IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN KEITH FLOWERS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 68140

RESPONDENT'S ANSWERING BRIEF

Appeal From a Denial of Post-Conviction Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(1) because it is a post-conviction appeal and does not involve the death penalty.

STATEMENT OF THE ISSUES

I. The District Court Did Not Err In Denying Flowers' Petition As It Was Procedurally Barred Pursuant To NRS 34.726 Without Good Cause.
II. The District Court Did Not Err In Denying Flowers' Petition On The Merits.

STATEMENT OF THE CASE

A. Flowers is Charged and Found Guilty by Jury

On December 13, 2006, Norman Keith Flowers, aka Norman Harold Flowers III, (hereinafter "Flowers"), was charged via a Grand Jury Indictment with the

following: Count 1 – Burglary (Felony – NRS 205.060); Count 2 – Murder (Felony– NRS 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 (hereinafter "Sheila"). 1 Appellant's Appendix, "AA", 84-86. On January 11, 2007, the State filed a Notice of Intent to Seek the Death Penalty in this matter. Id. at 115-18.

On January 23, 2007, Flowers filed a Motion in Limine to Preclude Evidence of Other Bad Acts. Id. at 120-30. On November 15, 2007, the district court ordered a Petrocelli[1] hearing on the bad acts the State wanted to introduce at trial. Id. at 171-73. At the Petrocelli hearing on August 1, 2008, the State sought to introduce evidence from Case C216032, where Flowers was charged with the murders of Marilee Coote ("Coote") and Rena Gonzalez ("Gonzalez"). Id. at 185. The district court found the murder and sexual assault of Coote was sufficiently similar in nexus and time to Sheila's murder and that there was clear and convincing evidence that Flowers sexually assaulted and murdered Coote. Id. Therefore, the district court held that evidence regarding the similarities between the Coote and Sheila murders was to be allowed at trial. Id. However, the district court denied admission of evidence of the Gonzales murder. Id.

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

An Amended Indictment was filed on October 15, 2008, and Flowers' jury trial began that same day. 2 AA 253, 259. On October 22, 2008, pursuant to a jury verdict, Flowers was found guilty of Counts 1, 2 and 3 in the Amended Indictment. 4 AA 799, 809-10. Flowers was found not guilty of Count 4. Id. On October 24, 2008, following a penalty hearing, the jury imposed a sentence of Life in Nevada State Prison Without the Possibility of Parole for Count 2. 5 AA 972.

B. Flowers is Sentenced

On January 13, 2009, Flowers was sentenced as follows: Count 1 – a maximum of 120 months in the Nevada Department of Corrections (NDC) with a minimum parole eligibility of 48 months; Count 2 – the jury imposed a sentence of Life without the possibility of parole, to run consecutive to Count 1; Count 3 – to Life with the possibility of parole after 120 months, to run consecutive to Count 2. Id. at 1043. 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 120 months. Id. at 1044-45. On January 29, 2009, Flowers appeared in court pursuant to the State's request for clarification of the sentence. Id. at 1048. An Amended Judgment of Conviction was filed February 12, 2012 to reflect the true sentence for Count 3 of Life *with* the possibility of parole with a minimum parole eligibility of 120 months. Id. at 1050-51.

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C. Flowers Begins the Direct Appeal Process

On January 26, 2009, Flowers filed a Notice of Appeal from his Judgment of Conviction. Id. at 1046. On February 20, 2009, Flowers filed an Amended Notice of Appeal. Id. at 1052.

On March 5, 2010, Flowers filed a Motion for New Trial Based upon Newly Available Evidence, which the district court denied. 6 AA 1151, 1168. On April 1, 2010, Flowers filed a Notice of Appeal from the district court's denial of his Motion. Id. at 1166.

D. Flowers Voluntarily Withdraws His Direct Appeals Pursuant to Negotiations in Case C216032

On June 10, 2011, pursuant to negotiations, Flowers entered an Alford plea to an Amended Indictment in Case C216032, which charged Flowers with two counts of First-Degree Murder for the deaths of Coote and Gonzales. Id. at 1195, 1202. Pursuant to negotiations, Flowers agreed to withdraw his appeals in the instant case which were pending before this 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). Id. at 1191-93. On June 13, 2011, Flowers filed a Motion to Voluntarily Dismiss his Appeals in this case. Id.

