IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 68140

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Tracie K. Lindeman
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NORMAN KEITH FLOWERS

Appellant,

v.

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

APPELLANT'S OPENING BRIEF

James A. Oronoz, Esq.
Nevada Bar No. 6769
Oronoz & Ericsson, LLC
700 South Third Street
Las Vegas, Nevada 89101
Telephone: (702) 878-2889
Facsimile: (702) 522-1542
jim@oronozlawyers.com
Attorney for Norman Flowers

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I.
JURISDICTIONAL STATEMENT

The District Court appointed James A. Oronoz, Esq. to represent Flowers in his post-conviction proceedings. On October 9, 2012, Flowers filed his Petition for Writ of Habeas Corpus (Post-Conviction). On October 30, 2012, the State filed its Response and Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus. On November 14, 2012, Flowers filed Defendant's Opposition to State's Response and Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus (Post-Conviction). On January 17, 2013, the District Court determined that Flowers demonstrated good cause and prejudice to overcome the procedural time bar for filing his Petition eleven (11) days after the one-year deadline. The District Court then set a briefing schedule to supplement Flowers' Petition. On July 7, 2014, Flowers filed his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). On August 25, 2014, the State filed State's Response and Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus. On November 10, 2014, Flowers filed his Reply to State's Response and Motion to Dismiss Defendant's Supplemental Petition for Writ of Habeas Corpus. On April 29, 2015, the parties argued the Petition and Supplemental Petition, and the District Court denied Flowers' Petition. On May 28, 2015, the District Court issued its Findings of Fact, Conclusions of Law and Order. On

June 3, 2015, Flowers filed his timely Notice of Appeal in this matter. This Court has jurisdiction over this appeal pursuant to NRS 34.575.

II.
STATEMENT OF THE CASE

This is an appeal of the district court's denial of Flowers' Petition for Writ of Habeas Corpus (Post-Conviction).

III.
ROUTING STATEMENT

Pursuant to NRAP 17, this case will be presumptively assigned to the Court of Appeals.

IV.
STATEMENT OF THE ISSUES

The issue is whether the District Court erred in denying Flowers' Petition for Writ of Habeas Corpus (Post-Conviction), or in the alternative, in denying Flowers an evidentiary hearing to determine the merits of his claims.

V.
PROCEDURAL HISTORY

A. PRE-TRIAL

On December 13, 2006, the State charged 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. AA0084. The charges listed the victim as Sheila Quarles. AA0084. On January 11, 2007, the State filed a notice of its intent to seek the death penalty. AA0115.

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. AA0091. In that case, the State named Marilee Coote and Rena Gonzales as the victims. Id. The State filed a similar motion in case no. C216032. On January 2, 2007, the Defense filed an Opposition to the Motion in the instant case. AA0104. At a hearing on April 13, 2007, the State informed the District Court that Judge Bonaventure had denied the motion to consolidate in C216032. AA0149. 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. AA0149-AA0152.

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. AA0120. The State filed an opposition to the Motion on February 2, 2007. AA0132. 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 Flowers' potential bad acts arising from case C216032. AA0153. The Defense filed an

Opposition to that Motion on November 6, 2007. AA0165. 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. AA0170. The Petrocelli hearing occurred on August 1, 2008. AA0185. Therein, the District Court ruled that evidence pertaining to 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. AA0236.

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. AA0236.

On September 29, 2008, the Defense filed a Motion to Reconsider the District Court's ruling on its Motion in Limine. AA0243. 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. AA0787. 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. AA0174. 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. AA0174.

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 Flowers guilty of first-degree murder, guilty of sexual assault, and guilty of burglary, and not guilty of robbery. AA0809, AA0972. 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. AA0970.

On October 30, 2008, following the entry of verdict, the Defense filed a Motion for a New Trial. AA0975 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 Flowers' statements to police. AA0975 The State filed an Opposition on November 10, 2008. AA1023. The District Court denied the motion on November 18, 2008. AA1035.

Flowers was sentenced on January 13, 2009. AA1037. The Court sentenced 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. AA1037. The judgment of conviction was filed on January 16, 2009. AA1044. An amended judgment of conviction was filed on February 12, 2009. AA1050.

