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 VII

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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:

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DISTRICT COURT
CLARK COUNTY, NEVADA

NORMAN K. FLOWERS, Petitioner, vs. THE STATE OF NEVADA, Renee Baker, in her official capacity as the Warden of Ely State Prison; James Cox, in his official capacity as Director of the Nevada Department of Corrections; and the State of Nevada Respondents.	CASE NO. C228755 DEPT. NO. XI Date of Hearing: Time of Hearing:

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

Petitioner, NORMAN K. FLOWERS, by and through his counsel of record, JAMES A. ORONOZ, ESQ., hereby files this Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) Pursuant to NRS Chapter 34. This Petition, including the following Points and Authorities, is made upon the pleadings and papers already on file, and any evidentiary hearing and oral argument of counsel deemed necessary by the Court. Petitioner, NORMAN K. FLOWERS, alleges that he is being held in custody in violation of the Fifth, Sixth, and

Fourteenth Amendments of the Constitution of the United States of America, as well as Articles I and IV of the Nevada Constitution.

MEMORANDUM OF POINTS AND AUTHORITIES

I. RELEVANT PROCEDURAL HISTORY

A. PRE-TRIAL

On December 13, 2006, the State charged Mr. Flowers by way of Indictment with the following: one count of burglary, one count of robbery, one count of first degree murder, and one count of sexual assault. The charges listed the victim as Sheila Quarles. On January 11, 2007, the State filed a notice of its intent to seek the death penalty.

On December 26, 2006, the State filed a motion to consolidate the instant case with the case in State v. Flowers, Dist. Ct. No. C216032. In that case, the State named Marilee Coote and Rena Gonzales as the victims. Id. The State filed a similar motion in case C216032. On January 2, 2007, the Defense filed an Opposition to the Motion in the instant case. At a hearing on April 13, 2007, the State informed the district court that Judge Bonaventure had denied the motion to consolidate in C216032. The district court judge, at that time Judge Mosley, expressed a desire to consolidate the cases and asked that the matter be heard before Judge Villani, who was to receive case C216032 following Judge Bonaventure's retirement.

On January 23, 2007, the Defense filed a Motion in Limine to Preclude Evidence of Other Bad Acts, seeking to exclude admission of the facts of the Coote and Gonzales case. The State filed an opposition to the Motion on February 2, 2007. On November 5, 2007, the State filed a Motion for Clarification of the Court's Ruling, seeking guidance on whether Judge Mosley's comments from the April 13, 2007 hearing had constituted a ruling permitting the State to affirmatively move to admit in the instant case evidence of Mr. Flowers' potential bad acts arising from case C216032. The Defense filed an Opposition to that Motion on November

6, 2007. Judge Bell conducted a hearing on the matter on November 15, 2007, wherein he ordered that a Petrocelli hearing be conducted to determine the admissibility of the bad acts evidence. The Petrocelli hearing occurred on August 1, 2008. Therein, the district court ruled that evidence pertaining to Mr. Flowers' possible involvement in the death of Marilee Coote was admissible in the instant case, but that evidence with respect to the Rena Gonzales investigation was not.

The district court directed that the State could present evidence from the Coote case only to demonstrate the similarities between the two cases. The district court allowed the testimony from the nurse and coroner/medical examiner concerning the manner of Coote's death, the nature of her injuries, and the DNA evidence from the Coote case.

On September 29, 2008, the Defense filed a Motion to Reconsider the district court's ruling on its Motion in Limine. While the district court denied this motion, it provided that the Defense be allowed to enter a continuing objection to the bad acts evidence. The district court further ruled that the Defense was entitled to cautionary instructions with respect to the bad acts evidence and to a relevant jury instruction at the time the case was submitted to the jury. This limiting instruction at trial took the form of an admonishment to the jury that the bad act testimony only be considered contingent upon a finding that the acts had been proven by clear and convincing evidence. The district court further admonished the jury to consider the evidence only for the purposes of determining identity, intent, motive, and absence of mistake or accident.

On July 30, 2008, several months before trial, the Defense filed a bench brief with the district court detailing the facts of the Coote and Gonzales investigations. The brief further argued that admission of the evidence from either of those cases constituted a de facto joinder solely for the purposes of creating emotional, prejudicial impact.

B. TRIAL

Trial commenced on October 15, 2008. After five days of trial, the court submitted the case to the jury. The jury returned its verdict finding Mr. Flowers guilty of first-degree murder, guilty of sexual assault, and guilty of burglary, and not guilty of robbery. During the subsequent penalty phase, the jury returned special verdicts for mitigating circumstances and imposed a verdict of life without the possibility of parole rather than death.

On October 30, 2008, following the entry of verdict, the Defense filed a Motion for a New Trial. The Motion cited as grounds for a new trial the district court's rulings allowing admission of the bad acts evidence from case C216032 and allowing admission of certain portions of Mr. Flowers' statements to police. The State filed an Opposition on November 10, 2008. The district court denied the motion on November 18, 2008.

Mr. Flowers was sentenced on January 13, 2009. The court sentenced Mr. Flowers to a term of forty-eight (48) months to one hundred twenty (120) months in prison for burglary, a consecutive term of life without the possibility of parole for first-degree murder, and a consecutive term of one hundred twenty (120) months to life in prison for sexual assault. The judgment of conviction was filed on January 16, 2009. An amended judgment of conviction was filed on February 12, 2009.

C. DIRECT APPEAL

Mr. Flowers filed a Notice of Appeal on January 26, 2009. Mr. Flowers filed an Amended Notice of Appeal on February 20, 2009. On December 21, 2009, Mr. Flowers' appellate counsel filed an opening brief with the Nevada Supreme Court, alleging the following errors:

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

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

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

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

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

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

7. There is insufficient evidence to support Flowers' conviction; and

8. The judgment should be vacated based on cumulative error.

The State filed an answering brief on February 19, 2010. The Defense filed a reply brief on May 3, 2010. Oral argument was held before the Northern Nevada Panel of the Nevada Supreme Court on February 15, 2011. On June 13, 2011, pursuant to a plea agreement resolving case C216032, the Defense filed a motion to voluntary dismiss the appeal, which was granted.

D. POST-CONVICTION LITIGATION

The district court appointed James A. Oronoz, Esq., to represent Mr. Flowers on June 8, 2012, in connection with this post-conviction proceeding. This Supplemental Petition now follows.

II. RELEVANT FACTS

Around 3:00 p.m., on March 24, 2005, Debra Quarles returned to her home at 1001 North Pecos Road in Las Vegas, Nevada to find her eighteen year-old daughter Sheila "Pooka" Quarles drowned in the bathtub. Grand Jury Transcript "GJT" Vol. 1 at 20-29. She also discovered that her stereo was missing from the living room. Id.

Sheila Quarles' autopsy revealed evidence of homicide and of sexual assault. GJT Vol. 1 at 38-39. Doctors took DNA from inside of her vagina for analysis. Id. Testing of the DNA revealed two separate contributors of semen. Norman Keith Flowers was determined to be a likely contributor. TT Vol. 4B at 45-48. It was later conclusively determined that Sheila Quarles' neighbor, George Brass, Jr., was the second contributor. Id.

The course of the investigation revealed that Sheila Quarles maintained several sexual relationships around the time of her death. This included a relationship with a female transit driver, Qunise Toney. GJT Vol. 1 at 13-14. Evidence also showed that Sheila Quarles told a former boyfriend, William Kinsey, that she was dating a man named Keith. TT Vol. 4B at 5-8. George Brass, Jr., a neighbor, also claims to have maintained a continuing sexual relationship with Sheila Quarles, TT Vol. 3B at 81, but Sheila Quarles' mother, Debra, could not corroborate this fact. TT Vol. 2B at 34.

Through police investigation and through testimony elicited at both the Grand Jury proceedings and at trial, evidence partially established a timeline of events during Sheila Quarles' final hours. At or around 6:30 a.m., Sheila Quarles returned to the apartment at 1001 North Pecos after spending the night with Qunise Toney. TT Vol. 2B at 45-46. Qunise Toney spoke with Sheila Quarles three or four more times throughout the day, by phone, with the last time being around 11:00 a.m. or 12:30 p.m., and Qunise Toney testified at trial that Sheila Quarles seemed to be in a "good mood." TT Vol. 2B at 152-53. Debra Quarles, the victim's mother, also spoke with her daughter five times that day by phone, later testifying that Sheila Quarles sounded "normal" each time. TT Vol. 2B at 16. Debra Quarles last spoke with Sheila Quarles around 1:00 p.m. During that conversation, the phone went dead. When Debra tried to call back, no one answered. Id. At or around 1:35 p.m., Qunise Toney received a call from

Sheila Quarles' phone, but when she answered, no one was on the line. Qunise Toney's return call went straight to voicemail. TT Vol. 2B at 161.

In the afternoon, Debra Quarles returned to the apartment complex. TT Vol. 2B at 19-22. Debra Quarles estimated the time as being around "three something." Id. Robert Lewis, a neighbor[1] who was apparently watching out of the window, came down to help. Id. The front door to the Quarles' apartment was closed but not locked, which was unusual because. Sheila Quarles habitually locked the door while home alone. Id. As described above, upon entering the apartment Debra Quarles immediately noticed that the stereo in the living room was missing. Id. She went to her bedroom and noticed that her room was "messed up." Id. She also heard the sound of water dripping in the bathroom and went to turn it off. Id.

Debra Quarles walked into the bathroom, pulled back the shower curtain, and found Sheila Quarles' body face-up in a full tub of water. TT Vol. 2B at 22-23. During this time, Robert Lewis had been waiting in the living room, but came to help Debra Quarles pull Sheila out of the water. Id. At that point, Debra Quarles left the apartment to pick up her son, Ralph, who was working nearby. TT Vol. 2B at 24. Robert Lewis also left the apartment, told neighbors that Sheila Quarles needed help, and someone called 911. TT Vol. 2A at 121.

When Debra returned, police and paramedics had already arrived at the apartment and were beginning their investigation. TT Vol. 2B at 24. The first officer on the scene was Officer Brian Cole, who estimated at trial that he arrived at the apartment at or around 2:50 p.m. TT Vol. 2A at 108. He found Sheila's body lying on the floor and secured the scene. TT Vol. 2A at 109-111. Debra provided the officers the following information: the pillow cases were missing from the pillows in her bedroom, Sheila's bank card and cellular phone were missing, jewelry and CDs were missing, and, as mentioned before, the stereo that had been in the living room was missing. TT Vol. 2B at 26. She also supplied the name of Qunise Toney as the only person she could imagine who could have been involved in Sheila's death. TT Vol.2B at 25.

Several other people spoke with police officers at the scene. Qunise Toney, who had been told about Sheila's death, arrived at the apartment and spoke to the police. TT Vol. 2B at 156.

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[1] Robert Lewis is also the uncle of George Brass, Jr.

George Brass, Jr., who also had been told of Sheila's death, arrived at the apartment and spoke briefly with an officer. TT 3B at 91. Brass did not mention anything to the officer about having been inside the apartment earlier that day or about having sex with Sheila earlier that day. Id.; TT Vol. 2B at 115.

Homicide Detective James Vaccaro responded to the scene as the homicide supervisor. TT Vol. 2B at 69. He concluded that there was no sign of forced entry into the apartment. TT Vol. 2B at 74. He discovered Sheila's clothing underneath where her body had been lying in the bathroom. TT Vol. 2B at 89. Her underwear had apparently been placed on the outside of the jeans and backwards. Id. As described above, analysts eventually discovered DNA from two male sources on Sheila's underwear collected at the crime scene. TT, Vol. 4B at 45-48. At trial, Vaccaro agreed that "women can have sex with people consensually and later get murdered and there is not necessarily a sexual component to the homicide." TT, Vol. 2B at 128.

Crime scene analysts collected twenty-one (21) samples for fingerprint analysis and found fingerprints on nine (9) of those samples. TT Vol. 2B at 190. They did not attempt to take any prints off of Sheila's body. TT Vol. 2B at 96-97. Not a single fingerprint from Norman Flowers was found in the apartment. TT Vol. 2B at 194-95.

Police never recovered the items that were missing from the apartment, including the stereo or Sheila's bankcard. TT Vol. 3B at 73; TT Vol. 4A at 67. While Sheila's cellular phone was not recovered, officers were able to obtain phone records for her phone number. TT Vol. 3B at 70-71. The last calls recorded were an outgoing call to Qunise's number around 1:35 p.m. and a similar incoming call just prior to Qunise's call. Id.

Further police investigation and testimony at trial placed several people around the Quarles' apartment the day of Sheila's murder. Robert Lewis, George Brass. Jr.'s uncle, testified that he had seen Brass at the apartment complex around lunch time the day Sheila was killed. TT Vol. 2B at 61. He estimated the time as being around 11:20 or 11:30 a.m. Id. According to George Brass' testimony at trial, he had been around the apartment complex only briefly in the late morning, and then had gone to work at the Wal-Mart near Craig and Martin Luther King in Las Vegas. TT Vol. 3B at 82. Brass claimed that his shift was to begin at 11:45 a.m., and he stated

that he arrived at work on time or close to on time. TT Vol. 3B at 83. At trial, the State called Gabriel Ubando, an assistant manager at the Wal-Mart on Craig and Martin Luther King, who testified that the comings and goings of Wal-Mart employees are traced by badges that they carry with them, which must be swiped when leaving and returning. TT Vol. 3B at 97-100. According to Ubando, Wal-Mart records show that Brass clocked into work at 12:04 p.m., clocked out for lunch at 4:04 p.m., returned at 5:03 p.m., and left at 7:45. Id. The records do not reflect the time that Brass left work to return to Sheila's apartment after her death, a period in which he acknowledges he did not clock out, but he claims he told his supervisor leaving was necessitated by the emergency at the Quarles' apartment. TT Vol. 3B at 89-91.

Further, Debra told Detectives about an older man who had recently moved into the apartment complex. TT Vol. 2B at 36. She told them that he had recently been released from prison. Id. She made the investigators aware that, on one occasion about a month prior to Sheila's death, the man had knocked on the Quarles' apartment door and had asked Debra's younger daughter, Miracle, to go get Sheila. TT Vol. 2B at 36-38. Debra had told the man how old Sheila was and had told him to stay away from their house. Id. After Sheila's death, she gave police the man's name, Darnell, along with a physical description. Id. Detectives Long claims to have "run . . . down" that lead and it had "turned out to be nothing." TT Vol. 4A at 70.

Robert Lewis was also known to have been hanging around the apartment the day of Sheila's death. When police responded to the scene, Lewis voluntarily gave a DNA sample and spoke with police for approximately an hour, but the police did not take a written statement. TT Vol. 3B 26-27. The Defense was able to uncover evidence that Robert Lewis frequently sold items at pawn shops, including women's jewelry. TT 4A at 13-16. However, the jury was not allowed to hear this evidence at trial.

Lewis also testified about seeing one of his nephews, Anthony Culverson, around Sheila's apartment the day of Sheila's death TT Vol. 2B at 62. Lewis testified at trial that he had previously noticed Culverson interacting with Sheila, and that Culverson's interactions had prompted Lewis to tell him "she was a youngster, he shouldn't be trying to talk to her like that." TT Vol. 2B at 63.

Natalie Sena was also a resident of the apartment complex where the Quarles lived in March of 2005. TT Vol. 4B at 104. She told police that, on the day Sheila died, she had seen a tall, skinny man in a flannel shirt near the Quarles' apartment. TT Vol. 4B at 106-07. She also thought she remembered seeing George Brass, Jr., known to her as "Chicken," before and after 12:00 p.m. TT Vol. 4B at 108. She testified at trial that she had seen Brass with the other tall skinny man. Id. She also testified that, after 12:00 p.m., she had seen the tall skinny man knocking on Sheila Quarles' door or just coming out of her apartment. Id. She described his manner as "creeping." Id.

At the time of Sheila's death, Natalie Sena was living in the apartment above Sheila's with a man named Jesus Navarro. TT Vol. 4B at 110. She testified at trial that, two or three days after Sheila's death, she saw Jesus (sometimes called "Jesse") outside of her apartment with a "radio" with "detachable speakers." Id. Sena testified that she had asked Navarro where he got the "radio" and that he had told her that he got it "from the apartment downstairs, the girl's downstairs apartment." TT Vol. 4B at 111.

Veronica Sigala, the assistant manager at the apartment complex, also testified about her interactions with Navarro. TT Vol. 4B 130-35. She had seen him break into apartments around the complex. She had told him to leave the property seven or eight times and had called the police on him three or four time. Id.

Martha Valdez, also a resident at the apartment complex at the time of Sheila's death, testified at trial about a man who had broken into her home after midnight shortly after she had moved in. TT Vol. 4B 139-41.

Detective George Sherwood was one of the police investigators assigned to work on the case under Detective Vaccaro. TT Vol. 4A at 40. He would later testify as to how investigators developed Mr. Flowers as a suspect. Sherwood was aware that the DNA recovered from Sheila's underwear and genitals pointed to the presence of two different male DNA profiles. TT Vol. 4A at 70. Part of the DNA recovered from Sheila's genitals and underwear was matched with DNA records from Flowers already in the laboratory's "CODIS" database. TT Vol. 4A at 71. Sherwood was made aware of this information on August 22, 2006. Id. Thereafter, Mr.

Flowers was treated as a suspect. Sherwood remembered another homicide detective handling a case with a suspect also named Norman Flowers. TT Vol. 4A at 72. That case also involved a sexual assault and murder.[2] Id.

Dan Long, a detective with the Las Vegas Metropolitan Police Department's Gang Unit, was also involved in the investigation of Sheila Quarles' death. TT Vol. 3B at 16. He would later describe at trial the means by which investigators came to suspect that George Brass, Jr., was the second contributor to the DNA samples retrieved from Sheila's vagina and underwear. TT Vol. 3B at 40. Long explained how he had found through one source that Sheila "had been talking to a man by the name of Chicken." TT Vol. 3B at 41. Long determined that a man nicknamed "Chicken" resided in the same apartment complex as Sheila, and that his real name was George Brass, Jr. TT Vol. 3B at 41-42.

At that time, Brass was in custody at Clark County Detention Center. Long spoke with Brass, and Brass admitted both to having been in the apartment the day Sheila was killed and to having sex with her. TT Vol. 3B at 96.

Q- "Without saying what he specifically said, did Mr. Brass agree to speak with you about Sheila Quarles and his relationship with her?"

A- "Yes, he did."

