I am pleading guilty to was committed while I was incarcerated on another charge or while I was on probation or parole that I am not eligible for credit for time served toward the instant offense(s).

I understand that if I am not a United States citizen, any criminal conviction will likely result in serious negative immigration consequences including but not limited to:

1. The removal from the United States through deportation;
2. An inability to reenter the United States;
3. The inability to gain United States citizenship or legal residency;
4. An inability to renew and/or retain any legal residency status; and/or
5. An indeterminate term of confinement, with the United States Federal Government based on my conviction and immigration status.

Regardless of what I have been told by any attorney, no one can promise me that this conviction will not result in negative immigration consequences and/or impact my ability to become a United States citizen and/or a legal resident.

I understand that the Division of Parole and Probation will prepare a report for the sentencing judge prior to sentencing. This report will include matters relevant to the issue of sentencing, including my criminal history. This report may contain hearsay information regarding my background and criminal history. My attorney and I will each have the opportunity to comment on the information contained in the report at the time of sentencing. Unless the District Attorney has specifically agreed otherwise, then the District Attorney may also comment on this report.

WAIVER OF RIGHTS

By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges:

1. The constitutional privilege against self-incrimination, including the right to refuse to testify at trial, in which event the prosecution would not be allowed to comment to the jury about my refusal to testify.
2. The constitutional right to a speedy and public trial by an impartial jury, free of excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the assistance of an attorney, either appointed or retained. At trial the State would bear the burden of proving beyond

a reasonable doubt each element of the offense(s) charged.

3. The constitutional right to confront and cross-examine any witnesses who would testify against me.

4. The constitutional right to subpoena witnesses to testify on my behalf.

5. The constitutional right to testify in my own defense.

6. The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34.

VOLUNTARINESS OF PLEA

I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.

I understand that the State would have to prove each element of the charge(s) against me at trial.

I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.

All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.

I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.

I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

//

//

My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

DATED this 10 day of June, 2011.

NORMAN KEITH FLOWERS,
AKA NORMAN HAROLD FLOWERS
Defendant

AGREED TO BY:

PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

CERTIFICATE OF COUNSEL:

I, the undersigned, as the attorney for the Defendant named herein and as an officer of the court hereby certify that:

1. I have fully explained to the Defendant the allegations contained in the charge(s) to which Alford pleas are being entered.

2. I have advised the Defendant of the penalties for each charge and the restitution that the Defendant may be ordered to pay.

3. I have inquired of Defendant facts concerning Defendant's immigration status and explained to Defendant that if Defendant is not a United States citizen any criminal conviction will most likely result in serious negative immigration consequences including but not limited to:

   a. The removal from the United States through deportation;

   b. An inability to reenter the United States;

   c. The inability to gain United States citizenship or legal residency;

   d. An inability to renew and/or retain any legal residency status; and/or

   e. An indeterminate term of confinement, by with United States Federal Government based on the conviction and immigration status.

   Moreover, I have explained that regardless of what Defendant may have been told by any attorney, no one can promise Defendant that this conviction will not result in negative immigration consequences and/or impact Defendant's ability to become a United States citizen and/or legal resident.

4. All pleas of Alford offered by the Defendant pursuant to this agreement are consistent with the facts known to me and are made with my advice to the Defendant.

5. To the best of my knowledge and belief, the Defendant:

   a. Is competent and understands the charges and the consequences of pleading Alford as provided in this agreement,

   b. Executed this agreement and will enter all Alford pleas pursuant hereto voluntarily, and

   c. Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time I consulted with the Defendant as certified in paragraphs 1 and 2 above.

Dated: This 10 day of June, 2011.

ATTORNEY FOR DEFENDANT

hjc/SVU

AIND
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163
200 South Third Street
Las Vegas, Nevada 89155-2212
(702) 455-4711
Attorney for Plaintiff

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NORMAN KEITH FLOWERS, aka,
Norman Harold Flowers, III,
#1179383

Defendant.

Case No. **C216032**
Dept. No. **VIII**

AMENDED

INDICTMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

The Defendant above named, **NORMAN KEITH FLOWERS, aka, Norman Harold Flowers, III**, accused by the Clark County Grand Jury of the crimes of **FIRST DEGREE MURDER (Category A Felony - NRS 200.010, 200.030);** committed at and within the County of Clark, State of Nevada, on or about the 3rd day of May, 2005, as follows:

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COUNT 1 – FIRST DEGREE MURDER

did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill victim, a human being, MARILEE COOTE, by manual strangulation with his hands and/or an unknown object; Defendant being responsible under one or more of the following principles of criminal liability, to-wit: (1) by killing MARILEE COOTE with premeditation, deliberation and malice aforethought; and/or (2) by killing MARILEE COOTE during the perpetration or attempted perpetration of sexual assault and/or burglary.

COUNT 2 – FIRST DEGREE MURDER

did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill RENA GONZALES, a human being, by manual strangulation, Defendant being responsible under one or more of the following principles of criminal liability, to-wit: (1) by killing RENA GONZALES with premeditation, deliberation and malice aforethought; and/or (2) by killing RENA GONZALES during the perpetration or attempted perpetration of sexual assault and/or burglary.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY 
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

05BGJ016X/05F10466X/hjc/SVU
LVMPD EV# 0505030926/0505032974
(TRK11)

FILED

SEP 17 11 47 AM '12

CLERK OF THE COURT

ORDR

JAMES A. ORONOZ, ESQ.
Nevada Bar No. 6769
THOMAS A. ERICSSON, ESQ.
Nevada Bar No. 4982
ORONOZ & ERICSSON, L.L.C.
700 SOUTH 3RD STREET
Las Vegas, Nevada 89101
Telephone: (702) 878-2889
Facsimile: (702) 522-1542
Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

NORMAN FLOWERS,

Petitioner,

vs.