C. DIRECT APPEAL

Flowers filed a Notice of Appeal on January 26, 2009. AA1046. Flowers filed an Amended Notice of Appeal on February 20, 2009. AA1052. On December 21, 2009, Flowers' appellate counsel filed an opening brief (AA1054) 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 <u>Crawford v. Washington</u> and <u>Commonwealth v. Melendez-Diaz</u>;

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. AA1105. The Defense filed a reply brief on May 3, 2010. AA1170. Oral argument was held before 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. AA1191.

D. POST-CONVICTION LITIGATION

The District Court appointed James A. Oronoz, Esq., to represent Flowers on June 8, 2012, in connection with this post-conviction proceeding. On September 17, 2012, the District Court entered an Order finding good cause to extend the date for filing Flowers' Petition for Writ of Habeas Corpus (Post-Conviction) by thirty (30) days. AA1204. Flowers filed his Petition on October 9, 2012.[1] AA1205.

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[1] Although the State has challenged the timeliness of Flowers' Petition, the District Court found good cause to extend the time within which Flowers was to

On July 7, 2014, Flowers filed his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). AA1293. On August 25, 2014, the State filed the State's Response and Motion to Dismiss Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). AA1328. On November 10, 2014, Flowers filed his Reply to State's Response and Motion to Dismiss Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). AA1349. On April 29, 2015, the parties argued the Petition, and the District Court denied the Petition without an evidentiary hearing. AA1369. On May 28, 2015, the Court filed its Findings of Fact, Conclusions of Law and Order. AA1380. On June 3, 2015, Flowers filed his Notice of Appeal. AA1389.

VI.
STATEMENT OF THE 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. AA0020-AA0029. She also discovered that her stereo was missing from the living room. Id.

Sheila Quarles' autopsy revealed evidence of homicide and of sexual assault. AA0038-AA0039. Doctors took DNA from inside of her vagina for

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file the Petition. Despite the State's repeated challenges, the District Court entered an Order on February 26, 2013, explicitly stating that the District Court found good cause to overcome the time bar against filing an untimely Petition and consider the merits of Flowers' claims. AA1270.

analysis. Id. Testing of the DNA revealed two separate contributors of semen. Norman Keith Flowers was determined to be a likely contributor. AA0635. 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. AA0013-AA0014. Evidence also showed that Sheila Quarles had a boyfriend, William Kinsey. AA0711-AA0712. George Brass, Jr., a neighbor, also claimed to have maintained a continuing sexual relationship with Sheila Quarles, AA0560, but Sheila Quarles' mother, Debra, could not corroborate this fact. AA0420.

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. AA0423. 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." AA0449-AA0450. 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. AA0415. 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. AA0452.

In the afternoon, Debra Quarles returned to the apartment complex. AA0416-AA0417. Debra Quarles estimated the time as being around "three something." Id. Robert Lewis, a neighbor[2] 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. AA0417. During this time, Robert Lewis had been waiting in the living room, but came to help

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

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. AA417. Robert Lewis also left the apartment, told neighbors that Sheila Quarles needed help, and someone called 911. AA0397.

When Debra returned, police and paramedics had already arrived at the apartment and were beginning their investigation. AA0417. 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. AA0393. He found Sheila's body lying on the floor and secured the scene. AA0394. 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. AA0418. She also supplied the name of Qunise Toney as the only person she could imagine who could have been involved in Sheila's death. AA0418.

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. AA0450. George Brass, Jr., who also had been told of Sheila's death, arrived at the apartment and spoke briefly with an officer. AA0562. 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.; AA0440.

Homicide Detective James Vaccaro responded to the scene as the homicide supervisor. AA0429. He concluded that there was no sign of forced entry into the apartment. AA0430. He discovered Sheila's clothing underneath where her body had been lying in the bathroom. AA0434. 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. AA0635. 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." AA0443.

Crime scene analysts collected twenty-one (21) samples for fingerprint analysis and found fingerprints on nine (9) of those samples. AA0459. They did not attempt to take any prints off of Sheila's body. AA0435-AA0436. Not a single fingerprint from Norman Flowers was found in the apartment. AA0460.

Police never recovered the items that were missing from the apartment, including the stereo or Sheila's bankcard. AA0558; AA0595. While Sheila's cellular phone was not recovered, officers were able to obtain phone records for her phone number. AA0557. 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. AA0427. 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. AA0560. 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. AA0560. 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. AA0564. 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. AA0561-AA0562.

Further, Debra told Detectives about an older man who had recently moved into the apartment complex. AA0420. 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. AA0420-AA0421. 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." AA0596.