Q- "Could he have refused to speak with you at that point?"

A- "Absolutely."

Q- "Could he have told you that I don't want to talk to you at all, I want my lawyer, I don't want to talk to you?"

A- "Yes."

Q- "He didn't do that?"

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[2] Prior to trial, the State proposed to admit the facts of the investigation in a companion case, involving a victim named Marilee Coote, to demonstrate "identity, motive, knowledge, intent, [and] absence of mistake" in the instant case. The defense argued for its exclusion based on the fact that it is unproven bad act evidence, and on the catastrophic prejudicial effect the admission of other unproven allegations of sexual assault and murder would have on Flowers' case. **See Defendant's Motion in Limine to Preclude Evidence of Other Bad Acts and Motion to Confirm Counsel, June 23, 2007; Defendant's Motion to Reconsider the Ruling on Defendant's Motion in Limine to Preclude Evidence of Other Bad Acts, September 29, 2008.** Substantial evidence was introduced in Mr. Flowers' trial purportedly connecting Mr. Flowers to the Coote murder and purportedly showing similarities between the Coote case and Sheila Quarles' case.

A- "No."

TT Vol. 3B at 41-43.

Brass would later testify at trial that he had been inside the Quarles' apartment and had had sex with Sheila the day she died, at around 10:30 a.m. TT Vol. 3B at 82. He testified that they had had sex on the living room floor and that he had been inside the apartment "[m]aybe 20 minutes at the most." TT Vol. 3B at 87-88. The levels of DNA evidence in Sheila's vagina and underwear were "pretty much even" as to both Flowers and Brass. TT Vol. 4B at 68. The detectives became aware of this fact only a few months before Mr. Flowers was to go on trial.

After matching Mr. Flowers' DNA to the DNA found in Sheila's vagina and underwear, police approached Flowers and interviewed him about the case. TT Vol. 4A at 81 et seq. Flowers was in custody at the time on another matter. Id. During the course of this interview, Flowers sought to invoke his right to remain silent, explaining that he did not want to "get involved in anybody else's matters." TT Vol. 4A at 87. The interrogation continued anyway. Id. At trial, the Defense unsuccessfully sought to exclude the testimony drawn from Flowers after his invocation of his right to remain silent. TT Vol. 5 at 121. The court admitted this evidence. Id.

At trial, the doctor who performed Sheila Quarles' autopsy, Dr. Ronald Knoblock, did not testify, although the results of the autopsy were clearly an essential part of the State's case. Instead, the State called medical examiner Lary Simms, who presented Dr. Knoblock's findings, despite the fact that Dr. Knoblock resided in Las Vegas, Nevada at the time of the trial. Further, the DNA analyst who performed some of the DNA analysis central to the State's case in the Marilee Coote investigation, Thomas Wahl, was also not called. Instead, Kristina Paulette testified about DNA examinations that Wahl had performed. Both instances were clear violations of Flowers' rights to due process, confrontation, and cross-examination of witnesses. In spite of this, trial counsel failed to object to either the testimony of Dr. Simms or of Ms. Paulette.

Dr. Simms testified to the results of the autopsy. TT Vol. 2A at 46 et seq. He testified that Sheila had been asphyxiated, caused by strangulation to her neck. TT Vol. 2A at 51, 54. He

concluded that the absence of ligature marks indicated likely manual strangulation. TT Vol. 2A at 54-55. He also noted that the autopsy results showed bruising on Sheila's abdomen, an abrasion on her knee, and lacerations in the vaginal area. TT Vol. 2A at 51. He stated his opinion that the tearing in the lining of the vagina were consistent with forcible penetration, as would occur in a sexual assault. TT Vol. 2A at 51-52. He also stated his belief that the lacerations had occurred prior to her death, within an hour of death. TT Vol. 2A at 52. He acknowledged that semen inserted into a vagina can remain for a period of time and that the presence of DNA inside the vagina of a sexual assault and murder victim does not necessarily mean the deposit of that semen was contemporaneous with a sexual assault. TT Vol. 2A at 97-98. He also acknowledged that it is not scientifically possible, where the semen of two different men is identified inside a vagina, to determine which was deposited first without more evidence than was available in this case. TT Vol. 2A at 98-99.

Dr. Simms also testified that there had been a fresh hemorrhage to the right side of Sheila's scalp that was consistent with blunt force trauma (TT Vol. 2A at 56), as well as frothy fluid in her airway, which he stated could be a sign of drowning. TT Vol. 2A at 60. Dr. Simms recited Dr. Knoblock's conclusion that Sheila's cause of death had been drowning, with strangulation as a contributing factor. TT Vol. 2A at 68. Flowers did not contest the cause of death. Defense counsel properly objected, therefore, when the State sought to introduce numerous gruesome photos from the autopsy, which included a photograph of Sheila's tongue after it had been removed from her body. TT Vol. 2A at 61-68. Over defense objection, the district court admitted the photographs as exhibits 93 – 108. TT Vol. 2A at 61-62.

Kristina Paulette testified at trial as to her own DNA analysis and as to analysis performed by another DNA expert, Thomas Wahl. TT Vol. 4B at 30, 48. As described above, trial counsel failed to object to Ms. Paulette's testimonial hearsay statements regarding the work of Mr. Wahl, who was not present to present his own findings. Ms. Paulette described to the jury that DNA samples taken from Sheila's vagina revealed the presence of DNA from two separate males. TT Vol. 4B at 36, 41-42. Paulette explained how her first tests had first revealed Mr. Flowers as a possible contributor to one of the male DNA profiles but that, later, in 2008, she

was given a buccal swab from George Brass, Jr., and determined that Brass was a likely contributor to the other male DNA profile. TT Vol. 4B at 40, 46.

During direct examination, the State elicited improper vouching testimony from Detective Vaccaro regarding the State's essential witness, George Brass, Jr.:

> Q- "Now, if Mr. Brass—or assuming Mr. Brass admitted or told detectives that he had sexual contact with Miss Quarles on the day of her death, the room or the location that the intercourse took place wouldn't be particularly relevant in the investigation, would it, if it was a consensual relationship?"
>
> A- "Not with regard to that sexual contact with regard to Mr. Brass."
>
> Q- "Okay. So if he said that he had sex with her on the floor of one of the rooms in Debra Quarles' apartment, knowing that doesn't necessarily tell you who killed Sheila Quarles later on?"
>
> A- "I think that the correct answer to that would be that it wasn't important until we knew more about that sexual activity and whether or not he was a suspect in our case. So I don't know if that's a confusing answer, but when we learned about him as a suspect or not a suspect in our case, when he did not develop as a suspect in our case, then that location that the consensual sex took place wasn't of any importance to us."
>
> Q- "I mean—yeah, I guess that's my question." It doesn't tell you any more about the investigation or how she was killed if he says I had sex with her on the living room floor, on the kitchen floor or on the bedroom floor? That doesn't tell you anything about who killed Sheila Quarles, does it?"
>
> A- "No. I mean, he could have said he had sex with her at a location other than the apartment even, for that matter. The fact that he said that he had sexual contact with her, but then showed additional information—or additional investigation showed us that he wasn't a suspect in that, where they had sex wasn't of importance to us; and, at that point, I think that was beyond my time there anyway. So in my experience, that wouldn't have been important to me."
>
> Q- "And the fact that someone has sex with another individual on a floor or on a

carpet, that wouldn't necessarily mean that sperm or some kind of DNA would end up on the carpet by virtue of the sexual activity, would it?"

A- "No. But I guess we could say that depending upon the positioning of the two individuals having sex, you could make a conclusion whether or not there was some deposit of semen on the surface that they were having sex on. So I don't really know how to answer that."

Q- "Maybe, maybe not?"

A- "It doesn't mean it's always going to be there."

TT Vol. 2B at 130-131.

At several stages during trial, the State's attorneys also improperly commented on Flowers' decision not to testify and not to speak with detectives during interrogation:

> 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 gave 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 went to work.

TT Vol. 5 at 50-51.

> 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.

TT Vol. 5 at 118-20.

After five days of trial, the court submitted the case to the jury. The jury deliberated for over 24 hours before returning its verdict, finding Mr. Flowers guilty of first-degree murder, guilty of sexual assault, and guilty of burglary, and finding him not guilty of robbery. During the penalty phase, the jury returned special verdicts for mitigating circumstances and imposed a verdict of life without the possibility of parole, rather than death.

Mr. Flowers was sentenced on January 13, 2009. The court sentenced Mr. Flowers to a term of forty-eight (48) months to one hundred twenty (120) months in prison for burglary, a consecutive term of life without the possibility of parole for first-degree murder, and a consecutive term of one hundred twenty (120) months to life in prison for sexual assault.

III. GROUNDS FOR RELIEF

LEGAL AUTHORITY RELEVANT TO ALL CLAIMS

A conviction cannot stand when defense counsel provides ineffective assistance of counsel. U.S. Const. Amends. V, VI, & XIV; Nevada Constitution Art. I. Counsel is ineffective when (1) his performance is deficient, such that counsel made errors so serious he ceased to function as the "counsel" guaranteed by the Sixth Amendment, and (2) when the deficiency prejudiced the defendant, such that the result of the trial is rendered unreliable. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). The question of whether a defendant has received

ineffective assistance at trial is a mixed question of law and fact and is subject to independent review. State v. Love, 109 Nev. 1136-38, 865 P.2d 322, 323 (Nev. 1993).

Performance of trial counsel will be judged against the objective standard for reasonableness, and is deficient when it falls below that standard. State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (Nev. 2006); Means v. State, 120 Nev. 1001, 103 P.3d 25 (Nev. 2004). Where trial counsel might claim that an action was a strategic one, the reviewing court must satisfy itself that the decisions were, indeed, reasonable. Strickland, 466 U.S. at 691.

Prejudice to the defendant occurs where there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (Nev. 1996). A "reasonable probability" is one sufficient to undermine confidence in the outcome. Id.

With respect to post-conviction habeas corpus petitions, all factual allegations in support of an ineffective assistance of counsel claim need only be proven by a preponderance of the evidence. Powell, 122 Nev. at 759.

ARGUMENT

I. Trial counsel was ineffective for failing to object to the improper testimony of a State's witnesses testifying as to the results of work performed by other experts, in violation of Crawford v. Washington.

The Confrontation Clause guarantees that "testimonial" out-of-court statements of a witness are barred unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity to cross-examine. U.S. Const. amend. VI; Crawford v. Washington, 541 U.S. 36, 53-54 (2004). A testimonial statement is "a declaration or affirmation made for the purpose of establishing or proving some fact." Id. at 51. There are a "core class of testimonial statements" which include (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. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009) (citing Crawford, 541 U.S. at 51-52).

Additionally, a forensic report prepared for the purposes of aiding a police investigation epitomizes the definition of "testimonial." Bullcoming v. New Mexico, 131 S.Ct. 2705, 2717-2718 (2011). The Court in Crawford made clear that the "core class" of testimonial statements was not intended to be a comprehensive definition of what qualifies as "testimonial" (Crawford, 541 U.S. at 68), meaning that even statements falling outside of the core class may still be testimonial such that the protections of the Confrontation Clause are invoked. The Bullcoming Court explicitly stated that surrogate testimony of forensic laboratory reports do not meet the Confrontation Clause requirements:

> The question presented is whether the Confrontation Clause permits the prosecution to introduce **a forensic laboratory report containing a testimonial certification**—made for the purpose of proving a particular fact—**through the in-court testimony of a scientist who did not sign the certification or perform or observe the test** reported in the certification. **We hold that surrogate testimony of that order does not meet the constitutional requirement.** The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist. Bullcoming, 131 S.Ct. at 2710.

Under this clear standard, a prosecutor *cannot* introduce forensic evidence through a surrogate expert without analyzing whether the defendant cross-examined the original expert prior to trial because introducing that evidence explicitly violates the defendant's rights under the Confrontation Clause.

In Melendez-Diaz, the Supreme Court found that the admission of laboratory analysts' affidavits without the presence of the analysts who prepared the affidavits at trial violated the defendant's right to confront the witnesses against him. Melendez-Diaz, 557 U.S. at 329. The Court concluded that "[a]bsent a showing that the analysts were unavailable to testify at trial and that [the petitioner] had a prior opportunity to cross-examine them, [the petitioner] was entitled to be confronted with the analysts at trial." Id. at 311. Accordingly, in Bullcoming, the Court explained that laboratory and forensic reports constituted testimonial evidence because a surrogate witness could not convey the original observations outlined in the document. Bullcoming, 131 S.Ct. at 2715. As a result, the defendant would not be able to expose any lies, bias, subjectivity, unreliability, or inconsistencies with the reports as created by the original preparer, which facially and effectively deprives the defendant of his constitutional right to cross-examine the witness who created a testimonial piece of evidence against him. Bullcoming, 131 S.Ct. at 2715-2716. (See also, Melendez-Diaz, 557 U.S. at 321).

The *only* method to circumvent the defendant's right to confront the preparer of a laboratory or forensic report would be to show that the witness was unavailable to testify at trial *and* to show that the defendant had a prior opportunity to cross-examine that witness. Melendez-Diaz, 557 U.S. at 309. Without *both* of these elements, a testimonial statement cannot be introduced to a jury unless the defendant has the opportunity to cross-examine the original witness. Crawford, 541 U.S. at 68. (See also, Melendez-Diaz, 557 U.S. at 309).

The rationale for this rule stems from the fact that human nature encompasses subjectivity, bias, and unreliability. Melendez-Diaz, 557 U.S. at 321. Also, "[t]here is a wide variability across forensic science disciplines with regard to techniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability, and published material." Melendez-Diaz, 557 U.S. at 320-321 (Citing National Academy Report S-5). As a

result, scientific inquiry, although generally methodological, does not always maintain perfect objectivity, which further strengthens a defendant's need to cross-examine the witnesses that the State presents. Id. at 321.

Additionally, a prosecutor cannot claim that a forensic report or affidavit should be admissible as a business record without confrontation. Melendez-Diaz, 557 U.S. at 321.

> 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.** Melendez-Diaz, 557 U.S. at 321 (internal citations omitted).

The Court has also concluded that business records, as most other hearsay exceptions, are not testimonial by nature. Id. at 324. Therefore, business records that are not testimonial do not generally require confrontation because they are "created for the administration of an entity's affairs" rather than for the use of proving a fact at trial. Id. at 324.

a. Failure to object to testimonial autopsy reports

Here, Dr. Knoblock's autopsy report constituted testimonial evidence. First, the autopsy report clearly served as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford, 541 U.S. at 51. Additionally, any expert report "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" constitutes a testimonial report. Melendez-Diaz, 557 U.S. at 311 (citing Crawford, 541 U.S. at 52). Accordingly, Dr. Knoblock conducted an autopsy on Ms. Quarles, deduced that her death occurred by homicide, and subsequently prepared a report. Any objective witness would reasonably believe that an autopsy report indicating *homicide* as a method of death would be subject to later use in a criminal trial.

Because Dr. Knoblock's autopsy report constituted testimonial evidence, the parties should have analyzed (1) whether Dr. Knoblock was unavailable to testify at trial, and (2) whether Mr. Flowers had a prior opportunity to cross-examine Dr. Knoblock as a witness.

Dr. Knoblock left the Clark County Medical Examiner's office shortly after preparing Ms. Quarles' autopsy report, but Dr. Knoblock remained in Las Vegas, Nevada, as a practicing physician. Also, the record does not reflect that the State offered any reasonable explanation for Dr. Knoblock's absence at trial. Instead, the State called Dr. Simms to testify to the contents of the autopsy report prepared by Dr. Knoblock. A critical fact that is beyond dispute is that Dr. Simms was not present during the autopsy, nor did he have any personal knowledge of the contents of the report. Thus, it would have been virtually impossible to confront any issues pertaining to subjectivity, bias, methodology, or unreliability. Quite simply, Dr. Simms testified to a report for which he did not have the authority or the knowledge to answer for Dr. Knoblock's methodology, subjective opinion, or bias.

Additionally, Mr. Flowers did not have any prior opportunity to cross-examine Dr. Knoblock as a witness. Although the State offered Dr. Simms as a witness to testify to the contents of Dr. Knoblock's report, the fatally defective confrontation issues presented by this constitutionally deficient practice remain.

Dr. Knoblock's autopsy report should not have been admissible as evidence at trial because the admission of that report violated Mr. Flowers' Sixth Amendment right to confront Dr. Knoblock as a witness against him. Despite these facts, Mr. Flowers' trial counsel did not object to the admission of Dr. Simms' testimony of presenting the findings contained in Dr. Knoblock's report.

///

i. Deficient performance

Trial counsel was ineffective by failing to object to Dr. Simm's testifying about Dr. Knoblock's autopsy reports. Here, the autopsy reports referenced by Dr. Simms at trial were clearly testimonial. Therefore, they were inadmissible at trial without the presence of the original author of the reports or without a prior opportunity for cross-examination, pursuant to Melendez-Diaz and Crawford. Mr. Flowers did not have the opportunity to cross-examine Dr. Knoblock at either the preliminary hearing or at trial, and the State did not offer an explanation for Knoblock's absence. The U.S. Supreme Court's holding in Melendez-Diaz clearly compels the exclusion of his autopsy reports.

Knowing the importance of the autopsy reports to the State's case, a reasonably prudent attorney should have taken steps to prevent testimony regarding the autopsy reports at trial. Further, any reasonably prudent attorney should object when the Defendant suffers a denial of his Sixth Amendment Right to Confrontation. A failure of this magnitude certainly rises to the level of an error that impacted the outcome of the trial. In essence, trial counsel's failure to object to Dr. Simms' testimony regarding the autopsy records prepared by Dr. Knoblock unequivocally constituted deficient performance. As such, protecting this right is a mandatory function of representing a criminal defendant. In this light, trial counsel's performance fell below the objective standard of providing counsel as required by the Sixth Amendment.

ii. Prejudice

Mr. Flowers suffered prejudice because the proper exclusion of the State's autopsy evidence would have reasonably resulted in a different outcome such that this error of trial counsel effectively undermines confidence in the outcome of the verdict. Trial counsel's failure to object generally precluded Mr. Flowers' ability to raise the issue on appeal without a showing of plain error. Flores v. State, 121 Nev. 706, 722, 120 P.3d 1170, 1180-81 (Nev. 2005). That

fact alone shows that Mr. Flowers suffered irreparable prejudice. Not only did trial counsel fail to object, but trial counsel also failed to inquire as to Dr. Knoblock's unavailability at trial. Trial counsel should have known that confronting a witness is an essential right afforded to the defendant by the Constitution. Because of trial counsel's failure to protect Mr. Flowers' constitutional right to confront Dr. Knoblock as a witness against him, Mr. Flowers was forced to appeal the issue on the grounds of plain error. Mr. Flowers should not have suffered this prejudice resulting from a blatant constitutional violation. Because of the deficiency in the performance and the prejudice, trial counsel stripped Mr. Flowers of his Constitutional right to effective assistance of counsel.

b. Failure to object to DNA evidence

Mr. Wahl's DNA report pertaining to the Coote case constituted testimonial evidence. First, the DNA report "created solely for an 'evidentiary purpose'" and "made in aid of a police investigation" was a "declaration or affirmation made for the purpose of establishing or proving some fact." Bullcoming, 131 S.Ct. at 2717, Crawford, 541 U.S 53-54. (See also, Melendez-Diaz, 557 U.S. at 311). Additionally, any report that would "lead an objective witness reasonably to believe that the statement would be available for use at a later trial," constitutes a testimonial report. Melendez-Diaz, 557 U.S. at 311 (Citing Crawford, 541 U.S. at 52).