STATE OF NEVADA

Respondents.

CASE NO: C228775

DEPT NO: IX

ORDER

IT IS HEREBY ORDERED that the current deadline (September 28, 2012) for filing the defendant's Post-Conviction Petition for Writ of Habeas Corpus is extended for a period of thirty (30) days.

DATED this 14th Day of September, 2012

JENNIFER P. TOGLIATTI

DISTRICT COURT JUDGE

Respectfully submitted by:

THOMAS A. ERICSSON, ESQ.
Nevada Bar No. 4982

PWHB
THOMAS A. ERICSSON, ESQ.
Nevada Bar No. 4982
ORONOZ & ERICSSON, L.L.C.
700 SOUTH 3RD STREET
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Facsimile: (702) 522-1542
tom@oronozlawyers.com
Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

NORMAN FLOWERS

Petitioner,

vs.

THE STATE OF NEVADA, RENEE BAKER, Warden

Respondent.

CASE NO: C228755
DEPT. NO: IX

Date of Hearing: 11-26-2012
Time of Hearing: 9:00 AM

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

1. Name of the institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: **Ely State Prison, White Pine County, Nevada.**

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

3. Date of Judgment of Conviction: **February 12, 2009.**

4. Case number: **C228755.**

(a) Length of sentence: **As to Count 1 – A minimum of 48 months with a maximum of 120 months; As to Count 2 – Life without the possibility of parole to run consecutive to Count 1; As to Count 3 – Life with the possibility of parole with a minimum parole eligibility after 120 months to run consecutive to Count 2.**

(b) If sentence is death, state any date upon which execution is scheduled: **N/A**

6. Are you presently serving a sentence for conviction other that the conviction under attack in this motion? **Yes.**

If yes, list crime, case number, and sentencing being served at this time:

Under case number C216032, Petitioner was convicted of two counts of First Degree Murder. As to Count 1, the court sentenced the Petitioner to Life without the possibility of parole. As to Count 2, the court sentenced the Petitioner to Life with the possibility of parole after twenty-five years. The court ordered Count 2 to run concurrent to Count 1 and the entire sentence to run consecutive to case number C228755.

7. Nature of offense involved in conviction being challenged: **Petitioner was convicted of Burglary; First Degree Murder; and Sexual Assault.**

8. What was your plea? (Check one)

(a) Not guilty **X**

(b) Guilty ___

(c) Guilty but mentally ill ___

(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: **Mr. Flowers plead Not Guilty to all counts throughout his prosecution and was convicted pursuant to a guilty verdict following a jury trial.**

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.**

13. If you did appeal, answer the following:

(a) Name of Court: **Supreme Court of the State of Nevada.**

(b) Case number or citation: **53159 (Consolidated with case 55759)**

(c) Result: **Dismissed pursuant to a guilty plea agreement entered in case number C216032.**

(d) Date of result: **September 28, 2011.**

14. If you did not appeal, explain briefly why you did not: **N/A.**

15. Other than on 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 state or federal court? **Yes.**

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

(a) (1) Name of court: **Eighth Judicial District Court, Clark County, Nevada.**

(2) Nature of proceeding: **Pro Per Motion to Appoint Counsel.**

(3) Grounds raised: **Assistance of counsel is necessary to investigate and develop post-conviction claims.**

(4) Did you receive an evidentiary hearing on your petition, application or motion: **No.**

(5) Result: **Granted.**

(6) Date of result: **May 30, 2012.**

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: **July 30, 2010.**

(b) (1) Name of court: **Eighth Judicial District Court, Clark County, Nevada.**

(2) Nature of proceeding: **Motion for New Trial.**

(3) Grounds raised: **After hearing the evidence pertaining to the Robbery count, the jury did not find the Petitioner of guilty of Robbery. The admission of the evidence presented on the Robbery count was overwhelmingly prejudicial to the Petitioner. Had the evidence not been admitted, there was insufficient evidence presented to find the Petitioner guilty beyond a reasonable doubt of the remaining charges.**

(4) Did you receive an evidentiary hearing on your petition, application or motion: **Yes.**

(5) Result: **Denied.**

(6) Date of result: **November 12, 2008.**

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: **November 18, 2008.**

(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. **See Exhibit A.**

(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? **No.**

Citation or date of decision: **N/A.**

(2) Second petition, application or motion? **No.**

Citation or date of decision: **N/A.**

(3) Third petition, application or motion? **No.**

Citation or date of decision: **N/A.**

(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 ½ by 11 inches attached to this petition. Your response may not exceed five handwritten or typewritten pages in length.): **N/A.**

17. Has any ground being raised in this petition been previously presented to this or any other court by way of a petition for writ of habeas corpus, motion, application, or any other post-conviction proceeding? If so, identify:

(a) Which of the grounds is the same: **N/A.**

(b) The proceedings in which these grounds were raised: **N/A.**

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

18. Any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to this petition. Your response may not exceed five handwritten or typewritten pages in length.): **All issues have not been raised in other post-conviction proceedings. See Exhibit A.**

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to this petition. Your response may not exceed five handwritten or typewritten pages in length.): **Yes. See Exhibit A.**

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

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: **Deputy Special Public Defender, Clark Patrick – Trial ; Deputy Special Public Defender, Randall Pike – Trial; Deputy Special Public Defender, JoNell Thomas - Appeal**

22. Did you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? **Yes**.

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

Supporting FACTS (Tell your story briefly without citing cases or law.): **See Exhibit A**.