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

On September 28, 2011, this Court issued an Order Dismissing Flowers' Appeals in Docket #53159 and #55759. 6 AA 1239. 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." Id.

F. Flowers Begins the Post-Conviction Process

On June 8, 2012, the district court appointed James A. Oronoz as post-conviction counsel. Respondent's Appendix, "RA," 51-52. At a status check on July 13, 2012, post-conviction counsel advised the district court he still had not obtained Flowers' file. RA 47-48. 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 district court to file the motion electronically. RA 48-49.

On August 27, 2012, defense counsel advised the district court that he was still not in possession of Flowers' file. RA 42. Counsel presented the district court with an Order, which was signed in open court, ordering the District Attorney's Office to provide Flowers with a copy of discovery. RA 42-44.

i. Prior to the Running of the Statutory Time Period, the District Court Grants Oral Motion to Extend the Timeline for the filing of Flowers' Post-Conviction Petition for Writ of Habeas Corpus

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. RA 53-60. That day, defense 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." RA 56-57. Defense counsel then made an oral motion to extend the timeline for the filing of Flowers' post-conviction petition, which was granted. RA 59-60. The district court also vacated its earlier discovery order due to the State's request to brief the issue. Id. On September 17, 2012, the district court filed its order extending Flowers' Petition for Writ of Habeas Corpus for 30 days. 6 AA 1204.

ii. On October 9, 2012, Post-Conviction Counsel Files an Untimely Original Petition

On October 9, 2012, Flowers, with the aid of counsel, filed a Post-Conviction Petition for Writ of Habeas Corpus. Id. at 1205-20. On October 30, 2012, the State moved to dismiss Flowers' Petition arguing it was untimely, and that Flowers had not demonstrated good cause or prejudice to overcome the one-year time bar. Id. at 1221, 1225. On October 31, 2012, Flowers filed a Motion to Place on Calendar to

Supplement his Petition for Writ of Habeas Corpus, which the State opposed. RA 11-14; 25-30. On November 23, 2012, Flowers filed a Reply to the State's Opposition to his Motion to Place on Calendar to Supplement his Petition for Writ of Habeas Corpus. RA 31-39.

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

On September 12, 2012, prior to the filing of his petition, Flowers filed a Motion to Obtain a Complete Copy of Discovery from the State. RA 1-5. On December 14, 2012, the State filed its Opposition. RA 17-24. 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. RA 21-23. The State further argued that Flowers' Petition should not be granted because it was untimely. Id. The State urged the court to resolve the pending motion to dismiss Flowers' post-conviction petition before potentially ordering the State to provide post-conviction discovery. Id.

On January 16, 2013, the district court heard arguments on Flowers' Discovery Motion and issued a minute order the next day. 6 AA 1291-92. Before the district court could entertain the Discovery Motion, it had to determine whether Flowers' Petition was timely filed. The court found: 1) NRS 34.726 does not address instances where a pending appeal is dismissed and no remittitur is issued; 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 [Flowers'] file for reasons outside of his control"; 3) the district 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. Id.

iv. Flowers files a Supplemental Petition for Writ of Habeas Corpus Due to his Extension and the District Court Denies his Petition on the Merits and Flowers files the Instant Opening Brief.

On March 5, 2013, the State filed a Renewed Response and Motion to Dismiss Flower's Post-Conviction Petition for Writ of Habeas Corpus. Id. at 1273. Flowers filed a Supplemental Post-Conviction Petition for Writ of Habeas Corpus on July 7, 2014.[2] 7 AA 1293. On August 25, 2014, the State filed its Response moving to dismiss Flowers' Supplemental Petition arguing first that it was untimely, and that Flowers was not denied effective assistance of counsel. Id. at 1328, 1338. On November 10, 2014, Flowers filed a Reply to the State's Response and Motion to Dismiss his Supplemental Petition. Id. at 1349. On April 29, 2015, the parties argued the Petition, and the district court denied Flowers' Petition on the merits without an evidentiary hearing. Id. at 1379. The district court issued its Findings of Fact,

[2] This appeal seems to be a replica of the claims and law that were raised in Flower's Supplemental Petition that he filed in district court on July 7, 2014 and was denied on April 29, 2015.