In Bullcoming, the United States Supreme Court determined that laboratory and forensic reports, such as DNA reports, constitute testimonial evidence. This means that surrogate experts cannot convey the original observations contained in the report. Bullcoming, 131 S.Ct. at 2715. In this case, the prosecutor introduced the testimony of Ms. Paulette, who was the original DNA examiner for Ms. Sheila Quarles' case. However, the prosecutor also introduced Ms. Paulette's testimony regarding the Merilee Coote case, for which Mr. Flowers was not on trial. In this case, Ms. Paulette testified about the contents of a DNA report prepared by Mr. Wahl for the

Coote case. However, Mr. Wahl was the original preparer for the DNA report in Ms. Coote's case. As a result, Ms. Paulette was not present at the time that Mr. Wahl created the original DNA report for Ms. Coote's case.

These undisputable facts show that Mr. Wahl's DNA report constitute testimonial evidence subject to the Confrontation Clause requirements. Bullcoming, 131 S.Ct. at 2713-2714. However, the prosecutor in this case introduced Ms. Paulette as someone qualified as a custodian of records to review records kept during the normal course of business for the DNA laboratory. Pursuant to Melendez-Diaz, the DNA report, like other forensic reports, cannot constitute business records that are exempt from the Confrontation Clause requirements because they were prepared in conjunction with a criminal investigation and created to prove a fact at trial. Melendez-Diaz, 557 U.S. at 324 (See also, Bullcoming, 131 S.Ct. at 2714; Conner v. State, 130 Nev. Adv. Op. No. 49, 63 (2014) (Gibbons, C.J., concurring)).

Because the report should have been subject to the Confrontation Clause requirements, the parties should have analyzed (1) whether Mr. Wahl was unavailable to testify at trial, and (2) whether Mr. Flowers had the prior opportunity to cross-examine Mr. Wahl as a witness.

The record does not reflect any information regarding Mr. Wahl's availability. The State did not offer any explanation for his absence at trial. The State simply began to ask Ms. Paulette to interpret and to testify regarding the contents of Mr. Wahl's report, but Ms. Paulette was not present when Mr. Wahl conducted his report. Although Ms. Paulette conducted an independent examination of the DNA results after Mr. Wahl conducted his examination, Ms. Paulette had no authority to testify to the contents of Mr. Wahl's report because Mr. Wahl's report clearly constituted testimonial evidence, which may have contained subjective, biased, or unexplainable methodologies.

i. Deficient performance

Trial counsel failed to protect Mr. Flowers' constitutional right to confront a witness against him. Trial counsel objected to the admission of Mr. Wahl's report on hearsay grounds. However, Melendez-Diaz clearly states that forensic reports do not constitute business records under the hearsay exception. Therefore, forensic reports fall within the reach of the Confrontation Clause. As such, trial counsel failed to protect Mr. Flowers' Sixth Amendment right to confront Mr. Wahl as a witness because Mr. Wahl prepared the original DNA report.

In addition, Mr. Flowers did not have an opportunity to cross-examine Mr. Wahl at either the preliminary hearing or at trial. Nor did the State offer an explanation for Mr. Wahl's absence. The U.S. Supreme Court's holding in Melendez-Diaz clearly compels the exclusion of his DNA testing report because the defendant did not have an opportunity to cross-examine the scientist who created the reports. Accordingly, Mr. Flowers' trial counsel raised an objection which the United States Supreme Court has deemed inapplicable. The real violation at play constituted a blatant violation of Mr. Flowers' Sixth Amendment rights.

Because of the importance of the DNA to the State's case against Flowers with respect to the Coote murder, a reasonably prudent attorney should have taken steps to prevent testimony concerning that evidence at trial. Further, any prudent attorney should object when the Defendant is being subjected to a denial of his Sixth Amendment Right to Confrontation. In this light, failure to object properly to Ms. Paulette's testimony regarding the DNA records prepared by Mr. Wahl constituted deficient performance on the part of trial counsel.

ii. Prejudice

Mr. Flowers suffered prejudice because the exclusion of Mr. Wahl's DNA report would have substantially affected the outcome of the trial. Trial counsel's failure to raise the correct objection cost Mr. Flowers a denial of his constitutional right to confront Mr. Wahl as a witness.

Trial counsel's error created a reasonable probability that "but for counsel's errors, the result of the trial would have been different." Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (Nev. 1996). Trial counsel's failure to object generally precluded Mr. Flower's ability to raise the issue on appeal without a showing of plain error. Flores v. State, 121 Nev. 706, 722, 120 P.3d 1170, 1180-81 (Nev. 2005). That fact alone shows that Mr. Flowers suffered irreparable prejudice. Trial counsel's failure substantially affected Mr. Flower's constitutional rights under the Sixth Amendment. As such, Mr. Flowers suffered irreparable prejudice due to trial counsel's failure to provide reasonably competent assistance. In light of these facts, trial counsel was ineffective for failing to object to inadmissible evidence, thereby depriving Mr. Flowers of a fundamental right to confront witnesses against him.

II. Trial counsel was ineffective for failing to object to the prosecution's improper vouching for the credibility of its own witness.

Nevada law requires that "[i]t is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony." DeChant v. State, 116 Nev. 918, 924, 10 P.3d 108, 112 (2000), (Citing Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994)). Furthermore, a prosecutor may not vouch. Browning v. State, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004).[3] A prosecutor vouches when the "prosecution places " 'the prestige of the government behind the witness'" by providing "'personal assurances of [the] witness's veracity."' Browning, 120 Nev. at 359. (Citing U.S. v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992); U.S. v Roberts, 618 F.2d 530, 533 (1980)).

The Nevada Supreme Court has expressly adopted the Ninth Circuit's logic, "Analysis of the harm caused by vouching depends in part on the closeness of the case." Lisle v. State, 113

[3] See also, Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). "A prosecutor may not vouch for the credibility of a witness or accuse a witness of lying."

Nev. 540, 553, 937 P.2d 473, 481 (1997); (Citing U.S. v. Frederick, 78 F.3d 1370, 1378 (9th Cir.1996); Ref. Roberts, 618 F.3d at 534). Likewise, "If the issue of guilt or innocence is close, if the state's case is not strong, prosecutor misconduct will probably be considered prejudicial." Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118-119 (2002). (Citing, Garner v. State, 78 Nev. 366, 374, 374 P.2d 525m 530 (1962). Therefore, the closer the case, the more significant the issue of vouching becomes to reviewing courts, and the more likely that reversal for vouching is appropriate.

Prejudicial prosecutorial misconduct occurs when "a prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process." Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). (Citing Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004)). In order to evaluate prosecutorial misconduct, the Nevada Supreme Court has adopted a two-step analysis to determine the propriety of a prosecutor's conduct: (1) determine "whether the prosecutor's conduct was improper," (2) determine "whether the improper conduct warrants reversal." Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).[4]

In Lisle, the prosecutor inadvertently suggested that his essential witnesses were credible. Lisle, 113 Nev. at 553. Therefore, the prosecutor cannot suggest that the "prestige of the government" supports the credibility of the witnesses in any way, even when the nature of that testimony is critical to the prosecutor's case. Lisle, 113 Nev. at 553. In Rowland, the

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[4] The Ninth Circuit expressly states, "'As a general rule, a prosecutor may not express his opinion of the defendant's guilt or his belief in the credibility of government witnesses.' Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony. **'Vouching is especially problematic in cases where the credibility of the witnesses is crucial, and in several cases applying the more lenient harmless error standard of review, [courts] have held that such prosecutorial vouching requires reversal.'**" U.S. v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993). (Internal citations omitted).

prosecutor labeled one witness as "a man of integrity" and "honor." Rowland, 118 Nev. at 39.

The court held,

> "**Calling a witness a person of integrity and honor is indeed commenting on the character of the witness and vouching for the testimony given**. This characterization of the witness's testimony **'amounts to an opinion as to the veracity of a witness in circumstances where veracity might well have determined the ultimate issue of guilt or innocence.'** This argument was prosecutorial error. 'Many strong adjectives could [have been] used [to describe the testimony] **but it was for the jury, and not the prosecutor, to say which witnesses were telling the truth...**'" Rowland, 118 Nev. at 39.

In both Lisle and Rowland, the prosecutors improperly used the "prestige of the government" to support the credibility and veracity of their witnesses.

In Anderson, the prosecutor impermissibly undermined the testimony of a defense witness by accusing him of lying. Anderson, 121 Nev. 511, 516-517. The Court held that the prosecutor's statements, "[the defendant's son] 'couldn't not look at [him] and lie to [him],' and that Anderson and his son had years to 'cook up a story and they did,'" affected the defendant's substantial rights. Anderson, 121 Nev. at 517. In Valdez, during jury selection, the prosecutor remarked that the defendant was on a "man hunt" before his arrest. Valdez, 124 Nev. 1190. The court held that the prosecutor's reference to a "man hunt" was improper prosecutorial conduct because "A prosecutor may not 'blatantly attempt to inflame a jury.'" Valdez, 124 Nev. 1191. (Citing Collier v. State, 101 Nev. 473, 479, 705 P.2d 1126, 1130 (1985)).

Here, the prosecutors used the prestige of the government to give credit to a very incredible and vulnerable essential State witness. The prosecutors used the testimony of two detectives in their closing arguments to vouch for Mr. Brass's credibility. Ironically, at the same time, Mr. Brass was defending his own very serious charges of murder, attempt murder, and robbery. Mr. Brass has since been convicted of murder with use of a deadly weapon, attempt murder with use of a deadly weapon, conspiracy to commit robbery, robbery with a deadly

weapon, and attempt robbery with a deadly weapon. Thus, the State found itself in the unenviable position of attempting to utilize the testimony of a witness whom, in a different courtroom, in the same courthouse, they were also trying to convict and incarcerate with life without parole.

In addition, during the direct examination of Detective James Vaccaro, the prosecutor vouched to the jury that Mr. Brass should not have been considered a prime suspect to the murder and sexual assault. Detective Vaccaro retired in 2007, but Mr. Brass did not admit to having sex with the victim until a detective approached him in 2008. Accordingly, Detective Vaccaro did not have any personal knowledge regarding Mr. Brass's admission because Detective Vaccaro had already retired at the time of Mr. Brass's admission. Therefore, the prosecutor used the prestige of the government when it used Detective Vaccaro's position as a representative of law enforcement to make Mr. Brass's story more believable.

Additionally, the prosecutor questioned Detective Dan Long about his in-custody conversation with Mr. Brass. During this testimony, the prosecutor asked Detective Long about Mr. Brass's willingness to speak about Ms. Quarles.

Q- "Without saying what he specifically said, did Mr. Brass agree to speak with you about Sheila Quarles and his relationship with her?"

A- "Yes, he did."

Q- "Could he have refused to speak with you at that point?"

A- "Absolutely."

Q- "Could he have told you that I don't want to talk to you at all, I want my lawyer, I don't want to talk to you?"

A- "Yes."

Q- "He didn't do that?"

A- "No."

TT Vol. 3B at 41-43.

Although the prosecutor asked simple questions, these questions have a dire effect when viewed in light of the closeness of the case. As the court has stated, "Analysis of the harm caused by vouching depends in part on the closeness of the case." Lisle, 113 Nev. at 553. This line of questioning directly relates to the prosecution's vouching for Mr. Brass as their essential witness. Logically, the prosecutor wanted to establish that Mr. Brass could not have possibly lied about his involvement in the victim's murder because he truthfully told Detective Long that he had sex with her on the morning that she was murdered. Like the prosecutor in Lisle, the prosecutor here used tactics to establish a false sense of credibility.

During the State's closing arguments, the prosecutor explicitly vouched for Mr. Brass' credibility. The prosecutor labeled Mr. Brass as a man who "had nothing to hide," which is certainly not the position of the District Attorney's office when they prosecuted Mr. Brass for murder in a separate case. Additionally, the prosecutor compared Mr. Brass' willingness to be open and testify to Mr. Flowers' wish to invoke his right to silence. As a result, the prosecutor's cutting statements "so infected the proceedings with unfairness as to result in a denial of due process."

Each of these examples shows a common thread in the prosecutor's strategy—the prosecutor used her power as a government agent to vouch for Mr. Brass' credibility in order to obtain a conviction. In reality, the vouching had everything to do with the fact that the State wanted to convict Mr. Flowers, so they created a fake sense of "credibility" to purport the story of their essential witness.

Under the Valdez standard, the reviewing court should first determine that the prosecutor's conduct was improper. This determination is not difficult. The prosecutors in this case had no

reason to believe that Mr. Brass showed any sort of credibility, and therefore, they had no basis for which to use Mr. Brass' testimony to elicit an emotional response from the jury and to inflame the jury.

The second determination under Valdez requires the court to determine whether the improper conduct requires reversal. In this case, there should be no other remedy. The prosecutor used one of the victim's lover's testimony to implicate and convict another of the victim's lovers. Again, it bears repeating that the prosecutors absolutely vouched in the closing arguments, which created the false and erroneous illusion that Mr. Brass was someone to be trusted.

This was a very close case. Mr. Brass and Mr. Flowers each had sex with the same girl the day she died. When presenting that odd scenario, the State impermissibly and illegally resorted to vouching in order to convict Mr. Flowers.

a. Deficient Performance

Trial counsel's performance fell deficient by allowing the prosecutor to vouch for a witness. The law clearly states that prosecutors cannot use the prestige of the government to vouch for any witness. However, trial counsel in this case did not object to the State's continued vouching for Mr. Brass' credibility.

The serious nature of this error created a situation in which trial counsel failed to act as Mr. Flower's counsel. By allowing the State to vouch, Mr. Flowers' trial counsel allowed the State to fabricate a credible witness. The vouching inevitably poisoned the jury to such an extent that the jury could not have made any other determination as to the outcome because the defense did not undermine the credibility of the witness.

Under State v. Powell, trial counsel's performance must be judged for deficiency against an objective standard for reasonableness. State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458

(Nev. 2006). Judging Mr. Flowers' trial counsel's performance against *any* standard of reasonableness shows deficiency. Trial counsel failed to recognize the State's vouching tactics, and as such, allowed the jury to hear about a completely incredible and vulnerable essential witness.

b. Prejudice

Mr. Flowers suffered prejudice as a result of trial counsel's failure to object to the State's vouching. Trial counsel allowed the prosecutors to inject a sense of credibility to a very incredible and vulnerable witness. The jury had no choice but to believe the evidence presented.

The prejudice in this case stems from trial counsel's failure to object to the State's systematic vouching. The State did not simply vouch one time. The State blatantly vouched at least three times. Trial counsel should not have allowed the State to use improper vouching without raising the appropriate objections.

CONCLUSION

For the reasons stated above, Flowers' conviction is unconstitutional under the federal and state constitutions for each of the reasons stated herein. Mr. Flowers' judgment of conviction must therefore be vacated.

DATED this 7th day of July, 2014.

ORONOZ & ERICSSON LLC

/s/ James Oronoz
James A. Oronoz, Esq.
Nevada Bar No. 6769
700 South Third Street
Las Vegas, Nevada 89101
Attorney for Petitioner

VERIFICATION

Under the penalty of perjury, the undersigned declares that he is the retained 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 7 day of July, 2014.

JAMES A. ORONOZ

SUBSCRIBED AND SWORN to before me this 7th day of July, 2014.

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 on the 7th day of July, 2014, I served a true and correct copy of the above foregoing Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) to the Clark County District Attorney's Office by sending a copy via electronic mail to:

CLARK COUNTY DISTRICT ATTORNEY
pdmotions@clarkcountyda.com

I further certify that on the 7th day of July, 2014, I deposited in the United States Post Office at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the foregoing Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), addressed to the following:

RENEE BAKER
Warden
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

CATHERINE CORTEZ MASTO
Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4714

By: */s/ Rachael Stewart*
An employee of JAMES A. ORONOZ, ESQ.

RSPN
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant.

CASE NO: 06C228755

DEPT NO: XI

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

DATE OF HEARING: NOVEMBER 24, 2014
TIME OF HEARING: 9:00 AM

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

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On December 13, 2006, a Grand Jury issued an Indictment on NORMAN KEITH FLOWERS, aka Norman Harold Flowers III (hereinafter "Defendant") for the following: COUNT 1 – Burglary (Felony – NRS 205.060); COUNT 2 – Murder (Felony 200.010, 200.030); COUNT 3 – Sexual Assault (Felony – NRS 200.364, 200.366); and COUNT 4 – Robbery (Felony – NRS 200.380). The victim named in the Indictment was Sheila Quarles.

On December 26, 2006, the State filed a Motion to Consolidate seeking to consolidate this case with District Court Case Number C216032. The motion was also filed in Case Number C216032. In Case Number C216032, Defendant was charged with two (2) counts of murder (and other charges) for the deaths of Marilee Coote and Rena Gonzales. 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 Number C216032, denied the State's motion. 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, Defendant sought to keep out evidence of the Gonzales and Coote murders and to confirm attorney Brett Whipple as his counsel. The State filed an opposition on February 2, 2007. On February 5, 2007, the Court denied Defendant's motion to confirm counsel but did not address the prior bad acts. See Reporter's Transc. of Def.'s Mot. in Limine (Feb. 5, 2007).[1] On November 5, 2007, the State filed a Motion for Clarification of Court's Ruling seeking to clarify if they could introduce evidence of the murders charged in Case Number C216032 at trial in this matter. The Defendant filed an opposition on November 6, 2007. On November 15, 2007, the Court ordered a Petrocelli hearing on the bad acts that State wanted to introduce at trial. See Transc. of Proceedings: State's Mot. for Clarification (Nov. 15, 2007).[2]

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[1] This transcript was filed on November 28, 2010.
[2] This transcript was filed on July 30, 2008.