(a) Petitioner would respectfully raise issues as they become necessary. Petitioner would respectfully request this Court allow the undersigned to supplement this Petition.

WHEREFORE, Petitioner prays that this Honorable Court allow Thomas A. Ericsson, Esq., to Supplement this Petition.

DATED this 9 day of October, 2012.

ORONOZ & ERICSSON, L.L.C.

Thomas A. Ericsson
Nevada Bar No. 4982
700 South 3rd Street
Las Vegas, Nevada 89101
Attorney for Petitioner

VERIFICATION

Under the penalty of perjury, the undersigned declares that he is the appointed counsel for 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.

Under penalty of perjury, the undersigned declares that the Petitioner authorized him to commence this action.

Dated this 9 day of October, 2012.

THOMAS A. ERICSSON

SUBSCRIBED AND SWORN to before me
this 9TH day of October, 2012.

Notary Public in and for said
County and State

ALICIA M. ORONOZ
Notary Public-State of Nevada
APPT. NO. 10-2513-1
My App. Expires July 08, 2014

CERTIFICATE OF SERVICE

I hereby certify and affirm that I mailed a copy of the above foregoing Petition for Writ of Habeas Corpus (Post-Conviction) to counsel of record listed below October 9, 2012. Postage prepaid and addressed to the following:

STEPHEN B. WOLFSON
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155
Respondent

CATHERINE CORTEZ MASTO
Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4714

By: _____
An employee of Oronoz & Ericsson, L.L.C.

EXHIBIT A

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

(c) (1) Name of court: **Eighth Judicial District Court, Clark County, Nevada.**

(2) Nature of proceeding: **Motion for New Trial Based Upon Newly Available Evidence. Specifically, The Conviction of George Brass for Murder.**

(3) Grounds raised: **The State's initial theory was that a third party was present during the commission of the charged offenses. Evidence introduced at trial showed that George Brass had contact with the victim prior to her death. Brass testified at a hearing that the victim was strictly involved with women. Subsequent to Petitioner's trial, a jury convicted Brass of murder in another case. Following his conviction, Brass' DNA was entered into CODIS. A comparison revealed that Brass had sexual contact with the victim prior to her death. Had this information been available for impeachment purposes it is unlikely the jury would have found the Petitioner guilty beyond a reasonable doubt.**

(4) Did you receive an evidentiary hearing on your petition, application or motion: **Yes.**

(5) Result: **Denied.**

(6) Date of result: **March 17, 2010.**

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: **April 24, 2010.**

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to this petition. Your response may not exceed five handwritten or typewritten pages in length.): **Yes.**

On June 8, 2012, the district court appointed defense counsel, James A. Oronoz, Esq., to represent Flowers in post-conviction relief proceedings. That same day, the district court set a thirty (30) day status check on receipt of Flowers' case file. On June 15, 2012, counsel contacted the Special Public Defender's (SPD) Office, who represented the Petitioner through trial and appeal, to obtain a copy of the Petitioner's file. On June 22, 2012, Deputy Special Public Defender Randall Pike informed counsel that his office mailed the original case file to Flowers and therefore could not provide a copy of the file to counsel. On July 9, 2012, counsel contacted the State in an attempt to obtain a copy of discovery in the instant case. That same day, the State informed counsel that pursuant to NRS 34.780(2), the State would not provide discovery until after a Post-Conviction Petition for Writ of Habeas Corpus had been granted.[1] On July 13, 2012, the district court directed counsel to obtain the file from Flowers, who is currently an inmate

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[1] NRS 34.780(2) provides: After the writ has been granted and a date set for the hearing, a party may invoke any method of discovery available under the Nevada Rules of Civil Procedure if, and to the extent that, the judge or justice for good cause shown grants leave to do so.

at Ely State Prison. In addition, the district court advised the State to provide counsel with any missing discovery.

On August 27, 2012, counsel informed the district court that obtaining the file from Flowers was problematic because Flowers only received a portion of the file. According to Flowers, the prison would not give him any documents that contained social security numbers. Flowers believed that the remainder of the file was returned to the Special Public Defender's Office. Upon inquiry by counsel, the Special Public Defender's office denied receiving any portion of the file back from Ely State Prison. After informing the Court of this dilemma, the Court signed an Order that required the State to turn over a complete copy of the discovery in its immediate and constructive possession. However, rather than comply with this Court's Order, the State directed its Discovery Division to withhold the discovery from counsel. On August 31, 2012, the State issued a setting slip requesting a hearing on "Clarification of Discovery."

On September 10, 2012, the State orally opposed providing Flowers a copy of the discovery on the basis that it did not have a chance to oppose counsel's request at the last hearing. The Court stated that it had signed the discovery Order under the belief that the State did not object to providing the discovery. The district court then vacated the Discovery Order, set a briefing schedule and extended the deadline to file the Petitioner's post-conviction petition for thirty (30) days.