Conclusions of Law, and Order on May 28, 2015. Id. at 1380-88. Flowers filed a Notice of Appeal on June 3, 2015, appealing the denial of his Post-Conviction Petition. Id. at 1389. Flowers, through counsel, filed this Opening Brief, "OB," on October 5, 2015. The State responds as follows.

STATEMENT OF THE FACTS

A. Background Facts

On the afternoon of March 24, 2005, Debra Quarles ("Debra") returned to her apartment located at 1001 North Pecos Road. 3 AA 413. Debra shared the apartment with her daughter, Sheila. Id. 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 416. One 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 416-17. Robert followed Debra into the apartment with some grocery bags and waited in the living room as Debra searched for Sheila. Id. Debra walked into the apartment and noticed that her new stereo was missing. Id. at 416. Debra called out for her daughter but received no response. Id. She noticed that her bed was "messed up" and heard water dripping in the bathroom. Id. Eventually, Debra made her way into the bathroom to turn the water off. Id. Inside the bathroom, Debra noticed that the shower curtains were pulled shut. Id. at 417. Debra pulled the curtain back to find her daughter

Sheila submerged in the bathtub with part of her face sticking out of the water. Id. Debra noticed that the water in the bathtub was still very hot. Id. Debra became hysterical. Id. at 425. Robert lifted Sheila out of the bathtub. Id. at 417. A friend or family member covered up Sheila's naked torso area before the police arrived at the scene. Id. at 433, 2 AA 397. Robert went next door to his mother's apartment, and told his family members that Sheila needed help. 2 AA 397. Someone from that apartment called 9-1-1. Id. at 398. Hysterical, Debra left the scene to get her son Ralph, who lived close to the apartment. 3 AA 417. Robert's niece and others went to Sheila's apartment and stayed there on the phone with the 9-1-1 operator until police arrived. 2 AA 397-98. Paramedics arrived at the apartment but it was too late for them to render any aid or to revive Sheila. Id. at 394.

B. Dr. Simms' Testimony

Dr. Larry Simms, ("Dr. Simms"), a forensic pathologist with the Clark County Coroner's Office testified regarding Sheila's injuries, which he determined based on a review of Sheila's autopsy report as well as photographs taken at Sheila's autopsy. 2 AA 378-93. 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 Flowers' trial. Id. at 379. Dr. Simms testified that Sheila suffered internal injuries. Id. at 379-81. Sheila had two hemorrhages on her right scalp, which indicated she suffered a blunt force injury to her head. Id. at 380-81. 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 379-80. The injuries to Sheila's neck were consistent with someone applying pressure with his hands with the intent to cause injury. Id. at 381. 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 380. Based on his review of the autopsy photographs, Dr. Simms opined that Sheila's injuries were contemporaneous with her death. Id. at 380-81.

Moreover, Dr. Simms testified that Sheila had a "frothy fluid" in her airways, which is a sign of drowning. Id. at 381. 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 383. Based on his review of Dr. Knoblock's report and the autopsy photographs, Dr. Simms testified that he agreed with Dr. Knoblock's opinion. Id.

Dr. Simms also testified regarding the autopsy photographs and his interpretation of the injuries displayed therein. Id. at 382-84. When the State sought to admit the photographs into evidence, Flowers' trial counsel objected noting that the cause of death was not being contested. Id. at 382. The district 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.

Dr. Simms also testified about Coote's autopsy, the victim in Case C216032. Id. at 384. Coote suffered several injuries to her neck, similar to Sheila, which indicated that she was manually strangled. Id. The neck injuries were consistent with someone applying pressure to inflict injury. Id. at 386. Also similar to Sheila, Coote suffered injuries to her head from blunt force trauma contemporaneous with the time of her death. Id. at 385. Also like Sheila, Coote had injuries to her vaginal area indicating she was sexually assaulted. Id.

C. Ms. Paulette's Testimony

The State called Kristina Paulette ("Ms. Paulette"), a forensic scientist/DNA analyst, with the Las Vegas Metropolitan Police Department ("LVMPD"). 4 AA 631. Ms. Paulette testified that she was personally involved in the investigation into Sheila's homicide as well as that of Coote's. Id. at 632.