On August 1, 2008, a Petrocelli hearing was conducted. See Recorder's Transc. of Petrocelli Hearing (Aug. 1, 2008).[3] The State sought to introduce evidence from Case Number C216032. Id. The Court found that the murder and sexual assault of Coote was sufficiently similar in nexus and time to Sheila Quarles murder. Id. at 52. The court also found that there was clear and convincing evidence that the Defendant sexually assaulted and murdered Coote. See Id. Finally, the Court found that probative value for purposes of intent and identity was not outweighed any unfair prejudice. See Id. Therefore, the Court held that evidence regarding the similarities between the Coote and Quarles murders was to be allowed at trial. Id. However, the Court denied admission of evidence of the Rena Gonzales murder at trial. Id.

An Amended Indictment was filed on October 15, 2008, alleging the same charges as set forth in the Indictment. On October 22, 2008, pursuant to a jury verdict, Defendant was found guilty of COUNTS 1, 2 and 3, i.e., Burglary; First-Degree Murder and Sexual Assault, respectively. Defendant was found not guilty of COUNT 4 – Robbery. On October 24, 2008, following a penalty hearing, the jury imposed a sentence of LIFE Without the Possibility Of Parole for COUNT 2. On October 30, 2008, Defendant filed a Motion for New Trial alleging insufficient evidence. On November 10, 2008, the State filed an Opposition. The Court denied this Defendant's 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 (NDC) 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 W*ithout* 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

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[3] This transcript was filed on August 26, 2008.

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 W*ith* the Possibility Of Parole with a minimum parole eligibility of ONE HUNDRED TWENTY (120) MONTHS for COUNT 3.

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 5, 2010, Defendant filed a Motion for New Trial Based upon Newly Available Evidence, i.e., George Brass' conviction for murder in Case Number C253756 which, if available, could have been used to impeach Mr. Brass' testimony at Defendant's trial. On March 9, 2010, the State filed an opposition. At a hearing on March 17, 2010, the State argued that Defendant went to trial knowing that the trial of Mr. Brass was pending. Recorder's Transc. of Def.'s Mot. for New Trial at 3 (Mar. 17, 2010).[4] The State further argued that Mr. Brass had an alibi at the time of Sheila's murder, which was verified by work records. Id. The Court denied the Motion for New Trial. Id. at 4. On April 1, 2010, Defendant filed a Notice of Appeal from the Court's denial of his Motion for New Trial.

On June 10, 2011, pursuant to negotiations, Defendant entered an Alford plea to an Amended Indictment in Case Number C216032, which charged Defendant with two (2) counts of First-Degree Murder for the deaths of Marilee Coote and Rena Gonzales.[5] Pursuant to the plea negotiations, Defendant agreed to withdraw his appeals in this case which were pending before the Nevada Supreme Court; i.e., Flowers v. State, Docket # 53159 (Appeal from the Judgment of Conviction); and Flowers v. State, Docket # 55759 (Appeal from the District Court's order denying Defendant's motion for new trial). On June 13, 2011, Defendant filed a Motion to Voluntarily Dismiss his Appeal in each of these cases.

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[4] This transcript was filed on March 23, 2010.

[5] Prior to sentencing in Case Number C216032, Defendant moved to withdraw his Alford plea. The Court denied the motion and sentenced Defendant to LIFE Without the Possibility of Parole on COUNT 1; and LIFE with the Possibility of Parole after TWENTY-FIVE (25) YEARS on COUNT 2, COUNT 2 to run concurrent with COUNT 1, and both to run consecutive to the sentence imposed in this case. Defendant 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 Conviction, finding no abuse of discretion. Flowers v. Nevada, Docket #59250 (Order of Affirmance, Dec. 13, 2012). Remittitur issued January 9, 2013.

On September 28, 2011, the Supreme Court issued an Order Dismissing Appeals in Docket # 53159 and Docket # 55759. That order stated, "[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 May 16, 2012, Defendant filed a Motion for the Appointment of Counsel and Request for Evidentiary Hearing, seeking the appointment of counsel to in the preparation of a post-conviction petition for writ of habeas corpus. On May 30, 2012, the court granted Defendant's motion. On June 8, 2012, James A. Oronoz was appointed as post-conviction counsel.

At a status check on July 13, 2012, defense counsel advised the Court he still had not obtained Defendant's file. See Court Minutes (July 13, 2012). Counsel attempted to file a Motion for Leave to Conduct Discovery and for Court Order to Obtain Requested Documents and Evidence, in open court, but was instructed by the Court to file the motion electronically. Id.

On August 27, 2012, defense counsel advised the Court he was still not in possession of Defendant's file. See Court Minutes (Aug. 27, 2012). Counsel presented the Court with an Order which was signed in open court, ordering the District Attorney's Office to provide Defendant with a copy of discovery.

On September 10, 2012, before the time to file the post-conviction petition expired in this case, i.e., September 28, 2012, the parties appeared in court at the State's request for a clarification of the August 27 discovery order. That day, counsel 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." Trans. of Proceedings: Clarification of Disc. at 4-5 (Sept. 10, 2012).[6] Notwithstanding his acknowledgment of the deadline, defense counsel made an oral motion to extend the timeline for the filing of Defendant's post-

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[6] This transcript was filed on November 20, 2012.

conviction petition. Id. at 7. When counsel made the oral motion, the State mistakenly indicated that the deadline in this case had not yet started running. Id. 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.

Id. at 8. The Court also noted that when it signed the discovery order on August 27, 2012, it had not realized there would be an objection by the State to providing discovery. Id. at 7. Accordingly, the Court vacated the discovery order signed on August 27, 2012, and ordered briefing on the matter. Id. at 7-8.

On October 9, 2012, Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction). On October 30, 2012, the State moved to dismiss Defendant's petition as untimely. On October 31, 2012, Defendant filed a Motion to Place on Calendar to Supplement Defendant's Petition for Writ of Habeas Corpus. On November 2, 2012, State filed an opposition to Defendant's Motion to Place on Calendar. On November 23, 2012, Defendant filed a reply to State's opposition.

On September 12, 2012, prior to the filing of Defendant's petition, Defendant filed a Motion to Obtain a Complete Copy of Discovery from the State. On December 14, 2012, the State filed an opposition. In its opposition, the State noted that 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. The State further argued that Defendant's petition should not be granted because it was untimely filed. The State urged the Court to resolve the pending motion to dismiss Defendant's post-conviction petition before potentially ordering the State to provide post-conviction discovery.

On January 16, 2013, the Court heard argument on Defendant's discovery motion. The next day, the district court issued a minute order. See Court Minutes (Jan. 17, 2013). The Court found: 1) NRS 34.726 does not address instances where a pending appeal is dismissed and no remittitur is issued 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 his file for reasons outside of his control;" 3) the Court's September 17, 2012 Order granting an extension created prejudice; and 4) Defendant's filing of the petition within eleven (11) days of the deadline was reasonable. Id. The minute order noted that the discovery issue would be addressed at the next scheduled hearing on March 6, 2013.[7] Id. The instant case was reassigned to Department 11 on January 22, 2013.

On March 5, 2013, the State filed a Renewed Response and Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). On March 20, 2013, the Court ordered supplemental briefing as to Defendant's post-conviction petition. Following a stipulation by the parties to extend the briefing schedule, Defendant filed the instant Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) on July 7, 2014.

II. STATEMENT OF FACTS

A. Background Facts

On the afternoon of March 24, 2005, Debra Quarles ("Debra") returned to her apartment located at 1001 North Pecos Road. Reporter's Trans. of Jury Trial, Volume 2-B at 5, 18-19 (Oct. 16, 2008) ("TT 2B"). Debra shared the apartment with her daughter, Sheila Quarles ("Sheila"). Id. at 5-6. Debra had been grocery shopping and upon her return, she honked her horn to get Sheila out of the apartment to help with the groceries. Id. at 19. One (1) of Debra's neighbors, Robert Lewis ("Robert") came downstairs and helped Debra with her grocery bags. Id. When Debra reached the front door of her apartment, she noticed that the door was closed but not locked. Id. at 19-20. Robert followed Debra into the apartment with some grocery bags and waited in the living room as Debra searched for Sheila. Id. at 20-21. Debra walked into the apartment and noticed that her new stereo was missing. Id. at 20. Debra called out for her daughter but received no response. Id. She noticed that her bed was "messed up" and heard a water dripping in the bathroom. Id. Eventually, Debra made her way to the bathroom to turn the water off. Id. Inside the bathroom, Debra noticed that the shower curtains were pulled shut. Id. at 21. Debra pulled the curtain back to find her

[7] At a hearing on March 6, 2013, the State represented that the Court granted Defendant's discovery motion and agreed to provide discovery. However, the State asserted that it was not waiving the issue of untimeliness. See Court Minutes (Mar. 6, 2013).

daughter Sheila submerged in the bathtub with part of her face sticking out of the water. Id. at 21-22. Debra noticed that the water in the bathtub was still very hot. Id. at 22. Debra became hysterical. Id. at 56. Robert lifted Sheila out of the bathtub. Id. at 23. A friend or family member covered up Sheila's naked torso area before the police arrived at the scene. Id. at 85-86, Reporter's Trans. of Jury Trial, Volume 2-A at 123-24 (Oct. 16, 2008) ("TT 2A"). Robert went next door to his mother's apartment, and told his family members that Sheila needed help. TT 2A at 121-22. Someone from that apartment called 9-1-1. Id. at 125-26. Hysterical, Debra left the scene to get her son Ralph, who lived close to the apartment. TT 2B at 23-24. Robert's niece and others went to Sheila's apartment and stayed there on the phone with the 9-1-1 operator until police got to the apartment. TT 2A at 123-217. Paramedics arrived at the apartment but it was too late for them to render any aid or to revive Sheila. Id. at 110-111.

B. Dr. Simms' Testimony

Dr. Lary Simms, a forensic pathologist with the Clark County Coroner's Office testified regarding Sheila's injuries, which he determined based a review of Sheila's autopsy report as well as photographs taken at Sheila's autopsy. TT 2A at 46-106. The autopsy report in this case was prepared by Dr. Thomas Knoblock, a forensic pathologist who was no longer employed with the Coroner's office at the time of Defendant's trial. Id. at 49-50. Dr. Simms testified that Sheila suffered internal injuries. Id. at 51-60. Sheila had two (2) hemorrhages on her right scalp which indicated she suffered a blunt force injury to her head. Id. at 56-57. Dr. Simms also testified that Sheila had been asphyxiated; i.e., manually strangulated, and that there were tears on her vagina consistent with sexual assault. Id. at 51-52, 55. The injuries to Sheila's neck were consistent with someone applying pressure with his hands with the intent to cause injury. Id. at 57. Additionally, small hemorrhages in Sheila's eyes indicated that pressure was applied to her neck which led to a buildup of blood in the veins that burst. Id. at 53-54

Based on his review of the autopsy photographs, Dr. Simms opined that Sheila's injuries were contemporaneous with her death. Id. at 56-57.

Lastly, Dr. Simms testified that Sheila had a "frothy fluid" in her airways which is a sign of drowning. Id. At 60. Dr. Simms stated that Dr. Knoblock's opinion as to Sheila's cause of death was drowning with strangulation being a contributing factor. Id. at 68. Based on his review of Dr. Knoblock's report and the autopsy photographs, Dr. Simms testified that he agreed with Dr. Knoblock's opinion.

Dr. Simms also testified regarding the autopsy photographs and his interpretation of the injuries displayed therein. Id. at 63-69. When the State sought to admit the photographs into evidence, Defendant's trial counsel objected noting that the cause of death was not being contested. Id. at 61-62. The Court overruled counsel's objection and the photographs were admitted. Id. Counsel then objected to the nature of the photographs, but the Court again overruled counsel's objection. Id. at 62.

Dr. Simms also testified about Marilee Coote's autopsy, the victim in Case Number C216032. Marilee suffered several injuries to her neck, similar to Sheila, which indicated that she was manually strangled. Id. at 71. The neck injuries were consistent with someone applying pressure to inflict injury. Id. at 77. Also similar to Sheila, Marilee suffered injuries to her head from blunt trauma contemporaneous with the time of her death. Id. at 76. Moreover, like Sheila, Marilee had injuries to her vaginal area indicating that she was sexually assaulted. Id. at 75.

C. Ms. Paulette's Testimony

The State called Kristina Paulette, a forensic scientist / DNA analyst, with the Las Vegas Metropolitan Police Department. Reporter's Trans. of Jury Trial, Volume 4-A at 30 (Oct. 20, 2008) ("TT 4B"). Ms. Paulette testified that she was personally involved in the investigation into Sheila's homicide as well as that of Marilee Coote. Id. at 33.

At Sheila's autopsy, Ms. Paulette collected DNA samples from semen found in Sheila's vaginal area and on her underwear. Id. at 36. From this sample, Ms. Paulette was able to generate a DNA profile. Id. Initial testing revealed a mixture of at least three (3) individuals including that of the victim and two (2) unknown males. Id. at 36-38. Ms. Paulette entered the unknown DNA profiles into the DNA database, CODIS. Id. at 38-39.

As a result, the database revealed Defendant as a potential match. Id. Defendant's DNA profile was subsequently collected. Id. at 39-40. Ms. Paulette determined that Defendant's DNA matched the sample she retrieved at Sheila's autopsy. Id. at 41-42. More specifically, Ms. Paulette testified that the DNA did not exclude Defendant as a match but did exclude 99.99 percent of the remaining population. Id. at 42, 45-46.

Ms. Paulette also testified that she analyzed a buccal swab obtained from George Brass and that his DNA was also present in the samples retrieved at Sheila's autopsy.[8] Id. at 46-47.

The State also questioned Ms. Paulette regarding the findings of Thomas Wahl in conjunction with a vaginal swab taken from Marilee Coote at her autopsy. Id. at 48. Defense counsel objected on the basis of hearsay and conducted a brief voir dire of Ms. Paulette. Id. at 48-49. Ms. Paulette testified that the report generated by Mr. Wahl, in conjunction with Marilee's autopsy, was a business record and that she was qualified to testify as a custodian of records. Id.

As to Marilee, Ms. Paulette testified that Defendant was the source of the semen taken from Marilee's vaginal swab. Id. at 49. In Marilee's case, the DNA profile was rarer than one in 650 billion. Id. at 51. The same result issued regarding a rectal swab taken at Marilee's autopsy. Id. at 52. Mr. Wahl's report also indicated that Defendant's DNA matched DNA retrieved from a section of carpet taken from underneath Marilee's deceased body. Id. at 52-53, see Reporter's Trans. of Jury Trial, Volume 3-B at 16-21, 39-40 (Oct. 17, 2008) ("TT 3B") Ms. Paulette also testified to own her findings regarding the carpet sample. TT 4B at 53. Specifically, when Ms. Paulette was testing for the presence of semen on the carpet sample, her testing revealed the presence of detergent. See Id. at 53. However, despite the presence of detergent, Ms. Paulette determined that Defendant's DNA was present, within a statistical probability of one in 650 billion. Id.

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[8] Brass testified at trial that he had an ongoing sexual relationship with Sheila and that they had consensual sex on the morning of her murder. TT 3B at 81-82.

ARGUMENT

I. DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DISMISSED AS UNTIMELY PURSUANT TO NRS 34.726

As the State argued at length in its Renewed Response and Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction), filed on March 5, 2013, and hereby incorporated by reference, Defendant's Petition is untimely and should be dismissed pursuant to NRS 34.726.

Neither the Court nor the parties were empowered to extend the one-year time frame in the instant case. State v. Dist. Ct. (Riker), 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005) ("[T]he statutory rules regarding procedural default are mandatory and cannot be ignored when properly raised by the State."), State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003) ("[A] stipulation by the parties cannot empower a court to disregard the mandatory procedural default rules.").

Here, the Supreme Court order, filed on September 28, 2011, explicitly advised Defendant 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." Flowers v. State, Docket # 55759 (Order Dismissing Appeals, Sept. 28, 2011). Accordingly, Defendant had until September 28, 2012 to file a post-conviction petition. Defendant's petition was not filed until October 9, 2012. As Defendant fails to demonstrate good cause to overcome the time bar, his petition must be dismissed pursuant to NRS 34.726. The State notes that failure to receive Defendant's file in a timely manner is not good cause to overcome the time bar. Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

However, to the extent the Court is inclined to consider the merits of Defendant's petition, the State responds as follows.

II. DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL

To prevail on a claim of ineffective assistance of trial counsel a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test

of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 2063-64 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 104 S. Ct. at 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

"Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy." State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998) (citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2052). Furthermore, bare or naked allegations, which are unsupported by specific facts, are insufficient to grant relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 103 P.3d 35 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is within the range of competence demanded of attorneys in criminal cases." Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (internal quotation omitted).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2052). "A reasonable probability is a probability

sufficient to undermine confidence in the outcome." McNelton, 115 Nev. at 403, 990 P.2d at 1268 (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2052).

A. Defendant's Trial Counsel was not Ineffective for Failing to Object to the Testimony of Dr. Simms and Ms. Paulette

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him," and gives the accused the opportunity to cross-examine all those who "bear testimony" against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 1364 (2004); see also White v. Illinois, 502 U.S. 346, 359, 112 S.Ct. 736, 744 (1992) (Thomas, J., concurring in part and concurring in judgment) ("critical phrase within the Clause is 'witnesses against him'"). Thus, testimonial hearsay - i.e. extrajudicial statements used as the "functional equivalent" of in-court testimony - may only be admitted at trial if the declarant is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54, 124 S.Ct. at 1365. To run afoul of the Confrontation Clause, therefore, out-of-court statements introduced at trial must not only be "testimonial" but must also be hearsay, for the Clause does not bar the use of even "testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 51-52, 60 n.9, 124 S.Ct. at 1369 n.9 (citing, Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 2081-82 (1985)).