On September 21, 2012, Petitioner stipulated to vacate the briefing schedule and vacate the hearing set for argument under the belief that the Nevada Supreme Court did not issue a Remittitur upon dismissing appeals 53159 and 55759. However, post-conviction counsel recently discovered a footnote in the Order Dissmissing Appeals, that stated: "Because no remittitur will issue in this matter, see NRAP 42(b), the one-year

period for filing a postconviction habeas corpus petition under NRS 34.726(1) shall commence to run from the date of this order [September 28, 2011]."

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

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

The Petitioner, Norman Flowers, by and through appointed counsel hereby files this petition for writ of habeas corpus pursuant to NRS 34.724. Petitioner alleges that, upon information and belief, he is being held in custody in violation of the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States of America, and Articles I and IV of the Nevada Constitution. This timely first post-conviction petition for a writ of habeas corpus now follows. Mr. Flowers requests full discovery rights and an evidentiary hearing.

CLAIMS FOR RELIEF

At trial, Mr. Flowers was convicted of Burglary and the First Degree Murder and Sexual Assault of Rena Gonzales. Upon information and belief, Mr. Flowers' conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel due to his defense counsel's failure to protect his rights to a fair trial. U.S. Const. Amends. V, VI, & XIV; Nevada Constitution Art. I.

Claim I: The Petitioner cannot investigate or develop his claims without a complete copy of discovery from the State.

Supporting Facts: As of the date of this Petition, appointed counsel does not have access to a complete copy of the discovery that the State previously provided to trial counsel. Following direct appeal, trial counsel mailed the Petitioner his file at Ely State Prison. Upon information and belief, prison officials only gave the Petitioner documents that did not contain social security numbers. Accordingly, the Petitioner is unable to verify which documents are missing. Post-conviction counsel for the Petitioner has requested a complete copy of discovery from the State.

Justification for Raising Issue in Post-Conviction Proceeding:

The Petitioner submits that without a complete copy of the discovery, post-conviction counsel cannot fully investigate and develop the Petitioner's claims. As such, post-conviction counsel cannot effectively represent the Petitioner on post-conviction relief.

Claim II: Failure to Receive Effective Assistance of Counsel – Trial Counsel

Upon information and belief, Mr. Flowers' conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel due to his trial counsel's failure to protect his rights to a fair trial. U.S. Const. Amends. V, VI, & XIV; Nevada Constitution Art. I.

Supporting Facts:

Trial counsel failed to provide the Petitioner with a complete copy of his file. This failure has precluded post-conviction counsel and the court's ability to effectively review the validity of the Petitioner's conviction. Petitioner requests the Court's leave to further supplement this claim upon receiving a complete copy of discovery.

Justification for Raising Issue in Post-Conviction Proceeding:

Denial of fundamental constitutional rights.

Issues concerning ineffective assistance of counsel are properly raised in post-conviction proceedings.

Claim III: Failure to Receive Effective Assistance of Counsel – Appellate Counsel

Upon information and belief, Mr. Flowers' conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel due to his appellate counsel's failure to effectively appeal his conviction. U.S. Const. Amends. V, VI, & XIV; Nevada Constitution Art. I.

Supporting Facts:

Upon information and belief, appellate counsel wrote the Petitioner a letter stating that he had a low probability of prevailing on direct appeal (Supreme Court case number 53159). Trial counsel (Deputy Special Public Defender, Clark Patrick and Special Public Defender, David Schieck) used the letter to convince the Petitioner to plead guilty in case number C216032. Pursuant to the guilty plea agreement in case C216032, Petitioner agreed to dismiss the direct appeal of his conviction in the instant matter.

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Justification for Raising Issue in Post-Conviction Proceeding:

Denial of fundamental constitutional rights.

Issues concerning ineffective assistance of appellate counsel are properly raised in post-conviction proceedings.

DATED this 9 day of October, 2012.

ORONOZ & ERICSSON, L.L.C.

Thomas A. Ericsson
Nevada Bar No. 4982
700 South 3rd Street
Las Vegas, Nevada 89101
Attorney for Petitioner

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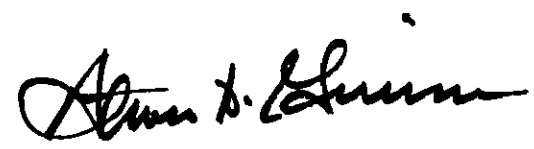

CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

NORMAN HAROLD FLOWERS III,
#1179383

Defendant.

CASE NO: C228755

DEPT NO: IX

STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: NOVEMBER 26, 2012
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through PAMELA WECKERLY, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's 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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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On December 13, 2006, a Grand Jury issued an indictment on NORMAN HAROLD FLOWERS III (hereinafter "Defendant") for the following: COUNT 1 - Burglary, COUNT 2 - Murder, COUNT 3 - Sexual Assault and COUNT 4 - Robbery. On January 11, 2007 the State issued a Notice of Intent to Seek the Death Penalty. On October 15, 2008, an Amended Indictment was filed.

After a jury trial, the jury verdict was entered into judgment on October 22, 2008. The Jury found the Defendant guilty of COUNT 1 – Burglary, COUNT 2 – Murder in the First Degree and COUNT 3 Sexual Assault. The Jury also found the Defendant not guilty of COUNT 4 – Robbery. On October 24, 2008, the Jury rendered a special verdict finding mitigating circumstances and a sentence of Life Without The Possibility Of Parole for COUNT 2. On October 30, 2008, Defendant filed a motion for new trial. The Court denied this motion on November 12, 2008.