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. AA0546. The Defense was able to uncover evidence that Robert Lewis frequently sold items at pawnshops, including women's jewelry. AA0627. 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 AA0427. 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." AA0427.

Natalie Sena was also a resident of the apartment complex where the Quarles lived in March of 2005. AA0649. She told police that, on the day Sheila died, she had seen a tall, skinny man in a flannel shirt near the Quarles' apartment. AA0650. She also thought she remembered seeing George Brass, Jr., known to her as "Chicken," before and after 12:00 p.m. AA0650. 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. AA0651. 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." AA0651.

Veronica Sigala, the assistant manager at the apartment complex, also testified about her interactions with Navarro. AA0656-AA0657. 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. AA0658-AA0659.

Detective George Sherwood was one of the police investigators assigned to work on the case under Detective Vaccaro. AA0588. 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. AA0596. 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. AA0596. 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. AA0596. That case also involved a sexual assault and murder.[3] 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. AA0543. 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. AA0549-AA0550. Long explained how he had found through one source that Sheila "had been talking to a man by the name of Chicken." AA0550. Long determined that a man nicknamed "Chicken" resided in the same apartment complex as Sheila, and that his real name was George Brass, Jr. AA0550.

[3] 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, January 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.

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. AA0563.

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.”

AA0550.

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. AA0560. 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.” AA0561. The levels of DNA evidence in Sheila’s vagina and underwear were “pretty much even” as to both Flowers and Brass. AA0640. 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. AA0599-AA0600. 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." AA0600. 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. AA0740. 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. AA0378 et seq. He testified that Sheila had been asphyxiated, caused by strangulation to her neck. AA0379-AA0380. He concluded that the absence of ligature marks indicated likely manual strangulation. AA0380. He also noted that the autopsy results showed bruising on Sheila's abdomen, an abrasion on her knee, and lacerations in the vaginal area. AA0379. 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. AA0379. He also stated his belief that the lacerations had occurred prior to her death, within an hour of death. AA0379. 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. AA0391. 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. AA0391.

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 (AA0380), as well as frothy fluid in her airway, which he stated could be a sign of drowning. AA0381. Dr. Simms recited Dr. Knoblock's conclusion that Sheila's cause of death had been drowning, with strangulation as a contributing factor. AA0383. 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. AA0382-AA0383. Over defense objection, the district court admitted the photographs as exhibits 93 – 108. AA0382.

Kristina Paulette testified at trial as to her own DNA analysis and as to analysis performed by another DNA expert, Thomas Wahl, who performed the DNA testing and analyses in the Coote case. AA0631, AA0635. As described above, trial counsel failed to object to Ms. Paulette's testimonial statements regarding the work of Mr. Wahl, who was not present to testify to his own findings, despite the fact that his findings were admitted at trial. Although trial counsel objected to Ms. Paulette's testimony regarding Mr. Wahl's report on hearsay grounds, trial counsel never raised an objection that the State's failure to call Mr. Wahl at trial violated Flowers' right to confront Mr. Wahl about his DNA report and analysis. AA0635.

Ms. Paulette described to the jury that DNA samples taken from Sheila's vagina revealed the presence of DNA from two separate males. AA0632-AA0634. Paulette explained how her first tests had first revealed 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. AA0633, AA0635.

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."
>
> AA0444.

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.
>
> AA0722.
>
> 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.
>
> AA0739.

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 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. AA0970.

Flowers was sentenced on January 13, 2009. The court sentenced 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. AA1037.

VI.
ARGUMENT

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, 1136-1138, 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.

A. The District Court Erred by not finding that Trial Counsel was Ineffective for Failing to Object to the Improper Testimony of two State's Witnesses Testifying as to the Results of Work Performed by Other Experts, in Violation of Crawford v. Washington.

The District Court erred by not finding that trial counsel was ineffective for failing to make a record and object to the improper testimony of two of the State's witnesses. At trial, two of the State's witnesses testified regarding testimonial reports that should have been admitted and presented through the original witnesses. However, because those witnesses were unavailable and Flowers had no prior opportunity to cross-examine those witnesses, the evidence should not have been presented at trial. Because trial counsel failed to object to the admission of the evidence through surrogate witnesses, trial counsel's performance fell below an objective standard of reasonableness for failing to protect Flowers' basic right to confront the witnesses against him. In light of that failure, Flowers sustained the prejudice of testimonial evidence being presented at trial through improper witnesses.