Appellant relies on Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), and Bullcoming v. New Mexico, 564 U.S. ___, 131 S.Ct. 2705 (2011), to argue that Dr. Simms' and Ms. Paulette's testimony was inadmissible in violation of the Confrontation Clause. AOB, p. 40. However, both Melendez-Diaz and Bullcoming are distinguishable from the instant case as they involved the admission of a forensic or written report. In Bullcoming, the trial court admitted a laboratory report of a non-testifying analyst that reflected the defendant's blood alcohol content. 564 U.S. at ___, 131 S.Ct. at 2709. In Melendez-Diaz, the trial court admitted three (3) certificates of analysis from a state laboratory which analyzed the substance seized by the defendant, concluding the substance was cocaine. 557 U.S. at 308, 129 S.Ct. at 2531. Defendant's case does not involve the

admission of another scientist's report.[9] As a result, this case is fundamentally distinguishable from Melendez-Diaz, and Bullcoming. Furthermore, neither Melendez-Diaz nor Bullcoming addressed autopsy reports or DNA reports nor did these cases determine whether the prosecution could introduce an analyst's testimonial forensic report (or transmit its substance) through an *expert* witness, as was done in the instant case. See Notice of Expert Witnesses (Nov. 2, 2007).

1. Dr. Simms testimony regarding Sheila's autopsy

Defendant alleges that his trial counsel was ineffective for failing to object to Dr. Simms testimony as it related to the findings contained in Dr. Knoblock's autopsy report. Petition at 20-22. Defendant's claim is without merit.

In U.S. v. De La Cruz, 514 F.3d 121 (1st Cir. Feb 01, 2008), the Court held that:

> An autopsy report is made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy. An autopsy report thus involves, in principal part, a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy. Such a report is, we conclude, in the nature of a business record, and business records are expressly excluded from the reach of Crawford.

The State recognizes that the holding in De La Cruz, is not universally accepted. Notably however, the Nevada Supreme Court has not ruled on whether an autopsy report is testimonial pursuant to Crawford nor has this issue been disposed of by the United States Supreme Court. See Malone v. State, 281 P.3d 1197 (Nev. 2009) (citing the split in authority and declining to address this issue), but see Conner v. State, 130 Nev. Adv. Op. 49, 327 P.3d 503, 511 (2014) (Gibbons, C.J., concurring) (expressing concern with the State's introduction of statements and opinions delineated in an autopsy report, through the testimony of a doctor who did not prepare the report).

The State contends that an autopsy report is not testimonial in nature and therefore, Dr. Simms' testimony as to anything therein did not violate Crawford. Namely, autopsy reports are the product of an official duty imposed by law, rather than a product of criminal

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[9] The Court emphasized in Melendez-Diaz that their concern was with the *admission* of written certificates because they were used in lieu of live, in court testimony. 557 U.S. at 310-311, 128 S.Ct. at 2532.

investigation for use at trial. NRS 259.050 describes the duties of coroners. "When a coroner or the coroner's deputy is informed that a person has been killed, has committed suicide or has suddenly died under such circumstances as to afford a reasonable ground to suspect that the death has been occasioned by unnatural means, the coroner shall make an appropriate investigation." NRS 259.050(1) (emphasis added). The coroner does not have discretion to conduct an autopsy only when the death has been the result of a criminal act. They must conduct an autopsy anytime a death has occurred by unnatural means. In Boorman v. Nevada Memorial Cremation Society, 126 Nev. Adv. Op. 29, 236 P.3d 4, 9 (2010), the Court stated, "A county coroner is obligated to perform its services...the county coroner's duty is to investigate the cause of death..." Unlike the reports held testimonial in Melendez-Diaz and Bullcoming, autopsy reports are generated regardless of any request by law enforcement and are not produced solely or even primarily for purposes of gathering evidence for a future criminal prosecution.[10] In fact, autopsies are conducted in many cases that do not involve a subsequent prosecution. See Williams v. Illinois, ___ U.S. ___, 132 S.Ct. 2221, 2251 (2012) (Breyer, J. concurring) ("[a]utopsies, like the DNA report in this case, are often conducted when it is not yet clear whether there is a particular suspect or whether the facts found in the autopsy will ultimately prove relevant in a criminal trial").

In Nardi v. Pepe, 662 F.3d 107, 111–12 (1st Cir.2011), the First Circuit acknowledged the uncertainty of the holding De La Cruz in light of the holdings in Melendez-Diaz, and Bullcoming. In Nardi, the First Circuit held that lower court's decision, that the autopsy report and the doctor's opinion in partial reliance upon it, did not violation the Confrontation Clause, was not contrary to Crawford. Id. In the context of the defendant's habeas petition, the First Circuit concluded that neither Crawford nor the later cases "clearly established" that autopsy reports are barred as testimonial. Id. ("Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in Melendez–Diaz and Bullcoming, and it is uncertain how the [Supreme] Court would resolve the question...even

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[10]This is consistent with Dr. Simms testimony that the police department, as opposed to the medical examiner, is responsible for collected forensic evidence associated with a deceased victim, in cases where a death is suspicious. See TT 2A at 92-93, 100.

now it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial."). The First Circuit also found that even if autopsy reports could be classified as testimonial, it is not clear that in-court expert opinion testimony in reliance on such reports would be inadmissible. Id. at 112.

Although the State contends that Defendant's right to confrontation was not violated as a result of Dr. Simms' testimony, this issue not been conclusively decided by the United States Supreme Court or by the Nevada Supreme Court. Additionally, courts are extremely divided on this issue. Compare, e.g., Bannah v. State, 87 So.3d 101, 103 (Fla. Dist. Ct. App. 2012) (autopsy reports are non-testimonial because they are prepared pursuant to statutory duty and not solely for use in prosecution), People v. Cortez, 931 N.E.2d 751 (Ill. App. Ct. 2010) (Melendez–Diaz did not upset prior holdings that autopsy reports are non-testimonial business records that do not implicate Crawford), and People v. Dungo, 286 P.3d 442, 450 (Cal. App. 4th Dist. 2012) ("The autopsy continued to serve several purposes, only one of which was criminal investigation," and "[t]he autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial."), with Commonwealth v. Avila, 912 N.E.2d 1014, 1029 (Mass. 2009) (autopsy report was testimonial hearsay), Cuesta-Rodriguez v. State, 241 P.3d 214 (Okla. Crim. App. 2010) (same), and Wood v. Texas, 299 S.W.3d 200, 209-10 (Tex. Crim. App. 2009) (not all autopsy reports are categorically testimonial, but where the police suspected the death at issue was a homicide, the autopsy report was testimonial).

Furthermore, as Dr. Simms testified as to his own opinion based on the autopsy report and the autopsy photographs, his testimony did not run afoul of the Confrontation Clause. See Williams, 132 S.Ct at 2228 ("[u]nder settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true.")

In the wake of conflicting case law, where error is not clear, Defendant fails to demonstrate that his counsel's actions fell below an objective standard of reasonableness. Counsel cannot be deemed deficient for failing to object in the present case, where there is no definitely case law to demonstrate that any such objection would have been sustained.

Moreover, counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Furthermore, even if the admission of Dr. Simms' testimony was in violation of Crawford, Defendant has not established a reasonable probability that but for counsel's error in failing to object, the result of the trial would have been different. Strickland, 466 U.S. at 687, 104 S. Ct. at 2052. As Defendant notes in his Petition, the cause of death was not disputed at trial. See Petition at 13. As such, it is unclear how Dr. Simms' testimony prejudiced Defendant's case. Notably, Defendant fails to allege what portion of Dr. Simms' was prejudicial. Rather, Defendant alleges prejudice on the basis that counsel's failure to object heightened the standard of review on appeal. See Petition at 22-23. As Defendant voluntarily dismissed his direct appeal, Defendant's argument lacks merit. Based on the foregoing, Defendant's claim must be denied.

2. Ms. Paulette's Testimony regarding Mr. Wahl's DNA Report

Defendant alleges that his trial counsel was ineffective for failing to object to Ms. Paulette's testimony as it related to the findings contained in Mr. Wahl's DNA report regarding Marilee Coote's case. See Petition at 23. Defendant argument is without merit.

First, as noted above, the instant case is distinguishable from Melendez-Diaz, and Bullcoming, wherein forensic reports were introduced at trial. Rather, in this case, Ms. 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 Las Vegas Metropolitan Police Department (LVMPD) forensics laboratory, the same laboratory Wahl worked at when he authored the DNA report, and was subject to cross-examination. See generally 4B 30-68.

Accordingly, defense counsel's performance did not fall below an objective standard of reasonableness in failing to object to Ms. Paulette's testimony on the basis that it violated the Confrontation Clause.

However, to the extent Mr. Wahl's report is testimonial in nature and Ms. Paulette's testimony thereto was improper, Defendant fails to demonstrate that but for counsel's failure to object to Ms. Paulette's testimony, the result of the trial would have been different.

Strickland, 466 U.S. at 687, 104 S. Ct. at 2052. Notably, Ms. Paulette testified to her own independent findings regarding the presence of Defendant's semen on the carpet inside Marilee's apartment. Although Ms. Paulette did not testify that she independently examined the semen sample from Marilee's vaginal swab, she did testify that Defendant's semen was found on section of carpet underneath Marilee's dead body. TT 4A at 53, TT 3B at 16-21, 39-40. As there is no basis for excluding testimony as to the carpet sample, Defendant cannot demonstrate prejudice from the remainder of Ms. Paulette's testimony. Furthermore, 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. Reporter's Trans. of Jury Trial, Volume 4-B at 83-85 (Oct. 20, 2008) ("TT 4B").[11]

Notably, the only allegation of prejudice is that counsel's failure to object heightened the standard of review on appeal. See Petition at 25-26. As Defendant voluntarily dismissed his direct appeal, Defendant's argument lacks merit. Accordingly, Defendant's claim must be denied.

B. Defendant's Trial Counsel was not Ineffective for Failing to Object to the State's Alleged Vouching

Defendant alleges that his trial counsel was ineffective for not objecting to the State's improper vouching of George Brass. Defendant's claim is without merit

It is well settled that the prosecution may not "vouch" for a witness' credibility. Browning v. State, 120 Nev. 347, 358, 91 P.3d 39, 48 (2004). "[S]uch vouching occurs when the prosecution places the prestige of the government behind the witness by providing personal assurances of the witness's veracity. Id. (internal citation and quotation marks omitted), accord Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002).

In Rowland, the Nevada Supreme Court determined it was prosecutorial misconduct to refer to a witness as a "man of integrity" and "honor." 118 Nev. at 39, 39 P.3d at 119. The Court reasoned that this characterization of the witness's testimony "amount[ed] to an opinion

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[11] This transcript was filed on October 21, 2008.

as to the veracity of a witness in circumstances where veracity might well have determined the ultimate issue of guilt or innocence." Id.

Here, Defendant alleges that State "vouched" for Mr. Brass during Detective Vaccaro's testimony. See Petition at 14-15, 29. Defendant does not specify how the testimony elicited from Detective Vaccaro was improper vouching nor is this claim evident from a review of the record. Accordingly, Defendant's claim regarding Detective Vaccaro is a bare and naked allegation insufficient to warrant relief. See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Defendant also contends that the State "vouched" for Mr. Brass during Detective Long's testimony by eliciting testimony that Mr. Brass could have refused to speak with Detective long had he so chose. See Petition at 11, 29. However, Detective Long's testimony is in no way a "personal assurance" by the prosecution of Mr. Brass' credibility and therefore does not constitute vouching.

Finally, Defendant contends that the State "vouched" for Mr. Brass during closing argument by indicating that Mr. Brass had "nothing to hide." See Petition at 30. Here, the State's comment was proper because it was commenting on the evidence presented and inviting the jury to draw such the reasonable inference that's Mr. Brass' testimony was truthful based on the totality of the evidence. This type of argument is proper. See Bridges v. State, 116 Nev. 752, 762, 6 P.3d 1000, 1008 (2000) ("The prosecutor had a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows."). Additionally, this argument is consistent with the jury's role of the "lie detector" in criminal cases. See U.S. v. Scheffer, 523 U.S. 303, 313, 118 S.Ct. 1261, 1266 - 67 (1998) ("A fundamental premise of our criminal trial system is that the jury is the lie detector. Determining the weight and credibility of witness testimony... has long been held to be the part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.") (internal citations omitted).

Furthermore, even if counsel was deficient for failing to object to the State's comments, Defendant fails to demonstrate that but for counsel's failure, the result of the trial would have been different. Strickland, 466 U.S. at 687, 104 S. Ct. at 2052.

Specifically, the evidence against Defendant was overwhelming. 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.

Ms. 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. While Defendant places great weight on the credibility of Mr. Brass because he testified that his sexual encounter with Sheila was consensual, the evidence presented at trial demonstrated Mr. Brass had an alibi during the time of Sheila's murder. Specifically, the police investigated Brass's alibi and found out that on March 24, 2005, Mr. 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.[12] TT 3B at 99. There was no indication that anyone changed Brass's time record. Id. at 99-100. Moreover, the Wal-Mart where Brass worked at was located a good distance away from Sheila's apartment with no convenient driving route. TT 4A at 92-93. Accordingly, although the consensual nature of Mr. Brass' contact with Shelia was important to the State's theory, there was corroborating evidence to support his testimony. Based on the foregoing, Defendant's claim must be denied.

CONCLUSION

Based on the foregoing, the State respectfully requests Defendant's Petition for Writ of Habeas Corpus (POST-CONVICTION) be denied as untimely pursuant to NRS 34.726. To the extent this Court is inclined to rule on the merits of Defendant's petition, the State

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[12] Sheila's mother Debra spoke with her on the telephone at approximately 1:00 p.m. and returned from the grocery store at approximately 3:00 p.m. Accordingly, Shelia's murder occurred sometime in the interim. See TT 2B at 16-19.

respectfully requests that Defendant's petition be denied as he failed to demonstrate that his counsel's representation fell below an objective standard of reasonableness, and that but for counsel's alleged errors, there is a reasonable probability that the result of the proceedings would have been different.

DATED this 25th day of August, 2014.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #

BY _____
PAMELA C. WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

CERTIFICATE OF SERVICE

I certify that on the 25th day of August, 2014, I e-mailed a copy of the foregoing State's Response And Motion To Dismiss Defendant's Supplemental Petition For Writ Of Habeas Corpus (Post-Conviction), to:

JAMES A. ORONOZ, Esq.
jim@oronozlawyers.com

BY _____
R. JOHNSON
Secretary for the District Attorney's Office

RO/PCW/rj/M-1

REPLY
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Attorney for Petitioner, Norman Flowers

DISTRICT COURT

CLARK COUNTY, NEVADA

NORMAN K. FLOWERS,

Petitioner,

vs.

THE STATE OF NEVADA, Renee Baker, in her official capacity as the Warden of Ely State Prison; James Cox, in his official capacity as Director of the Nevada Department of Corrections; and the State of Nevada

Respondents.

CASE NO.: 06C228755
DEPT NO.: XI

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

HEARING DATE: NOVEMBER 24, 2014
HEARING TIME: 9:00 A.M.

COMES NOW, Petitioner, NORMAN FLOWERS, by and through his attorney of record, JAMES A. ORONOZ, ESQ., of the law firm ORONOZ & ERICSSON LLC, and hereby submits his Reply to State's Response and Motion to Dismiss Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) in the above entitled matter.

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This Reply is based upon the pleadings and papers on file herein, the attached Memorandum of Points and Authorities, and any oral argument the Court may entertain.

Dated this 10th day of November, 2014.

/s/ James A. Oronoz

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

LEGAL ARGUMENT

A. Defendant's petition for writ of habeas corpus should not be dismissed as untimely

Despite the State's repeated attempts to argue that Mr. Flowers' Petition for Writ of Habeas Corpus (Post-Conviction) was untimely, this Court issued an Order on February 26, 2013, allowing Mr. Flowers' untimely Petition to be heard due to a showing of good cause and prejudice. As such, the parties have litigated this issue ad nauseam, and this Court has already decided this issue.[1]

B. Defendant was denied effective assistance of counsel

A defendant prevails on a claim of ineffective assistance of counsel by demonstrating that (1) counsel's performance was deficient to the point where it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defendant in such a way as to render the result of the trial unreliable. Strickland v. Washington, 466 U.S. 668, 687-688, 697, 104 S.Ct. 2052 (1984), McConnell v. State, 125 Nev. 243, 212 P.3d 307 (2009). A reviewing court must also determine whether counsel's strategic decisions satisfied an objective standard of reasonableness. State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006); Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004). Further, prejudice occurs when there is a "reasonable probability" that but for counsel's errors, the result of the trial would have been different. Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Additionally, in regard to post-conviction proceedings, all factual allegations in support of an ineffective assistance of counsel claim need only be proven by a preponderance of the evidence. Powell, 122 Nev. at 759.

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[1] The Nevada Supreme Court will defer to the district court's factual findings regarding good cause. State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012).

[2] In the State's Response, the State incorrectly denoted Mr. Flowers as "Appellant" and cited to "AOB, p. 40." However, this is not an appellate brief, nor did Mr. Flowers' supplemental petition contain forty pages.

[3] Examples of testimonial statements include the following: (1) ex parte in-court testimony or its functional equivalent, such as affidavits, custodial examinations, or similar pretrial statements

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1. *Defendant's trial counsel was ineffective for failing to object to the testimony of Dr. Simms and Ms. Paulette*

The Confrontation Clause of the Sixth Amendment mandates that a defendant in a criminal trial have the opportunity to confront the witnesses against him. U.S. Const. Amend. VI, Crawford v. Washington, 541 U.S. 36, 42, 124 S.Ct. 1354, 1359 (2004). Accordingly, the Confrontation Clause precludes any "testimonial" out-of-court statements by a witness unless the witness appears at trial, or if the witness is unavailable, the defendant had a prior opportunity to cross-examine the witness. Crawford, 541 U.S. at 53-54. See also, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309, 129 S.Ct. 2527 (2009), Bullcoming v. New Mexico, 131 S.Ct. 2705, 2710 (2011). Further, a testimonial statement "would lead an objective witness to reasonably believe that the statement would be available for use at a later trial." Vega v. State, 126 Nev. Adv. Op. 33, 236 P.3d 632, 637 (2010). Quoting Medina v. State, 122 Nev. 346, 354, 143 P.3d 471, 476 (2006), Flores v. State, 121 Nev. 706, 719, 120 P.3d 1170, 1178-1179 (2005). See also, Crawford, 541 U.S. at 52.