On January 13, 2009, Defendant was sentenced as follows: as to COUNT 1, to a maximum of ONE HUNDRED TWENTY (120) MONTHS in the Nevada Department of Corrections with a minimum parole eligibility of FORTY-EIGHT (48) MONTHS; as to COUNT 2, to Life Without The Possibility Of Parole, to run consecutive to COUNT 1; as to COUNT 3, to Life With The Possibility Of Parole after ONE HUNDRED TWENTY (120) MONTHS, to run consecutive to COUNT 2. The Judgment of Conviction was filed on January 16, 2009, erroneously noting as to COUNT 3 a sentence of Life *Without* The Possibility Of Parole, with a minimum parole eligibility of ONE HUNDRED TWENTY (120) MONTHS. On January 29, 2009, Defendant appeared in court with counsel pursuant to the State's request for clarification of the sentence. An Amended Judgment of Conviction was filed February 12, 2012 to reflect the true sentence of Life *With* The Possibility Of Parole with a minimum parole eligibility of ONE HUNDRED TWENTY (120) MONTHS.

On January 26, 2009, Defendant filed a Notice of Appeal from the Judgment of Conviction. On February 20, 2009, Defendant filed an Amended Notice of Appeal.

On March 3, 2010, Defendant filed a Motion for New Trial Based Upon Newly Available Evidence, Specifically the Conviction of George Brass for Murder. The State opposed the motion on March 9, 2010. At a court hearing on March 17, 2010, the State argued that although the defense tried to blame Mr. Brass and another individual, the Defendant went to trial knowing that the trial of Mr. Brass was pending and that Mr. Brass had an alibi. The District Court denied the Motion for New Trial. On April 1, 2010, Defendant filed a Notice of Appeal from the Court's denial of his motion for a new trial.

On June 10, 2011, pursuant to negotiations, Appellant entered a plea of by way of Alford to an Amended Information in District Court Case Number C216032, charging Appellant with two (2) counts of murder. Pursuant to the plea negotiations, Defendant additionally agreed to withdraw his appeals in Nevada Supreme Court for Docket 53159 (Appeal from the Judgment of Conviction) and 55759 (Appeal from the District Court's order denying Defendant's motion for new trial). In Case Number C216032, the court sentenced Appellant to Life Without The Possibility Of Parole (COUNT 1) and Life With The Possibility Of Parole after TWENTY-FIVE (25) YEARS (COUNT 2), COUNT 2 to run concurrent with COUNT 1 and both to run consecutive to the sentence imposed in Case Number C228755. On June 13, 2011, Defendant filed the agreed-upon Motion to Voluntarily Dismiss his Appeal with the Nevada Supreme Court for Docket 53159 (Appeal from the Judgment of Conviction) and 55759 (Appeal from the District Court's order denying Defendant's motion for new trial).

The Supreme Court issued an Order Dismissing Appeals on September 28, 2011. That order stated that "[b]ecause no remittitur will issue in this matter, see NRAP 42(b), the one-year period for filing a post-conviction habeas corpus petition under NRS 34.726(1) shall commence to run from the date of this order."

On February 3, 2012, Defendant filed a motion to withdraw counsel. On February 15, 2012, the motion was granted. On May 16, 2012, Defendant filed a Motion for the Appointment of Counsel and Request for Evidentiary Hearing. The Court granted the

motion on May 30, 2012 and appointed James A. Oronoz as post-conviction counsel on June 8, 2012.

On October 9, 2012, Defendant filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) with the aid of counsel, to which the State responds as follows.

ARGUMENT

I. DEFENDANT'S PETITION IS TIME BARRED

The mandatory provisions of NRS 34.726 state:

> 1. Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed ***within 1 year after entry of the judgment of conviction*** or, if an appeal has been taken from the judgment, within 1 year after the supreme court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
>
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner. . .

NRS 34.726(1) (Emphasis added). "[T]he statutory rules regarding procedural default are mandatory and cannot be ignored when properly raised by the State." State v. Eighth Judicial Dist. Court, 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005)

In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late, pursuant to the "clear and unambiguous" mandatory provisions of NRS 34.726(1). Gonzales reiterated the importance of filing the petition with the district court within the one-year mandate, absent a showing of "good cause" for the delay in filing. Gonzales, 590 P.3d at 902. The one-year time bar is therefore strictly construed.

Here, Defendant's Judgment of Conviction was filed on January 16, 2009.[1] Defendant appealed. The Supreme Court dismissed the appeal on September 28, 2011,

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[1] Defendant erroneously notes the date of Judgment of Conviction as February 12, 2009. This is the date of the Amended Judgment of Conviction which has no effect on the timeliness of the petition, but, rather, affects whether the Defendant can show good cause for his failure to present the petition in a timely manner, which is discussed below. Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

noting that because no remittitur would issue, the one-year period for filing a post-conviction habeas corpus petition would run from the date of the order, or September 28, 2011. Consequently, Defendant had until September 28, 2012 to file his post-conviction habeas petition as it pertains to his conviction. Defendant filed the instant petition on October 9, 2012. This is over the one-year time limitation which must be applied by the District Court, and therefore Defendant's petition must be dismissed.