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, 124 S.Ct. 1354, 158 L.Ed.2d 177 (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, 129 S.Ct. 2527, 174 L.Ed.2d 314 (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, 180 L.Ed.2d 610 (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).

That is to say, it would be an unusual situation in which a witness's testimony is not impacted to some degree by subjectivity, bias, and in the case of an expert witness, unreliability as to the methodology utilized in rendering an opinion. 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. The Court also explained that simply because a report falls within the business records exception to the hearsay rule does not preclude the report from being testimonial. See, Melendez-Diaz, 557 U.S., at 322-324. Again, this supports the Nevada Court's determination that "a statement is testimonial if it 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). 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, the District Court should have concluded that Dr. Knoblock's autopsy report constituted testimonial evidence, and as such, Dr. Simms should not have been able to testify regarding the contents of Dr. Knoblock's report. More specifically, 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, like an autopsy 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 experienced medical examiner, such as Dr. Knoblock, would reasonably believe that an autopsy report indicating *homicide* as a method of death and conducted *in conjunction with a homicide investigation* would be subject to later use in a criminal trial. Therefore, Dr. Knoblock's autopsy report on Ms. Quarles constituted a testimonial report because it was undoubtedly made in conjunction with a homicide investigation.

Additionally, under Vega, a defendant has the right under the Confrontation Clause to confront an expert witness's "honesty, proficiency, and methodology" as a means to challenging the witness's capabilities and deficiencies when conducting examinations. 236 P.3d at 637. *See also*, Melendez-Diaz, 557 U.S. at 317-320. In Vega, the Court held that the medical professional conducted the examination in conjunction with a police investigation, and as such, the report of that examination was testimonial in providing evidence that a sexual assault occurred. Id. at 637-638. In light of the fact that the report was crucial to the State's case against Vega, the Court determined that admitting the testimonial report violated Vega's Confrontation Clause rights.

Here, 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 Flowers had a prior opportunity to cross-examine Dr. Knoblock as a witness. Trial counsel was ineffective for failing to raise this issue and protect Flowers against the improper testimony offered by Dr. Simms, which ultimately led to the improper admission of Dr. Knoblock's autopsy report. Further, the District Court erred by failing to find trial counsel ineffective for failing to object to the improper testimony regarding the testimonial autopsy report.

To put the situation into perspective, 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. Despite the State's attempts to characterize Dr. Simms' testimony as an independent "opinion," the State did not offer Dr. Simms' testimony as an expert opinion regarding the methodology and reliability of Dr. Knoblock's findings. The State repeatedly asked Dr. Simms questions about the autopsy that did not comply with the standards to present an independent expert opinion. See Vega, 236 P.3d 632 (2010).

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, Flowers did not have any prior opportunity to cross-examine Dr. Knoblock as a witness because there was no preliminary hearing or other prior opportunity. 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 Flowers' Sixth Amendment right to confront Dr. Knoblock as a witness against him. Despite these facts, Flowers' trial counsel did not object to the admission of Dr. Simms' testimony of presenting the findings contained in Dr. Knoblock's report. As a result, the District Court erred by failing to find trial counsel ineffective for not protecting Flowers' right to confront Dr. Knoblock as a witness against him.

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 <u>Melendez-Diaz</u> and <u>Crawford</u>. 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 <u>Melendez-Diaz</u> 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. Therefore, the District Court erred by refusing to find trial counsel's performance deficient.

ii. Prejudice

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 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 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 Flowers' constitutional right to confront Dr. Knoblock as a witness against him, Flowers was forced to appeal the issue on the grounds of plain error. 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 Flowers of his Constitutional right to effective assistance of counsel. Therefore, the District Court erred in failing to find that Flowers suffered prejudice when trial counsel neither protected Flowers' right to confront the witness nor preserved the issue for appeal.

b. Failure to object to DNA evidence

The District Court erred by failing to find that Mr. Wahl's DNA report pertaining to the Coote case constituted testimonial evidence and that trial counsel was ineffective for failing to object to the admission of the DNA report through Ms. Paulette's testimony. First, the DNA report, prepared by Mr. Wahl, "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. <u>Melendez-Diaz</u>, 557 U.S. at 311 (Citing <u>Crawford</u>, 541 U.S. at 52).