In this case, the State attempts to make a confusing and inaccurate argument regarding testimonial statements. The State asserts that the Confrontation Clause only triggers when out-of-court statements are both "testimonial" and "hearsay." State's Response, at 13. By definition, testimonial statements are "made for the purpose of establishing or proving some fact" and "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial..." Crawford, 541 U.S. at 51-52. See also, Melendez-Diaz, 557 U.S. at 310, Bullcoming, 131 S.Ct. at 2713-2714 ("An analyst's certification prepared in connection with a criminal investigation or prosecution, the Court held, is "testimonial," and therefore within the compass of the Confrontation Clause."). Vega, 236 P.3d at 637. Also, by definition, "hearsay" is an out of court statement offered to prove the truth of the matter asserted. NRS 51.035. Regardless of the State's attempt to disband the application

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of testimonial statements and hearsay, the Confrontation Clause requirements apply to out-of-court statements intended to establish a fact at trial.

As a result, the testimony offered by Dr. Simms and Ms. Paulette at trial violated Mr. Flowers' confrontation rights. These witnesses testified to written statements of other doctors and analysts that were prepared to establish or prove a fact and were offered for the truth of the matter asserted.[2] Further, trial counsel was ineffective for failing to preserve Mr. Flowers' confrontation rights under the Sixth Amendment. This Court must review the potential prejudice for harmless error. Medina v. State, 122 Nev. at 355.

i. *Dr. Simms testimony regarding Sheila Quarles' autopsy*

The State incorrectly argues that Dr. Knoblock's autopsy report about Ms. Quarles is not testimonial because it is a business record and a "product of an official duty imposed by law, rather than a product of criminal investigation for use at trial." State's Response, 14-15. The State relies upon U.S. v. De La Cruz, 514 F.3d 121 (1st Cir. 2008), to assert that coroners always conduct autopsies during the normal course of business, and as such, autopsies can fall within the business records exception to the hearsay rule. However, the Nevada Supreme Court has not yet ruled on this issue. In Conner v. State, Chief Justice Gibbons wrote a concurring opinion explaining, "The United States Supreme Court has clearly explained that whether a report falls within an exception to the hearsay rule is not determinative of whether the report is testimonial." Conner v. State, 130 Nev. Adv. Op. 49, 63, 327 P.3d 503, 511 (2014) (Gibbons, C.J., concurring) (Ref. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 322-324, 129 S.Ct. 2527 (2009). Furthermore, the United States Supreme Court concluded that a "coroner's inquest" does not have the "special status" like a business record of being admitted into evidence without being subject to an opportunity for confrontation because a coroner could reasonably believe that his findings would be used in a criminal prosecution. Melendez-Diaz, 557 U.S. at 322. Therefore, the State cannot claim that the autopsy report constituted a non-testimonial business

[2] In the State's Response, the State incorrectly denoted Mr. Flowers as "Appellant" and cited to "AOB, p. 40." However, this is not an appellate brief, nor did Mr. Flowers' supplemental petition contain forty pages.

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record because the coroner could reasonably have believed that his report would have evidentiary value in a criminal prosecution.

Although the Nevada Supreme Court has not yet decided this issue, it decided a very similar issue in which it held that a nurse's report constituted a testimonial statement. In Vega v. State, the Nevada Supreme Court determined that a nurse's written report constituted a testimonial statement in a rape case because the nurse's statement would "lead an objective witness to reasonably believe that the statement would be available for use at a later trial." Vega v. State, 126 Nev. Adv. Op. 33., 236 P.3d 632, 637 (2010) (Internal citations omitted).

Additionally, a number of states have used this same logic to determine that autopsy reports constitute testimonial evidence because autopsy reports would lead an objective person reasonably to believe that the reports would be used in a criminal trial. The Crawford court distinctly noted that the "core class" of testimonial statements was not intended to be a comprehensive list or definition of what qualifies as "testimonial," meaning that even statements falling outside of the core class may still be testimonial because they tend to establish or prove some fact. In light of the broad definition of "testimonial" statements, medical and forensic reports, such as autopsy reports, made in conjunction with a criminal investigation qualify as testimonial statements because it is reasonable to believe that the report will be available for later use at trial.[3] Crawford, 541 U.S. at 68. *See also,* U.S. v. Ignasiak, 667 F.3d 1217 (11th Cir. 2012) (Autopsy reports were testimonial statements subject to Confrontation Clause); Malaska v. State, 88 A.3d 805 (Md.Spec.App. 2014) (Autopsy report contained sufficient formalized indicia as to accuracy of testing processes used or results obtained therefrom to be considered testimonial for purposes of state and federal confrontation analysis in homicide prosecution); Com. v. Carr, 986 N.E.2d 380 (Mass. 2013) (Death certificate prepared by examiner who

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[3] Examples of testimonial statements include the following: (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. Melendez-Diaz, 557 U.S. at 310 (citing Crawford, 541 U.S. at 51-52).

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performed autopsy on victim was testimonial in fact, and thus defendant's confrontation rights were violated by admission at first degree murder trial of the death certificate without testimony of examiner who had prepared it); State v. Navarette, 294 P.3d 435 (N.M. 2013) (Forensic autopsy reports are testimonial); State v. Kennedy, 735 S.E.2d 905 (W.Va. 2012) (For the purposes of use in criminal prosecutions, autopsy reports are under all circumstances testimonial); State v. Jaramillo, 272 P.3d 682 (N.M. Ct. App. 2011) (Autopsy report was prepared with the purpose of preserving evidence of criminal litigation as it was made with the intention of the medical examiner to establish the cause and manner of death); Martinez v. State, 311 S.W.3d 104 (Tex. Ct. App. 2010) (Autopsy report was testimonial); State v. Davidson, 242 S.W.3d 409 (Mo. Ct. App.2007) (When an autopsy report is prepared for the purposes of criminal prosecution, the report is testimonial).

Accordingly, forensic reports prepared in conjunction with and for the purposes of aiding a police investigation fall squarely within the definition of "testimonial." Bullcoming, 131 S.Ct. at 2717-2718. Thus, a forensic autopsy report made in conjunction with a criminal prosecution functions as a testimonial statement because it is created with the purpose of aiding a police investigation. Bullcoming, 131 S.Ct. at 2713-2714, 2717 (2011); (See also, Crawford, 541 U.S. at 51-52; Melendez-Diaz, 557 U.S. at 310-311, 320-321; Vega, 126 Nev. Adv. Op. 33, 236 P.3d at 637 (2010); Davis v. Washington, 547 U.S. 813, 830, 126 S.Ct. 2266 (2006)).

In this case, the State claims that Dr. Knoblock's report constituted a business record, and as such, the report was properly admitted into evidence under the business records exception to the hearsay rule. However, the United States Supreme Court clearly explained that a "coroner's inquest" is not admissible as evidence under the "special status" afforded to business records created during the normal course of business without becoming subject to the Confrontation Clause requirements because the "coroner's inquest" is comparable to a police record that is prepared for the production of evidence at trial. See Melendez-Diaz, 557 U.S. at 322.

Here, the record shows that Dr. Knoblock conducted the autopsy in the presence of three Las Vegas Metropolitan Police Department employees. Therefore, any objective person would

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reasonably believe that this particular autopsy report would have been an important piece of evidence and would have been prepared for the production of evidence at trial.

Further, the nurse's report in Vega served precisely the same function as the autopsy report in this case. The nurse prepared her report in conjunction with a sexual assault investigation, which is similar to Dr. Knoblock who prepared Sheila Quarles' autopsy report in conjunction with an ongoing homicide investigation. Dr. Knoblock conducted the autopsy in the presence of Las Vegas Metropolitan Police Department investigators and detectives. The presence of the investigators and detectives demonstrates that the autopsy, and subsequent report, were done at the behest of law enforcement based on a presumption that the victim died as a result of criminal activity. As such, Dr. Knoblock's autopsy report was clearly prepared for the purpose of aiding the investigation and criminal prosecution of Mr. Flowers, which makes the report a testimonial statement.

Moreover, the State misunderstands the relationship between the Confrontation Clause and hearsay exceptions. For example, in Melendez-Diaz, the Court explained that business records are admissible at trial because the records' preparation exists for something other than proving a fact at trial. Melendez-Diaz, 557 U.S. at 324. Non-testimonial business records are prepared during part of a normal record-keeping process without any intention of being used in a trial. The records become testimonial when the preparer would reasonably foresee that the records could be used in a criminal prosecution. Thus, the business records exception to the hearsay rule allows admission of records kept during the normal course of business that are not intended to serve any evidentiary purpose in a trial.

In this case, the autopsy report unmistakably constitutes testimonial evidence because Dr. Knoblock prepared the report *in conjunction with* and *in furtherance of* a criminal investigation. Dr. Knoblock conducted Sheila Quarles' autopsy with the knowledge of the ongoing criminal investigation. Therefore, the autopsy report necessarily constituted testimonial evidence, and as such, Mr. Flowers should have had the right to confront Dr. Knoblock as a witness against him.

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Additionally, the State contends that regardless of the confrontation issue, Dr. Simms qualified as an expert to give his own opinion regarding the evidence. However, the State's contention fails because Dr. Simms testified regarding Dr. Knoblock's subjective opinions pertaining to cause and manner of death, rather than confining his testimony only to matters within the scope of his specialized knowledge. To qualify as an expert witness, the expert must meet the following requirements:

> (1) [the expert] must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement). Perez v. State, 129 Nev. Adv. Op. 90, 313 P.3d 862, 866 (2013) (Citing Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (quoting NRS 50.275)).

Accordingly, under Nevada law, Dr. Simms should have been precluded from testifying about Dr. Knoblock's subjective opinions, which were included in the autopsy report, because they were outside the scope of Dr. Simms specialized knowledge. The State claims, "Dr. Simms testified to his own opinion based on the autopsy report..." State's Response, 16. However, the State also admits, "Dr. Simms stated that Dr. Knoblock's opinion as to Sheila's cause of death was drowning with strangulation as a contributing factor." State's Response, 9. Ref. TT 2A 68-69. Even if the autopsy report were not testimonial, Dr. Simms' testimony would not satisfy the requirements for expert testimony because Dr. Simms did not confine his testimony to his own scope of specialized knowledge because he did not perform the autopsy or generate the autopsy report. Thus, Dr. Simms' testimony should have been stricken for failure to meet the standard of expert testimony.

Even if Dr. Simms does qualify as an expert witness, his testimony constitutes impermissible surrogate testimony. In Bullcoming v. New Mexico, the defendant had been convicted of driving while intoxicated. Bullcoming, 131 S.Ct. at 2705, 2709. In Bullcoming, the prosecutors introduced a testimonial forensic report by calling an analyst as a witness who had not performed the testing or created the report in question. Id. at 2710-2711. The Supreme Court held that this sort of surrogate testimony violated the defendant's confrontation rights because

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the surrogate analyst could not convey the subjective nature of the testing and procedures. Id. at 2715.

Like the surrogate testimony in Bullcoming, Dr. Simms' testimony should not have been introduced at trial. Dr. Simms did not perform, and was not present, at Sheila Quarles' autopsy. Dr. Simms testimony consisted of his interpretation of Dr. Knoblock's findings based merely upon his review of the autopsy report. The situation became even more problematic when Dr. Simms attempted to convey Dr. Knoblock's subjective opinions regarding cause and manner of death at trial. TT 2A 68-69. Thus, the State violated Mr. Flowers' confrontation rights because he was unable to confront Dr. Knoblock about his performance of the autopsy, the opinions he derived from the autopsy, and the contents of his report. As such, Dr. Knoblock's findings contained in the autopsy report of Sheila Quarles should have been precluded due to a clear violation of Mr. Flowers right to confront the State's witnesses.

Considering the fact that Dr. Knoblock's autopsy report of Sheila Quarles should have been subject to the Confrontation clause requirements, Mr. Flowers' trial counsel was ineffective for failing to object to the State's introduction of the autopsy report through Dr. Simms as a surrogate witness. Dr. Knoblock's autopsy report indicated homicide as the method of death, which is the entire crux of the State's case, and as such, the basis of that determination should have been subject to confrontation.

The State also fails to recognize how Dr. Simms' testimony prejudiced Mr. Flowers. State's Response, at 17. The State notes, "As such, it is unclear how Dr. Simms' testimony prejudiced Defendant's case. Notably, Defendant fails to allege what portion of Dr. Simms' was prejudicial." State's Response, at 17, ln. 7-9. In light of the fact that Dr. Knoblock's autopsy report was heavily testimonial given the circumstances of this case, Mr. Flowers contends that the entirety of Dr. Simms' surrogate testimony violated his confrontation rights and served no legitimate purpose other than to bolster Dr. Knoblock's determination of homicide. Aside from the obvious constitutional violations, Dr. Simms discussed subjective opinions contained in the autopsy report. TT 2A 68-69. This caused irreparable prejudice because the jury heard Dr. Knoblock's subjective opinions, which were not subjected to cross-examination. This is

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precisely the kind of testimony that the Confrontation Clause seeks to prohibit. Thus, Mr. Flowers' trial counsel should have objected to this surrogate testimony in an effort to protect Mr. Flowers' confrontation rights.

Mr. Flowers' trial counsel's failure to object to Dr. Simms' testimony fell below an objective standard of performance by failing to protect Mr. Flower's constitutional right to confront one of the State's critical witnesses. This failure prejudiced Mr. Flowers to such an extent that the result of the trial would have been different. At a minimum, had trial counsel raised an objection, the trial court could have addressed Dr. Knoblock's availability and precluded Dr. Simms from acting as a surrogate witness and bolstering the subjective opinions contained in the autopsy report. Clearly, had the trial court precluded Dr. Simms from testifying regarding the cause and manner of death, the State could not have met their burden of proving all the elements of the alleged offenses beyond a reasonable doubt. Further, the objection would have preserved Mr. Flowers' appellate right to address Dr. Simms' testimony on direct appeal. Thus, trial counsel's failure to object caused Mr. Flowers to suffer irreparable prejudice.

ii. ***Ms. Paulette's testimony regarding Mr. Wahl's DNA report***

Trial counsel was ineffective for failing to object to Ms. Paulette's surrogate testimony regarding the opinions in Mr. Wahl's DNA report prepared for the Marilee Coote matter, a completely separate case.

At trial, Ms. Paulette testified regarding the contents of her own forensic DNA report for the Sheila Quarles homicide. Additionally, the State asked Ms. Paulette to testify to the contents of Mr. Wahl's DNA report for the Marilee Coote case—a completely separate and unrelated case in which Mr. Flowers had been involved. The judge in the Sheila Quarles case allowed evidence of the Marilee Coote case to show similarities and motive. Although Ms. Paulette testified to the contents of her own report for the Sheila Quarles case, Ms. Paulette became a surrogate witness for the contents of Mr. Wahl's report written for the Marilee Coote case.

Here, the State claims that Mr. Wahl's DNA report regarding the Marilee Coote case is somehow distinguishable from the forensic reports identified in Melendez-Diaz and Bullcoming. This contention fails. Mr. Wahl's DNA report in the Coote case was created during the course of

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a police investigation into a homicide. Certainly, Mr. Wahl created the DNA report for an "evidentiary purpose." Bullcoming, 131 S.Ct. at 2717, Crawford, 541 U.S. at 53-54, Melendez-Diaz, 557 U.S. at 311.

Additionally, the State fails to distinguish between Ms. Paulette's testimony regarding the contents of the Mr. Wahl's report in the Coote case and her testimony regarding her own report in the Quarles case. State's Response, at 17. During the trial, the State examined Ms. Paulette as a witness for two different evidentiary functions. First, Ms. Paulette testified to her own DNA analysis performed for Sheila Quarles' case and regarding the procedures in the LVMPD forensic laboratory. Since Ms. Paulette prepared this report, she could testify to contents and opinions of this report.[4] However, the State also offered Ms. Paulette as a witness to Dr. Wahl's DNA analysis and opinions regarding the Coote case, for which Mr. Flowers was not on trial. This second function clearly triggers the Confrontation Clause restraints because Ms. Paulette was not the analyst who prepared that report, nor did she have specialized knowledge regarding the conclusions contained in Mr. Wahl's report. Therefore, her testimony should not have been admitted because Mr. Flowers never had the opportunity to cross-examine Mr. Wahl.

Further, Ms. Paulette's testimony regarding Mr. Wahl's report caused Mr. Flowers to suffer irreparable prejudice because the DNA analysis linked Mr. Flowers to a murder for which he was not on trial. Accordingly, the jury heard about forensic evidence linking Mr. Flowers to a crime, and Mr. Flowers did not have the opportunity to cross-examine the analyst who created the testimonial report. Although Ms. Paulette's opinions regarding Mr. Wahl's report related to the Coote case, it is highly unlikely that the jury could distinguish the nature of the evidence and properly use Mr. Wahl's report for anything other than "a declaration or affirmation made for the purpose of establishing or proving some fact." Bullcoming, 131 S.Ct. at 2717. The simple

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[4]In its response, the State seems to confuse the argument in Mr. Flowers' supplemental petition. Mr. Flowers did not make an ineffective assistance claim regarding Ms. Paulette's testimony regarding her own findings. Mr. Flowers claims that counsel's failure to object to Ms. Paulette's testimony regarding the contents of Mr. Wahl's report constituted ineffective assistance of counsel because Mr. Flowers should have had the opportunity to cross-examine Mr. Wahl as a witness against him or Mr. Wahl's report should not have been admitted into evidence.

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fact in this case is that a homicide occurred, and the State impermissibly used Ms. Paulette's testimony about Mr. Wahl's analysis to link Mr. Flowers to the Sheila Quarles homicide, despite the fact that Mr. Wahl's analysis pertained to a different homicide altogether. This opened the door for the jury to draw impermissible inferences regarding Mr. Flower's guilt.

As such, trial counsel's failure to object to Ms. Paulette's surrogate testimony fell below an objective standard of reasonableness. This situation prejudiced Mr. Flowers to the extent that the outcome of the trial would have been different. Had the court sustained an objection, the State would have been forced to subject Mr. Wahl to cross examination, whereby the defense could have challenged a very powerful piece of evidence used to show Mr. Flower's motive for the Sheila Quarles murder. In the alternative, if the State could not produce Mr. Wahl for trial, Ms. Paulette's testimony pertaining to Mr. Wahl's report would have been precluded, and the State would have had significantly less support to prove the allegations against Mr. Flowers beyond a reasonable doubt.