II. DEFENDANT HAS NOT DEMONSTRATED GOOD CAUSE OR ACTUAL PREJUDICE SUFFICIENT TO OVERCOME THE ONE-YEAR TIME BAR

Defendant has not demonstrated good cause or actual prejudice sufficient to overcome the procedural bars. "To establish good cause, appellants *must* show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see also Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003) ("In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules."); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Such an external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Id. (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)).

The Nevada Supreme Court has clarified that, "appellants cannot attempt to manufacture good cause[.]" Clem, 119 Nev. at 621, 81 P.3d at 526. The Court explained that in order to establish prejudice, the defendant must show "not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions." Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993). To find good

cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Excuses such as the lack of assistance of counsel when preparing a petition as well as the failure of trial counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. See Phelps v. Dir. Nev. Dep't of Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988), superseded by statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

Defendant first implies that post-conviction counsel's inability to secure the file from his client should be good cause for his failure to comply with procedural rules. But just as counsel's failure to send a prisoner his files did not constitute good cause excusing the prisoner from filing a timely petition (Hood v. State, 111 Nev. 335, 338, 890 P.2d 797, 798 (1995) (citing Phelps v. Director, 104 Nev. 656, 764 P.2d 1303 (1988)), nor is counsel's inability to obtain the file from his client or the prison good cause. Nor does defendant's argument explain *how* his inability to obtain the State's file prevented him from filing a timely petition. Hood, 111 Nev. at 338, 890 P.2d at 798. Notably, Defendant's only substantive claims appear to be ineffective assistance of trial counsel for failure to provide Defendant with a complete copy of his file and ineffective assistance of appellate counsel for informing Defendant of his low probability of success on direct appeal. Neither of these grounds would require a copy of the State's or defense counsel's file. There is no reason why Defendant could not file a timely petition and then thereafter seek leave to amend or supplement the petition after receiving the discovery he alleges he required. Moreover, Defendant waived any claims that were appropriate for direct appeal when he voluntarily dismissed his direct appeal. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

Second, Defendant seems to imply that the parties' stipulations regarding discovery and briefing should be considered good cause. But, as discussed above, the District Court is required by NRS 34.810(1)(b) to apply procedural bars, and a stipulation by the parties

cannot empower a court to disregard these statutory requirements. State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003).

Third, post-conviction counsel's failure to notice the Nevada Supreme Court's footnote regarding the commencement of the one-year statute of limitations is not good cause. By definition, this is not an impediment external to the defense. See Hathaway, 119 Nev. at 251, 71 P.3d at 506. Post-conviction counsel makes no showing that he was somehow prevented from reading this publicly-available document.

Fourth, the Amended Judgment of Conviction here is not good cause for the delay in filing. Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004). Because the claims presented have no relation to the proceeding leading to the amendment, the Amended JOC is not good cause. Nor, as Sullivan requires, was the amendment substantive, but, rather, was clerical to reflect what actually transpired at the sentencing hearing.

Nor has Defendant made an adequate showing of prejudice. Courts may excuse the failure to show cause where the prejudice from a failure to consider the claim amounts to a "fundamental miscarriage of justice." Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); Hogan, 109 Nev. at 959, 860 P.2d at 715-16; cf. NRS 34.800(1)(b). This standard can be met where the petitioner makes a colorable showing he is actually innocent of the crime or is ineligible for the death penalty. See Mazzan, 112 Nev. at 842, 921 P.2d at 922; Hogan, 109 Nev. at 954-55, 959, 860 P.2d at 712, 715-16. To avoid application of the procedural bar to claims attacking the validity of the conviction, a petitioner claiming actual innocence must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation. Schlup v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (quoting Carrier, 477 U.S. at 496, 106 S.Ct. 2639). Not only has Defendant failed to attempt to demonstrate his actual innocence, but his grounds for relief fall well short of this stringent standard. That trial counsel failed to provide Defendant with a complete copy of his file and that appellate counsel apprised Defendant of the low probability of success on direct appeal have no bearing on whether a reasonable juror would

have convicted Defendant absent these errors, because these alleged errors took place after the jury rendered its verdict based on the evidence.

Defendant has not demonstrated cause or prejudice to overcome the procedural bar, and the petition is untimely.

CONCLUSION

In light of the foregoing, the State respectfully moves to dismiss Defendant's petition.

DATED this 30th day of October, 2012.

Respectfully submitted,

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

BY /s/ Pamela Weckerly
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Response And Motion To Dismiss Defendant's Petition For Writ Of Habeas Corpus (Post-Conviction), was made this 30th day of October, 2012, by facsimile transmission to:

THOMAS A. ERICSSON, Esq.
658-2502

BY: /s/ R. Johnson
R. JOHNSON
Secretary for the District Attorney's Office

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DISTRICT COURT

CLARK COUNTY, NEVADA

NORMAN FLOWERS Petitioner, vs. THE STATE OF NEVADA Respondent.	CASE NO: C228755 DEPT. NO: IX Date of Hearing: November 26, 2012 Time of Hearing: 9:00 a.m.

DEFENDANT'S OPPOSITION TO STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION).

COMES NOW, the defendant, NORMAN FLOWERS, by and through his attorney, JAMES A. ORONOZ, ESQ. of ORONOZ & ERICSSON, L.L.C., and submits his Opposition to the State's Response and Motion to Dismiss Defendant's Petition For Writ of Habeas Corpus (Post-Conviction).

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This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support thereof, and oral argument at the time of hearing.

DATED this 14th day of November, 2012.

ORONOZ & ERICSSON, L.L.C.