In <u>Bullcoming</u>, 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. <u>Bullcoming</u>, 131 S.Ct. at 2715. In this case, the prosecutor properly 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 Flowers was not on trial. Accordingly, the State improperly offered Ms. Paulette's testimony regarding the Coote case. 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. Therefore, Ms. Paulette had no personal knowledge about Mr. Wahl's report, nor should have Ms. Paulette testified to the contents of the report.

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 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. As a result, the District Court erred by refusing to find that trial counsel was ineffective for not objecting and protecting Flowers' right to confront Mr. Wahl as a witness against him.

i. Deficient performance

Trial counsel failed to protect 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 squarely within the reach of the Confrontation Clause. As such, trial counsel failed to protect Flowers' Sixth Amendment right to confront Mr. Wahl as a witness because Mr. Wahl prepared the original DNA report.

In addition, 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, Flowers' trial counsel raised an objection that the United States Supreme Court has deemed inapplicable. The real violation at play constituted a blatant violation of 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. Therefore, the District Court erred by refusing to find trial counsel's performance deficient.

ii. Prejudice

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 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 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 Flowers suffered irreparable prejudice. Trial counsel's failure substantially affected Flower's constitutional rights under the Sixth Amendment. As such, 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 Flowers of a fundamental right to confront witnesses against him. Therefore, the District Court erred in failing to find that Flowers suffered prejudice when trial counsel neither protected Flowers' right to confront the witness nor preserved the issue for appeal.

B. The District Court Erred in Failing to Find that Trial counsel was ineffective for failing to object to the prosecution's improper vouching for the credibility of its own witness.

The District Court erred by refusing to find that trial counsel was ineffective for failing to object to the State's improper vouching of its own witness, George Brass. At trial, the State offered the testimony of police officers to support the credibility of George Brass, despite the fact that Brass' DNA was also found in Ms. Quarles body. Therefore, Flowers' trial counsel should have objected to the improper vouching and protected Flowers. However, trial counsel did not object, and the State was able to support Brass' credibility through eliciting testimony of police officers. Thus, the District Court erred by not finding that trial counsel was ineffective for failing to protect Flowers from the State's improper vouching.

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).[4] 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 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.2d 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

[4] 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."

v. State, 118 Nev. 31, 38, 39 P.3d 114, 118-119 (2002). (Citing, Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 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).[5]

In Lisle, the prosecutor inadvertently suggested that his essential witnesses were credible. Lisle, 113 Nev. at 553. Therefore, the prosecutor cannot suggest

[5] 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).

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 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."

AA0550.

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 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 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 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 Flowers. Accordingly, trial counsel was ineffective for failing to protect Flowers against the State's improper vouching. Therefore, the District Court erred by failing to find that trial counsel was ineffective.

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. Therefore, the District Court should have found that trial counsel was ineffective.

The serious nature of this error created a situation in which trial counsel failed to act as Flower's counsel. By allowing the State to vouch, 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 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. Under these premises, the District Court should have found that trial counsel was ineffective for failing to object to the State's vouching tactics.

b. Prejudice

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. Therefore, the District Court erred by refusing to find that trial counsel's deficiency prejudiced Flowers.

VII.
CONCLUSION

Appellant respectfully requests that this Court vacate his conviction and order a new trial. In the alternative, Appellant requests this Court to reverse the denial of his Petition for Writ of Habeas Corpus (Post-Conviction) and remand these proceedings to the District Court for an evidentiary hearing on the merits of Flowers' claims.

Respectfully submitted this 5th day of October, 2015.

By: /s/ James A. Oronoz

JAMES A. ORONOZ, ESQ.
Nevada Bar No. 6769
700 South Third Street
Las Vegas, Nevada 89101
Telephone: (702) 878-2889
Attorney for Norman Flowers

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word, a word-processing program, in 14 point Times New Roman.

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I further certify that this brief complies with the type volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more and contains 11,863 words. I understand that I may be subject to sanctions in the event that the accompanying brief in not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of October, 2015.

Respectfully submitted,

By: /s/ James A. Oronoz

JAMES A. ORONOZ, ESQ.
Nevada Bar No. 6769
700 South Third Street
Las Vegas, Nevada 89101
Telephone: (702) 878-2889
Attorney for Norman Flowers

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:

CATHERINE CORTEZ MASTO
Nevada Attorney General

STEVEN S. OWENS
Chief Deputy District Attorney

BY /s/ Rachael Stewart
Employee of Oronoz & Ericsson, LLC