2. *Defendant's trial counsel was ineffective for failing to object to the State's vouching*

The State used the prestige of the government to vouch for George Brass' credibility, despite the fact that Mr. Brass had sex with Sheila Quarles on the day of her murder, which should have effectively made Mr. Brass an alternative suspect in this case. During the trial, the State elicited testimony from Detective Vaccaro and Detective Long that constituted vouching for Mr. Brass' credibility. Additionally, during closing arguments, the State explicitly vouched for Mr. Brass' credibility by drawing a comparison between Mr. Brass' admission that he had sex with Sheila Quarles the day she died, and Mr. Flowers' election to exercise his Fifth Amendment right to remain silent. Thus, during its closing argument, the State persistently described Mr. Brass as a trustworthy individual, thereby vouching for his credibility.

It is established that a prosecutor may not vouch for the credibility of its own witness. Browning v. State, 120 Nev. 347, 358-359, 91 P.3d 39, 48 (2004); Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). Further, a prosecutor vouches by placing the "prestige of the government behind the witness" and provides "personal assurances of [the] witness's veracity." Browning, 120 Nev. at 359; Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114 (2002).

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As the State noted, in Rowland, the Nevada Supreme Court held that describing an inmate witness as a "man of integrity" and "honor" constituted prosecutorial misconduct. Rowland, 118 Nev. at 39. However, the State clearly neglected the remainder of the Rowland opinion. In Rowland, the Court reasoned, "even asserting that the defendant is lying is equally impermissible." Id. See also, Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153 (1988) ("The characterization of testimony as a lie is improper argument.").

Nevada has adopted the Ninth Circuit's logic regarding prosecutorial vouching, "Analysis of the harm caused by vouching depends in part on the closeness of the case." Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997); (citing U.S. v. Frederick, 78 F.3d 1370, 1378 (9th Cir.1996); Ref. U.S. v. Roberts, 618 F.2d 530, 534 (1980). Further, "If the issue of guilt or innocence is close, if the state's case is not strong, prosecutor misconduct will probably be considered prejudicial." Rowland, 118 Nev. at 38. As a result, if the question regarding innocence or guilt is close, then the reviewing courts will be more likely to reverse the case based upon prejudicial vouching. Nevada has adopted a two-pronged analysis to determine the propriety of a prosecutor's conduct: (1) determine "whether the prosecutor's conduct was improper," and (2) determine "whether the improper conduct warrants reversal." Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).

In this case, the State incorrectly claims that Mr. Flowers did not explain how the State's elicited testimony from Detective Vaccaro constituted improper vouching. Mr. Flowers explained the following:

> In addition, during the direct examination of Detective James Vaccaro, the prosecutor vouched to the jury that Mr. Brass should not have been considered a prime suspect to the murder and sexual assault. Detective Vaccaro retired in 2007, but Mr. Brass did not admit to having sex with the victim until a detective approached him in 2008. Accordingly, Detective Vaccaro did not have any personal knowledge regarding Mr. Brass's admission because Detective Vaccaro had already retired at the time of Mr. Brass's admission. Therefore, the prosecutor used the prestige of the government when it used Detective Vaccaro's position as a representative of law enforcement to make Mr. Brass's story more believable.

Supplemental Petition, at 29.

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Further, in the Statement of Facts of the Supplemental Petition, Mr. Flowers provided the direct portion of Detective Vaccaro's testimony in which the State elicited responses to vouch for Mr. Brass:

> During direct examination, the State elicited improper vouching testimony from Detective Vaccaro regarding the State's essential witness, George Brass, Jr.:
>
> Q- "Now, if Mr. Brass—or assuming Mr. Brass admitted or told detectives that he had sexual contact with Miss Quarles on the day of her death, the room or the location that the intercourse took place wouldn't be particularly relevant in the investigation, would it, if it was a consensual relationship?"
>
> A- "Not with regard to that sexual contact with regard to Mr. Brass."
>
> Q- "Okay. So if he said that he had sex with her on the floor of one of the rooms in Debra Quarles' apartment, knowing that doesn't necessarily tell you who killed Sheila Quarles later on?"
>
> A- "I think that the correct answer to that would be that it wasn't important until we knew more about that sexual activity and whether or not he was a suspect in our case. So I don't know if that's a confusing answer, but when we learned about him as a suspect or not a suspect in our case, when he did not develop as a suspect in our case, then that location that the consensual sex took place wasn't of any importance to us."
>
> Q- "I mean—yeah, I guess that's my question." It doesn't tell you any more about the investigation or how she was killed if he says I had sex with her on the living room floor, on the kitchen floor or on the bedroom floor? That doesn't tell you anything about who killed Sheila Quarles, does it?"
>
> A- "No. I mean, he could have said he had sex with her at a location other than the apartment even, for that matter. The fact that he said that he had sexual contact with her, but then showed additional information—or additional investigation showed us that he wasn't a suspect in that, where they had sex wasn't of importance to us; and, at that point, I think that was beyond my time there anyway. So in my experience, that wouldn't have been important to me."
>
> Q- "And the fact that someone has sex with another individual on a floor or on a carpet, that wouldn't necessarily mean that sperm or some kind of DNA would end up on the carpet by virtue of the sexual activity, would it?"
>
> A- "No. But I guess we could say that depending upon the positioning of the two individuals having sex, you could make a conclusion whether or not there was some deposit of semen on the surface that they were having sex on. So I don't really know how to answer that."
>
> Q- "Maybe, maybe not?"
>
> A- "It doesn't mean it's always going to be there."
>
> TT Vol. 2B at 130-131.

Supplemental Petition, at 14-15.

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Detective Vaccaro had no personal knowledge of Mr. Brass' admission that he had sex with Shelia Quarles on the day she died. Detective Vaccaro testified that he retired in 2007. TT Vol. 2B at 114. In August of 2008, Mr. Brass admitted to having sex with Sheila Quarles on the day she died. TT Vol. 2B at 113-114. As such, Detective Vaccaro could not have personal knowledge regarding Mr. Brass' affairs because he was no longer working as a detective at the time of Mr. Brass' admission. TT Vol. 2B at 114.

Despite the fact that Detective Vaccaro did not have personal knowledge regarding Mr. Brass' admission, the State asked Detective Vaccaro to make assumptions about the situation and develop incorrect conclusions based upon those assumptions. Detective Vaccaro admitted to lacking personal knowledge of Mr. Brass' admission and to having heard about the admission on a second-hand basis. TT Vol. 2B at 114, 130-131. Knowing that Detective Vaccaro did not have personal knowledge about Mr. Brass' admission, the State repeatedly asked Detective Vaccaro questions to ensure that Mr. Brass' admission would not make Mr. Brass a suspect in the criminal investigation. TT Vol. 2B at 130-131. See Supplemental Petition, at 14-15. The State's questioning lead Detective Vaccaro to vouch for the police officers' decision not to investigate Mr. Brass as a potential suspect in Sheila Quarles' homicide. Logically, Detective Vaccaro would answer the State's questions in a manner that supported the other officers' decision to exclude Mr. Brass as a suspect and failure to inquire further into his admission. Thus, the State used Detective Vaccaro to vouch for the credibility of the other officers' failure to question Mr. Brass as a potential subject to Sheila Quarles' murder. In turn, the State used this questioning as a mechanism to take suspicion away from Mr. Brass and to convey Mr. Brass as a credible individual in order to convict Mr. Flowers despite the closeness of the case.

As a result of the prosecutor's line of questioning, the State created a situation in which Mr. Flowers suffered prejudice. This is a very close case because the victim had sex with two men on the day she died. However, the police and the prosecutors only chose to investigate one potential suspect, despite the fact that in 2008, Mr. Brass explicitly disclosed the fact that he slept with Sheila Quarles on the day she died. The prosecutors knew that Detective Vaccaro had retired in 2008 when Mr. Brass provided this admission, and the prosecutors questioned

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Detective Vaccaro about Mr. Brass despite Detective Vaccaro's lack of personal knowledge about the situation. This line of questioning certainly constitutes improper vouching.

Additionally, the State cannot argue that it did not elicit any "personal assurances" when questioning Detective Long about Mr. Brass' willingness to discuss Sheila Quarles. For example, the State repeatedly questioned Detective Long about Mr. Brass' voluntary conversation about Sheila Quarles. Supplemental Petition, at 11-12, 29-30. TT Vol. 3B at 41-43, 66-68. The State used Detective Long's explanation as to why Mr. Brass was not a suspect to build Mr. Brass' credibility. Detective Long, as a law enforcement agent, holds a public position and represents the prestige of the government. Therefore, by demonstrating that Detective Long supported the decision to exclude Mr. Brass as a suspect, the State used Detective Long as a representative of government prestige to support the contention that Mr. Brass was credible because he voluntarily spoke with Detective Long.

The State impermissibly drew a comparison between Mr. Flowers exercising his right to remain silent and Mr. Brass' willingness to talk. The State explicitly used Detective Long's testimony to show that Mr. Brass spoke to Detective Long, despite the fact that he could have refused to discuss Sheila Quarles. This sent a powerful message to the jury that the State believed Mr. Brass was more credible than Mr. Flowers because Mr. Brass' willingness to talk to the police precluded his viability as a suspect to Sheila Quarles' death. Thus, a lay jury would be more likely to believe the prosecutor's logic as to which man could have committed the murder. However, based on the scientific evidence presented, a reasonable jury could not have determined which man had sex with Sheila Quarles first on the day she died, which demonstrates the closeness of this case. Therefore, the prosecutor impermissibly vouched for Mr. Brass' credibility in juxtaposition to Mr. Flowers' exercise of his right to remain silent, when in fact, Mr. Brass was a legitimate suspect in Sheila Quarles' death.

Further, the State incorrectly contends that labeling Mr. Brass as having "nothing to hide" simply invited the jury "to draw such the reasonable inference that's [sic] Mr. Brass' testimony was truthful based on the totality of the evidence" during the closing arguments. State's Response, at 19. The State's contentions fail. The State continuously told the jury that

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Mr. Brass could not be the killer because Mr. Brass voluntarily discussed his relationship with Sheila Quarles with detectives. Supplemental Petition, at 15-16. TT Vol. 5 at 118. Additionally, the State explained that Mr. Brass did not evade the police and displayed a cooperative demeanor. Id. TT Vol. 5 at 118-120. Further, the State drew conclusions that the evidence absolutely vilified Mr. Flowers because Mr. Flowers did not voluntarily speak with law enforcement. Id. By comparing Mr. Brass' willingness to testify against Mr. Flowers' choice to exercise his right to remain silent, the prosecutor's statements infected the proceedings with unfounded conclusions regarding Mr. Flowers' culpability. As such, the prosecutors' vouching was improper because it bolstered the credibility of a state witness to improve the likelihood of convicting Mr. Flowers. This was a close case, as shown by the DNA evidence. Thus, the prosecutors seized the opportunity to highlight Mr. Flower's refusal to speak to the police in an effort to convince the jury that Mr. Flowers was guilty because he elected to remain silent rather than cooperate with the police.

The State argues that it was simply providing the facts to the jury in a manner such that the jury could function as the lie detector and determine the credibility of the witnesses. State's Response, at 19. This argument is inapplicable to this case. The State presented improper conclusions, which allowed the jury to heed to emotional prompts and attribute credibility to Mr. Brass, when in fact, Mr. Brass did not merit that credibility. The State's comparison of Mr. Brass' admission with Mr. Flowers' silence provided the jury with an opportunity to attribute unwarranted credibility to Mr. Brass and to ignore him as an alternate suspect.

As previously stated, the facts presented to the jury made this a very close case. Mr. Flowers and Mr. Brass each had sex with Sheila Quarles on the day she died. Thus, the State impermissibly resorted to vouching in order to give them an unwarranted advantage in convicting Mr. Flowers because the State did not have concrete facts upon which to convict Mr. Flowers.

Accordingly, trial counsel's deficiency stemmed from the failure to object to the State's impermissible vouching, which irrevocably prejudiced Mr. Flowers' right to a fair trial. Had trial counsel objected to the State's vouching, the result of the trial would have been different

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because the jury would have seen Mr. Brass as an alternate suspect rather than a credible witness. Given the closeness of the case, the State's vouching, which constituted prosecutorial misconduct, cannot be considered harmless. Thus, had the court sustained an objection to the State's vouching, the outcome of the case would have been different.

II.

CONCLUSION

For the reasons stated above, Norman Flowers' conviction is unconstitutional under the federal and state constitutions for each of the reasons stated herein. Mr. Flowers' judgment of conviction must therefore be vacated.

DATED this 10th day of November, 2014.

/s/ James A. Oronoz

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 2014, I served a true and correct copy of the foregoing Reply to State's Response and Motion to Dismiss Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) on the following:

STEVEN WOLFSON, Clark County District Attorney
PAMELA C. WECKERLY, Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101
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I further certify that on the 10th day of November, 2014, I deposited in the United States Post Office at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the foregoing Reply to State's Response and Motion to Dismiss Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), addressed to the following:

RENEE BAKER
Warden
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

CATHERINE CORTEZ MASTO
Nevada Attorney General
100 N. Carson Street
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/s/ Rachael Stewart
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TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. NORMAN FLOWERS, Defendant.	CASE NO. C228755 DEPT. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS/ STATE'S MOTION TO DISMISS SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

WEDNESDAY, APRIL 29, 2015

APPEARANCES:

For the State: ELISSA LUZAICH, ESQ.
Chief Deputy District Attorney

For the Defendant: LUCAS J. GAFFNEY, ESQ.

RECORDED BY: JILL HAWKINS, COURT RECORDER

LAS VEGAS, NEVADA, WEDNESDAY, APRIL 29, 2015, 9:16 A.M.

(Court was called to order)

THE COURT: Are we ready on Flowers?

MR. GAFFNEY: Your Honor, I'm standing in for Mr. Oronoz today.

THE COURT: Okay. First I want to compliment you guys on the quality of the briefing. It's been a long time since I have read briefs that are that well done. So I understand the issues are fairly limited, but the briefs were very well done on both sides.

MR. GAFFNEY: Thank you, Your Honor.

THE COURT: It's your motion.

MR. GAFFNEY: Well, Your Honor, I think our position is fairly well laid out in our brief. We believe that trial counsel's ineffective for failing to object to the use of essentially surrogate testimony to bring in the autopsy reports, which our position is that those are testimonial by nature. Those are not business records, but they're testimonial. They should have been excluded, and counsel's failure to object allowed those to come in. Therefore, that constitutes deficient performance. And obviously the prejudice here would be that if the autopsy report didn't come in, the State wouldn't be able to establish cause and manner of death, and the case would have had a different outcome.

And our -- essentially our argument is based on the

rulings in Bullcoming and Melendez. And like I said, I think our position is pretty clear on that. Knoblock's autopsy report is absolutely testimonial. It was prepared in anticipation of a criminal prosecution. In fact, it's my understanding that there were three law enforcement agents there with the coroner as he was conducting the autopsy. I can't think of another situation where a reasonable person couldn't objectively believe that the report they're going to issue would potentially be used in a criminal prosecution. And so for that same reason it's our position that the State's argument that the autopsy report should be considered a business record is incorrect. And, again, we'd point to Bullcoming and Melendez as our support for that.

And then additionally, to, you know, just sort of put a bow on it. Simms at trial testified using Knoblock's autopsy report. That report contained subjective conclusions regarding cause and manner of death. And not only is it our contention that Simms should not have been able to testify to that, but he couldn't testify to that. Mr. Flowers did not have the opportunity to cross-examine Knoblock, the author of that report, to determine whether there was any bias, determine whether his methodology was reliable, to determine if there were any lies contained in the report, for a lack of a better term.

And so, you know, our -- essentially our position there is that his right to confrontation under Crawford was

violated. His trial counsel should have objected. They didn't. That's deficient, it's ineffective assistance, and he was prejudiced as a result of that.

And essentially our argument would be the same as to the DNA reports that were brought in through Christina Paulette. Now, we understand that she did an independent examination of the body that Mr. Flowers was on trial for, but as to the other report that came in concerning the murder of Marilee Coote, she shouldn't have been allowed to testify as to the results there. And it's for the same reasons that I stated. It's the -- I would again point to Bullcoming and Melendez saying that there was subjective conclusions, there was methodology that was used in coming to those conclusions that Mr. Flowers wouldn't have had the opportunity to cross-examine the author of that report on. And so she shouldn't have been allowed to testify as to Mr. Wahl's conclusions, the author of the autopsy report, which, again, may have contained subjective conclusions.

And then lastly, we brought up the issue of vouching. And essentially we -- our argument is that the State used two detectives, they elicited testimony from two detectives to bolster the credibility of George Brass, who trial counsel was trying to develop as an alternate suspect in this case. And, you know, as you know from reading the briefs and probably trial transcripts, Mr. Brass's DNA was found inside the victim along with Mr. Flowers's. And so it's our position given those

circumstances that this was a close case, and if not for the vouching of these detectives, who were essentially bolstering Mr. Brass's credibility, the outcome of the trial could have been different. And I would point to essentially the testimony, the questions and answers elicited from Detective Vaccaro, and also the testimony of Detective Long, who talked about how Brass came to the police voluntarily, he talked to the police voluntarily, whereas Mr. Flowers invoked his right to remain silent. And they tried to use that juxtaposition to bolster Brass's credibility, and we thought that that was improper and trial counsel should have objected to that and their failure to object to that caused Mr. Flowers prejudice.

And so that's essentially our position. And for those reasons we believe that at least an evidentiary hearing would be warranted where we could bring in trial counsel to ask them whether they were aware of these issues and whether there was some strategic reason why they decided not to object and not to pursue these issues.

THE COURT: Ms. Luzaich.

MS. LUZAICH: Thank you. First the State would reiterate that it is our position that this writ is procedurally barred, that it is untimely --

THE COURT: Judge Togliatti already made findings on that, though.

MS. LUZAICH: Right, right, right.

THE COURT: So I'm going to skip past that part.

MS. LUZAICH: Just --

THE COURT: I understand --

MS. LUZAICH: I'm protecting my record. So --

THE COURT: -- you're preserving that issue, but that's already --

MS. LUZAICH: I do understand. I just wanted --

THE COURT: I'm past that one.

MS. LUZAICH: The Supreme Court is very clear that we always have to raise things, otherwise they're waived.

THE COURT: Absolutely.

MS. LUZAICH: So I'm raising it. I recognize --

THE COURT: Keep raising it.

MS. LUZAICH: -- your order.