By: */s/ James Oronoz*
JAMES A. ORONOZ, ESQ.
Nevada Bar No. 6769
700 South 3rd Street
Las Vegas, Nevada 89101
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

Pertinent Procedural Background

On October 22, 2008, the district court adjudicated the Petitioner, Norman Flowers ("Flowers"), guilty of: Count 1 – Burglary; Count 2 – Murder in the First Degree; and Count – 3 Sexual Assault. On January 13, 2009, the court sentenced Flowers as follows: as to Count 1, one hundred twenty (120) months in the Nevada Department of Corrections with a minimum parole eligibility of forty-eight (48) months; as to Count 2, Life Without the Possibility of Parole, to run consecutive to Count 1; as to Count 3, Life With the Possibility of Parole with a minimum parole eligibility of one hundred twenty (120) months, to run consecutive to Count 2.

On January 26, 2009, Flowers filed a Notice of Appeal. On September 28, 2011, pursuant to negotiations in case number C216032, whereby Flowers entered a plea pursuant to North Carolina v. Alford, 400 US 25, 91 S.Ct. 160 (1970), the Nevada Supreme Court dismissed Flowers' appeal (53159) in the instant case. In its Order

Dismissing Appeals, the Nevada Supreme Court stated: "Because no remittitur will issue in this matter, *see* NRAP 42(b), the one-year period for filing a post-conviction habeas corpus petition under NRS 34.726(1) shall commence to run from the date of this order. Flowers v. State, 53159, 2011 WL 4527339 (Nev. Sept. 28, 2011).[1] Therefore, pursuant to the Order, Flowers had until September 28, 2012, to file a post-conviction Petition for Writ of Habeas Corpus ("Petition"). However, on September 10, 2012, this Court granted an additional thirty (30) day extension to file the Petition.[2] On October 9, 2012, Flowers' filed his Petition well within the thirty (30) day extension granted by the Court.

Defense Inability to Obtain Case File

On June 8, 2012, the court appointed James A. Oronoz, Esq. ("Counsel") to represent Flowers in post-conviction relief proceedings. That same day, the Court set a thirty (30) day status check on receipt of Flowers' file. On June 15, 2012, counsel contacted the Special Public Defender's ("SPD") office, which represented Flowers during pretrial and appellate proceedings, to obtain a copy of Flowers' file. On June 22, 2012, Deputy Special Public Defender Randall Pike informed counsel that his office had mailed the original case file to Flowers in Ely State Prison and therefore could not provide counsel with a copy of Petitioners' file.

On July 9, 2012, counsel contacted the State in an attempt to obtain a copy of discovery in the instant case. Chief Deputy District Attorney, H. Leon Simon, informed counsel that pursuant to NRS 34.780(2), the State would not provide any discovery until after Flowers' Petition had been granted. On July 13, 2012, counsel informed the Court

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[1] *See* Order Dismissing Appeals, attached hereto as Exhibit A.

[2] *See* Correspondence from SPD, attached hereto as Exhibit B.

of the issues that had arisen pertaining to Flowers' file. Counsel explained to the Court that obtaining a copy of the file from Flowers would be problematic because Flowers' had removed or written on certain documents. The Court directed counsel to obtain the file from Flowers and advised the State provide counsel with any missing discovery.

On August 27, 2012, counsel informed the Court that in addition to Flowers' removal of documents, prison officials had removed documents from the file because they contained social security numbers and addresses of individuals involved in the case.[3] Counsel then contacted the Special Public Defender's office and learned that no portion of the file had been returned to them by the prison. After Thomas Ericsson explained to the Court the aforementioned issues, the Court ordered the State to provide the Petitioner with a complete copy of discovery.

Order Extending Deadline to File Petition

Seeking to prevent the defense from receiving a copy of Discovery in the case, on August 31, 2012, the State submitted a Setting Slip to the Court requesting a hearing on "Clarification of Discovery." On September 9, 2012, at the State's request, the Court vacated its discovery Order to allow the State to oppose Flowers' discovery request in writing. Accordingly, the Court set a briefing schedule on the discovery issue with the final brief (Flowers' Reply) being due on September 26, 2012. Counsel informed the Court that the briefing schedule presented a problem because Flowers' Petition had to be filed by September 28, 2012. The State indicated that the issue was premature because the Nevada Supreme Court failed to issue a remittitur and therefore the Court did not

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[3] Upon inquiry, prison officials informed counsel that they did not have the missing documents in their possession.

have jurisdiction over the case.[4] Additionally, the State argued that the Court should delay its decision on the discovery issue until after the Nevada Supreme Court determined whether Flowers' guilty plea in case number C216032 (appeal 59250) was valid.[5] At that point, counsel reiterated his concern regarding the deadline for filing Flowers' Petition and made an oral motion to extend the filing deadline. The State did not oppose the motion. The Court granted counsel's motion and extended the deadline for filing Flowers' Petition by thirty (30) days.[6]

Parties Stipulation Regarding Discovery

On September 12, 2012, Flowers filed his Motion To Obtain A Complete Copy of Discovery From The State. On September 21, 2012, *both* parties were under the mistaken belief that the Nevada Supreme Court's remittitur was forthcoming and that the Court lacked jurisdiction over the instant case. The parties entered into a Stipulation to take the discovery issue off calendar.[7] The Stipulation and Order could not be more clear that the parties only intended to vacate the briefing schedule and hearings pertaining to the discovery issue. Shortly thereafter, counsel became aware that even though no remittitur had issued, the Nevada Supreme Court had established a deadline for filing Flowers' Petition. The Nevada Supreme Court's Order indicated the deadline was September 28, 2012. On October 9, 2012, despite not having obtained the file, Counsel filed Flowers'

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[4] Clearly both parties were mistaken and overlooked the footnote in the Order that established a deadline for filing the Petition in lieu of the issuance of a remittitur, which is the usual mechanism that triggers the statutory filing deadline.

[5] If the Nevada Supreme Court finds Flowers' guilty plea invalid, the dismissed appeal in the instant case would be reinstated and render post-conviction proceedings premature.

[6] *See* Order filed September 17, 2012, attached hereto as Exhibit C.

[7] *See* Stipulation and Order attached hereto as Exhibit D.

Petition, well within the time limits specified in this Court's Order extending the deadline.

ARGUMENT

FLOWERS' PETITION IS NOT UNTIMELY

In its Motion to Dismiss, the State asserts that Flowers' Petition is time barred under NRS 34.726 because he failed to file his Petition within one year after the Nevada Supreme Court dismissed his appeal. The State argues that Flowers has not shown good cause to file his Petition beyond the statutory time period. What the State fails to recognize is that the good-cause analysis only applies in a situation where a Petition is filed untimely.

Here, it is clear that the Court gave Flowers an additional thirty (30) days to file his Petition. Flowers filed his Petition well within that thirty (30) day time limit. Therefore, any discussion of good cause is fundamentally misplaced and inapplicable as to the filing of Flowers' Petition. Accordingly, the defense is not advancing any of the good-cause arguments the State attributes to the defense in its Motion to Dismiss. Specifically, on September 14, 2012, the Court signed an Order extending the deadline to file Flowers' Petition by thirty (30) days, thereby establishing a new deadline of October 28, 2012. In compliance with the Court's Order, Flowers filed his Petition on October 9, 2012, well within the deadline established by this Court. Therefore, Flowers Petition is timely filed.

The existence and effect of this Court's Order extending the deadline seems to be completely lost upon the State, as demonstrated by its inexplicably bizarre attempt to revise the procedural history of this case by omitting any reference to this Court's Order in its Motion to Dismiss. On September 10, 2012, the State stood silent and offered no

opposition to Flowers' oral motion to extend the filing deadline, nor did the State offer any opposition to this Court's granting of the motion. Up to this point, the State has taken the position that remittitur had not yet issued, Flowers' PCR claim was premature and that this Court did not have jurisdiction. The State now seeks to reverse itself, and rely on the Order Dismissing Appeals as precedent to bar Flowers from pursuing his Post-Conviction Relief claims. At the same time, the State completely ignores the fact that this Court ordered a thirty (30) day extension for the filing of Flowers' Petition. To add insult to injury, they also ignore the fact that Flowers' Petition was filed within that thirty (30) day period. The State cannot have it both ways. They clearly advanced the position that this Court was without jurisdiction, fought the defense tooth and nail on even providing basic discovery in the case, and represented to the Court that the action was premature. Thankfully, this Court granted the defense request for a 30-day extension for filing of the Petition. It is indisputable that the Petition was filed within the timeframe that this Court mandated. Thus, Defendant's PCR rights are preserved. The State's many cited authorities in support of their misguided arguments completely miss this fundamental point.

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CONCLUSION

The Petitioner prays that this Honorable Court find that his Petition for Writ of Habeas Corpus is timely and allows leave to supplement the Petition as necessary.

DATED this 14th day of November, 2012.

ORONOZ & ERICSSON, L.L.C.

By: */s/ James Oronoz*
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Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

NORMAN FLOWERS Petitioner, vs. THE STATE OF NEVADA Respondent.	CASE NO: C228755 DEPT. NO: IX

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2012, I served a true and correct copy of the foregoing DEFENDANT'S OPPOSITION TO STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) on the following:

STEVE WOLFSON, Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101
PDMotions@CCdanv.com

/s/ Alicia Oronoz
An employee of Oronoz & Ericsson L.L.C.

EXHIBIT A

Unpublished Disposition
2011 WL 4527339
Only the Westlaw citation
is currently available.
An unpublished order shall not be
regarded as precedent and shall not
be cited as legal authority. SCR 123.
Supreme Court of Nevada.

Norman Keith FLOWERS a/k/a
Norman Harold Flowers, III, Appellant,
v.
The STATE of Nevada, Respondent.
Norman Harold Flowers, III, Appellant,
v.
The State of Nevada, Respondent.

Nos. 53159, 55759. | Sept. 28, 2011.

Attorneys and Law Firms

Special Public Defender

Attorney General/Carson City

Clark County District Attorney

Norman Keith Flowers

Opinion

ORDER DISMISSING APPEALS

*1 These are consolidated appeals from a judgment of conviction and an order denying a motion for a new trial. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge. Appellant has filed a motion to dismiss these appeals pursuant to a plea agreement in another case. Counsel represents that the consequences of dismissing these appeals have been explained to appellant and that appellant understands those consequences. Cause appearing, the motion is granted and we

ORDER these appeals DISMISSED.[1]

1 Because no remittitur will issue in this matter, *see* NRAP 42(b), the one-year period for filing a post-conviction habeas corpus petition under NRS 34.726(1) shall commence to run from the date of this order.

EXHIBIT B