That being said, remember that for there to be ineffective assistance of counsel there are two different prongs. First you have to find that their performance fell below the objective standard of reasonableness, and then assuming you do find that, that you have to find that but for whatever error it was the result would have been different.

Remember, the defendant waived his appeal. So technically you really can't find that the result would have been different, because he couldn't raise it on appeal because he waived his appeal.

But that being said, the defense relies on Melendez-

Diaz and Bullcoming for their hearsay issues. Melendez-Diaz and Bullcoming both are cases wherein an actual report, a document was admitted at trial and therefore nobody could testify. In Bullcoming it was the blood alcohol content, which obviously was an extremely important issue in the case, and nobody could cross-examine the person on how they came about with that result.

In Melendez-Diaz it was certification documents regarding whether or not something was cocaine and could that have been done in error. Well, nobody could of cross-examined on that.

Contrarily, in this situation we actually had live witnesses testify and were cross-examined based upon their testimony. As to Dr. Simms, he didn't only say, Dr. Knoblock performed this autopsy and this is what he found. Dr. Simms did an independent evaluation. He reviewed Dr. Knoblock's autopsy report, and he reviewed all of the photos. And there are tons and tons of photos from every angle of the autopsy that he was able to review. And based on his independent review of the report, what was found on the body, and the photographs, he opined his own conclusions and testified that his conclusion was consistent with what Dr. Knoblock said. And he was therefore able to be cross-examined. Dr. Knoblock wasn't. But even if you forgot about what he said Dr. Knoblock said, Dr. Simms's own opinion was what he testified to.

But the bottom line is cause and manner of death were not at issue in this case. The defense said that from the very beginning, it was not how did she die, but who did it. So you can't really say that it was below an objective standard of reasonableness by not objecting, and you certainly can't say -- and they don't really say what the prejudice was -- that there could have been a different result.

As to Christina Paulette, she testified that she is the custodian of records, that the report by Tom Wahl was a business record and she could testify about that. But even if you excluded Tom Wahl's report, Christina Paulette herself did the DNA analysis as it pertained to Sheila Quarles, and she did the testing on Marilee Coote's case where the carpet was -- there was DNA found on the carpet. And the location of that DNA what was what was so important. It was not just under her body, but it was under her vagina, which was -- and her legs were spread open, so very clearly what was there came from her vagina. So the fact that the defendant's DNA was there, irregardless [sic] of what Tom Wahl's report said, it was overwhelming evidence, and the jury wouldn't have found anything else otherwise.

As far as George Brass and vouching, that was actually me, it was my argument. And it wasn't vouching. Vouching is saying, I believe he's telling the truth, I'm the State, I believe and therefore you should too. I was just arguing facts.

I mean, we asked Detective Long, did George Brass have to interview. No, of course he didn't. He could have said pound sand. And if he said pound sand, Detective Long testified, there was nothing I can do. But not only did he choose to give an interview, he chose to give DNA. We couldn't have gotten a search warrant from him. We would have had no way to prove otherwise. So he voluntarily gave the DNA. He voluntarily spoke to Detective Long. That's not vouching, that's stating the facts, and asking the jury to draw the reasonable inference that he really did have nothing to lose, because he knew that he didn't do anything wrong.

Additionally, he had an alibi. Other witnesses corroborated the fact that he could not have been there at the time of her death. And the time of her death was contemporaneous with the time of the sexual assault. Therefore, it was not vouching in any way, and there was no objectively reasonable thing that they could have otherwise done. And they also don't show how there was any prejudice that the result would have been different.

So we would ask the Court to deny the petition. There is no merit to an evidentiary hearing.

THE COURT: Thank you.

Anything else?

MR. GAFFNEY: Your Honor, just on the stipulation as to cause and manner of death. That's a whole 'nother area that

we could potentially brief as far as ineffective assistance goes.

It was my understanding that they stipulated to cause and manner of death in order to keep the gruesome autopsy photos out. That was their -- I believe their stated reason. And so --

THE COURT: Sounds really strategic to me.

MR. GAFFNEY: Right. However, if they had been aware of this issue and they knew that they were going to have Simms testify, rather than Knoblock, then they would have been trying to keep out the autopsy report and photos in their entirety. And so that would be our position on that.

And just again, we do believe there is prejudice here. If the autopsy report goes out, there's no establishing cause and manner of death.

The prejudice as to the DNA reports, our position is that even though she wasn't necessarily testifying to the victim who was at issue in that case, by being allowed to bring in that evidence, I believe it was to establish intent and motive. Had that been excluded we also believe there would have been a different result, and therefore you have the prejudice.

And I think I already explained why we think there would be prejudice as to what we consider to be vouching on behalf of the detectives.

And, Your Honor, with that I'd submit it.

THE COURT: Thank you.

First the Court finds that the circumstances as presented in this case do not indicate vouching.

With respect to Dr. Simms, Dr. Simms testified related to the autopsy report his own independent conclusions. For that reason there's no Crawford issue.

With respect to Paulette, it appears that she is a custodian of records, testified not only to her own personal findings, but also to the contents of Mr. Wahl's DNA report. DNA reports do not appear to me to be testimonial in nature. And for that reason I am not going to grant an evidentiary hearing. There does not appear to be a basis here.

Can you please draft the findings, Ms. Luzaich.

MS. LUZAICH: Yes.

THE COURT: Thank you.

Thank you. Have a nice day.

MS. LUZAICH: Thank you.

THE COURT: And, again, it was very well briefed.

MR. GAFFNEY: Thank you.

THE PROCEEDINGS CONCLUDED AT 9:29 A.M.

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

JILL HAWKINS
Court Recorder

Electronically Filed
05/28/2015 07:22:05 AM

CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant.

CASE NO: 06C228755

DEPT NO: XI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: APRIL 29, 2015
TIME OF HEARING: 9:00 AM

THIS CAUSE having come on for hearing before the Honorable JUDGE ELIZABETH GONZALEZ, District Judge, on the 29th day of April, 2015, the Petitioner not being present, REPRESENTED BY LUCAS GAFFNEY, Esq., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through LISA LUZAICH, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

On December 13, 2006, a Grand Jury issued an Indictment on Norman Keith Flowers, aka Norman Harold Flowers III (hereinafter "Flowers") for the following: COUNT 1 – Burglary (Felony – NRS 205.060); COUNT 2 – Murder (Felony 200.010, 200.030); COUNT

3 – Sexual Assault (Felony – NRS 200.364, 200.366) and COUNT 4 – Robbery (Felony – NRS 200.380). The victim named in the Indictment was Sheila Quarles.

On December 26, 2006, the State filed a Motion to Consolidate seeking to consolidate this case with District Court Case Number C216032. The motion was also filed in Case Number C216032. In Case Number C216032, Flowers was charged with two counts of murder (and other charges) for the deaths of Marilee Coote and Rena Gonzales. Flowers filed an Opposition on January 2, 2007. On January 8, 2007, District Court Judge Joseph Bonaventure, sitting judge for Case Number C216032, denied the State's motion. On January 11, 2007, the State filed a Notice of Intent to Seek Death Penalty in this matter.

On January 23, 2007, Flowers filed a Motion in Limine to Preclude Evidence of Other Bad Acts and Motion to Confirm Counsel. In his motion, Flowers sought to keep out evidence of the Gonzales and Coote murders and to confirm attorney Brett Whipple, Esq., as his counsel. The State filed an opposition on February 2, 2007. On February 5, 2007, the Court denied Flowers' motion to confirm counsel but did not address the prior bad acts. On November 5, 2007, the State filed a Motion for Clarification of Court's Ruling seeking to clarify if they could introduce evidence of the murders charged in Case Number C216032 at trial in this matter. Flowers filed an opposition on November 6, 2007. On November 15, 2007, the Court ordered a Petrocelli hearing on the bad acts that the State wanted to introduce at trial. On August 1, 2008, the Court found that the murder and sexual assault of Coote had a sufficiently similar nexus to the Sheila Quarles murder and could be used at trial, but denied the admission of evidence of the Rena Gonzales murder.

An Amended Indictment was filed on October 15, 2008, alleging the same charges as set forth in the Indictment. On October 22, 2008, pursuant to a jury verdict, Flowers was found guilty of COUNTS 1, 2 & 3, i.e., Burglary; First-Degree Murder and Sexual Assault, respectively. Flowers was found not guilty of COUNT 4 – Robbery. On October 24, 2008, following a penalty hearing, the jury imposed a sentence of LIFE Without the Possibility of Parole for COUNT 2. On October 30, 2008, Flowers filed a Motion for New Trial alleging

insufficient evidence. On November 10, 2008, the State filed an Opposition. The Court denied Flowers' motion on November 12, 2008.

On January 13, 2009, Flowers was sentenced as follows: as to COUNT 1 – to a maximum of ONE HUNDRED TWENTY (120) MONTHS in the Nevada Department of Corrections (NDC) 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, Flowers 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 W*ith* the Possibility Of Parole with a minimum parole eligibility of ONE HUNDRED TWENTY (120) MONTHS for COUNT 3.

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

On March 5, 2010, Flowers filed a Motion for New Trial Based upon Newly Available Evidence. The Court denied the Motion for New Trial. On April 1, 2010, Flowers filed a Notice of Appeal from the Court's denial of his Motion for New Trial.

On June 10, 2011, pursuant to negotiations, Flowers entered an Alford plea to an Amended Indictment in Case Number C216032, which charged Flowers with two (2) counts of First-Degree Murder for the deaths of Marilee Coote and Rena Gonzales. Pursuant to the plea negotiations, Flowers agreed to withdraw his appeals in this case which were pending before the Nevada Supreme Court; i.e., Flowers v. State, Docket # 53159 (Appeal from the Judgment of Conviction); and Flowers v. State, Docket # 55759 (Appeal from the District Court's order denying Flowers' motion for new trial). On June 13, 2011, Flowers filed a Motion to Voluntarily Dismiss his Appeal in each of these cases. On September 28, 2011, the Supreme Court issued an Order Dismissing Appeals in Docket # 53159 and Docket # 55759.

On May 16, 2012, Flowers filed a Motion for the Appointment of Counsel and Request for Evidentiary Hearing, seeking the appointment of counsel in the preparation of a post-conviction petition for writ of habeas corpus. On May 30, 2012, the court granted Flowers' motion. On June 8, 2012, James A. Oronoz, Esq., was appointed as post-conviction counsel.

At a status check on July 13, 2012, defense counsel advised the Court he still had not obtained Flowers' file. On August 27, 2012, defense counsel advised the Court he was still not in possession of Flowers' file. Counsel presented the Court with an Order which was signed in open court, ordering the District Attorney's Office to provide Flowers with a copy of discovery.

On September 10, 2012, before the time to file the post-conviction petition expired in this case, the parties appeared in court at the State's request for a clarification of the August 27, 2012 discovery order. Defense counsel made an oral motion to extend the timeline for the filing of Flowers' post-conviction petition. The Court granted defense counsel's request and extended the deadline by 30 days. The Court also noted that when it signed the discovery order on August 27, 2012, it had not realized there would be an objection by the State to providing discovery. Accordingly, the Court vacated the discovery order signed on August 27, 2012, and ordered briefing on the matter.

On October 9, 2012, Flowers filed a Petition for Writ of Habeas Corpus (Post-Conviction). On October 30, 2012, the State moved to dismiss Flowers' petition as untimely. On October 31, 2012, Flowers filed a Motion to Place on Calendar to Supplement Defendant's Petition for Writ of Habeas Corpus. On November 2, 2012, State filed an opposition to Defendant's Motion to Place on Calendar. On November 23, 2012, Flowers filed a reply to State's opposition.

On September 12, 2012, prior to the filing of Flowers' petition, Flowers filed a Motion to Obtain a Complete Copy of Discovery from the State. On December 14, 2012, the State filed an opposition. On January 16, 2013, the Court heard argument on Flowers' discovery motion. The next day, the district court issued a minute order. The Court found: 1) NRS 34.726 does not address instances where a pending appeal is dismissed and no remittitur is

issued 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 his file for reasons outside of his control;" 3) the Court's September 17, 2012 Order granting an extension created prejudice; and 4) Flowers' filing of the petition within eleven days of the deadline was reasonable. The minute order noted that the discovery issue would be addressed at the next scheduled hearing on March 6, 2013. The instant case was reassigned to Department 11 on January 22, 2013.

On March 5, 2013, the State filed a Renewed Response and Motion to Dismiss Flowers' Petition for Writ of Habeas Corpus (Post-Conviction). On March 20, 2013, the Court ordered supplemental briefing as to Flowers' post-conviction petition. Following a stipulation by the parties to extend the briefing schedule, Flowers filed a Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) on July 7, 2014. On August 25, 2015, the State filed a Response and Motion to Dismiss Flower's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). Flowers filed a reply on November 10, 2014.

To prevail on a claim of ineffective assistance of trial counsel a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 2063-64 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 104 S. Ct. at 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a

reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2052). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." McNelton, 115 Nev. at 403, 990 P.2d at 1268 (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2052).

This Court finds that trial counsel was not ineffective for not objecting to the State's evidence regarding George Brass, as such did not constitute vouching. It is well settled that the prosecution may not "vouch" for a witness' credibility. Browning v. State, 120 Nev. 347, 358, 91 P.3d 39, 48 (2004). "[S]uch vouching occurs when the prosecution places the prestige of the government behind the witness by providing personal assurances of the witness's veracity. Id. (internal citation and quotation marks omitted), accord Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). Flowers alleged that the State vouched for Mr. Brass during Detective Vaccaro's testimony, but does not specify how the testimony elicited from Detective Vaccaro was improper vouching. Flowers also alleged that the State vouched for Mr. Brass during Detective Long's testimony by eliciting testimony that Mr. Brass could have refused to speak with Detective Long had he so chose. The Court finds this is not a "personal assurance" by the prosecution of Mr. Brass' credibility, and therefore no improper vouching occurred.

Flowers also contends that the State "vouched" for Mr. Brass during closing argument by indicating that Mr. Brass had "nothing to hide." This Court finds that the circumstances as presented do not indicate vouching. The State's comment was proper because it was commenting on the evidence presented and inviting the jury to draw a reasonable inference that Mr. Brass' testimony was truthful based on the totality of the evidence. This type of argument is proper. See Bridges v. State, 116 Nev. 752, 762, 6 P.3d 1000, 1008 (2000) ("The prosecutor had a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows."). Flowers has not shown deficiency or prejudice, thus this claim is denied.

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This Court finds that trial counsel was not ineffective for not objecting to Dr. Simms testimony as it related to the findings contained in Dr. Knoblock's autopsy report. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him," and gives the accused the opportunity to cross-examine all those who "bear testimony" against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 1364 (2004); see also White v. Illinois, 502 U.S. 346, 359, 112 S.Ct. 736, 744 (1992) (Thomas, J., concurring in part and concurring in judgment) ("critical phrase within the Clause is 'witnesses against him'"). Thus, testimonial hearsay - i.e. extrajudicial statements used as the "functional equivalent" of in-court testimony - may only be admitted at trial if the declarant is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54, 124 S.Ct. at 1365. To run afoul of the Confrontation Clause, therefore, out-of-court statements introduced at trial must not only be "testimonial" but must also be hearsay, for the Clause does not bar the use of even "testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 51-52, 60 n.9, 124 S.Ct. at 1369 n.9 (citing, Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 2081-82 (1985)).

This Court finds that no Confrontation Clause violation was committed during Dr. Simms' testimony as the autopsy report is not testimonial in nature. Autopsy reports are the product of an official duty imposed by law, rather than a product of criminal investigation for use at trial. See NRS 259.050. Unlike the reports held testimonial in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), and Bullcoming v. New Mexico, 564 U.S. ___, 131 S.Ct. 2705 (2011), autopsy reports are generated regardless of any request by law enforcement and are not produced solely or even primarily for purposes of gathering evidence for a future criminal prosecution. See Williams v. Illinois, ___ U.S. ___, 132 S.Ct. 2221, 2251 (2012) (Breyer, J. concurring) ("Autopsies, like the DNA report in this case, are often conducted when it is not yet clear whether there is a particular suspect or whether the facts found in the autopsy will ultimately prove relevant in a criminal trial").

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This Court finds that as Dr. Simms testified as to his own opinion based on the autopsy report and the autopsy photographs, his testimony did not run afoul of the Confrontation Clause. See Williams, 132 S.Ct. at 2228. ("Under settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true.") Thus, any objection by trial counsel would have been futile, and counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Flowers has not established deficiency, therefore this claim is denied.

This Court finds that trial counsel was not ineffective for failing to object to Ms. Paulette's testimony as it related to the findings contained in Mr. Wahl's DNA report regarding Marilee Coote's case, as there was no Confrontation Clause violation. 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 Las Vegas Metropolitan Police Department (LVMPD) forensics laboratory, the same laboratory Wahl worked at when he authored the DNA report, and was subject to cross-examination.

This Court has reviewed the other claims asserted by Flowers in his Petitions and finds them to be without merit.

This Court finds that as the record clearly belies Flowers' claims, an evidentiary hearing is not required.

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 20th day of May, 2015.

DISTRICT JUDGE

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

BY
CHRISTOPHER BURTON
Deputy District Attorney
Nevada Bar #012940

CERTIFICATE OF SERVICE

I certify that on the 20th day of May, 2015, I e-mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

LUCAS GAFFNEY, Esq.,
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BY
R. JOHNSON
Secretary for the District Attorney's Office

GC/CB/rj/M-1

NOT
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DISTRICT COURT

CLARK COUNTY, NEVADA

NORMAN FLOWERS, Appellant, v. THE STATE OF NEVADA, Respondent.	CASE NO. 06C228755 DEPT. NO. XI **NOTICE OF APPEAL**

NOTICE is hereby given that NORMAN FLOWERS, above-named appellant, hereby appeals to the Nevada Supreme Court from District Court's decision rendered in this action, the 28th day of May, 2015.

DATED this 3rd day of June, 2015.

ORONOZ & ERICSSON LLC

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DISTRICT COURT

CLARK COUNTY, NEVADA

NORMAN FLOWERS, Appellant, v. THE STATE OF NEVADA, Respondent.	CASE NO. 06C228755 DEPT. NO. XI

CERTIFICATE OF SERVICE

The undersigned herby certifies that electronic service was completed via the Wiznet Filing System and emailed to the following recipient(s) on this 3rd day of June, 2015.

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LISA LUZAICH
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/s/ Rachael Stewart
An Employee of Oronoz & Ericsson LLC