At Sheila's autopsy, Ms. Paulette collected DNA samples from semen found in Sheila's vaginal area and on her underwear. Id. From this sample, Ms. Paulette was able to generate a DNA profile. Id. Initial testing revealed a mixture of at least three individuals including that of the victim and two unknown males. Id. at 632-33. Ms. Paulette entered the unknown DNA profiles into the DNA database, CODIS. Id. at 633-34. As a result, the database revealed Flowers as a potential

match. Id. Flowers' DNA profile was subsequently collected. Id. at 633. Ms. Paulette determined that Flowers' DNA matched one of the samples she retrieved at Sheila's autopsy. Id. at 634. More specifically, Ms. Paulette testified that the DNA did not exclude Flowers as a match but did exclude 99.99 percent of the remaining population. Id. at 634-35.

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.[3] Id. at 635.

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. Defense counsel objected on the basis of hearsay and conducted a brief voir dire of Ms. Paulette. Id. at 635-36. Ms. Paulette testified that the report generated by Mr. Wahl, in conjunction with Coote's autopsy, was a business record and that she was qualified to testify as a custodian of records. Id.

As to Coote, Ms. Paulette testified that Flowers was the source of the semen taken from Coote's vaginal swab. Id. at 636. In Coote's case, the DNA profile was rarer than one in 650 billion. Id. The same result issued regarding a rectal swab taken at Coote's autopsy. Id. Mr. Wahl's report also indicated that Flowers' DNA

[3] George 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. 3 AA 559-60.

matched DNA retrieved from a section of carpet taken from underneath Coote's deceased body. Id. at 636-37, 3 AA 543-45, 549. Ms. Paulette testified to her own findings regarding the carpet sample. 4 AA 637. Specifically, when Ms. Paulette was testing for the presence of semen on the carpet sample, her testing revealed the presence of detergent. Id. However, despite the presence of detergent, Ms. Paulette determined that Flowers' DNA was present, within a statistical probability of one in 650 billion. Id.

SUMMARY OF THE ARGUMENT

The district court properly denied Flowers' Post-Conviction Petition as it was procedurally barred without good cause. Because no Remittitur issued, the time limit to file a Post-Conviction Petition began to run from the date of entry of this Court's order granting the Motion for Voluntary Dismissal of Flowers' Appeals, and neither the district court nor the parties were empowered to extend the one-year time frame. Also, Flowers failed to demonstrate good cause to overcome the time bar. By definition, Flowers' difficulties to obtain the file for his counsel cannot constitute an impediment external to the defense. Furthermore, even if this Court finds good cause did exist to delay Flowers' Petition and addresses the claims on the merits, Flowers failed to make an adequate showing of actual prejudice as to his three ineffective assistance of counsel claims.

First, Dr. Simms' testimony regarding Sheila's autopsy report written by Dr. Thomas Knoblock was not testimonial in nature and therefore, Dr. Simms' testimony as to anything therein did not violate Flowers' confrontation rights. Autopsy reports are the product of an official duty imposed by law, rather than a product of criminal investigation for use at trial. They 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. Also, the issue of whether an autopsy report is testimonial or not has not been conclusively decided by the United States Supreme Court or by this Court, so Flowers cannot argue that the report has been determined to be testimonial. Furthermore, Dr. Simms' testimony constituted expert testimony because he is experienced and qualified to make such opinions, and his testimony was based on his independent review of the autopsy reports and photographs. Additionally, Dr. Simms worked in the same office in the same position as Dr. Knoblock, and therefore could testify to the office procedures and was subject to such cross-examination, thus his testimony did not run afoul of the Confrontation Clause.

Second, Ms. Paulette's testimony regarding Mr. Thomas Wahl's DNA Report from the Marilee Coote case was not testimonial, and therefore, her testimony as to anything therein did not violate Flowers' confrontation rights. Ms. Paulette testified about a DNA report on DNA found in the Coote case that was authored by Mr. Wahl,

a DNA analyst who formerly worked in the LVMPD forensic lab. This report, however, was not admitted into evidence as a sworn affidavit in lieu of live testimony. Ms. Paulette also did her own re-testing of the DNA evidence from the Coote case as well as the instant case. She reviewed the DNA report, testified that she agreed to its findings and described procedures, and was available and subject to cross-examination. Thus, her testimony did not run afoul of the Confrontation Clause.

Lastly, the State did not vouch for its witness, Mr. George Brass. Flowers does not specify how the testimony elicited from Detective Vaccaro was improper vouching, nor is this claim evident from a review of the record. Also, Detective Long's testimony is in no way a personal assurance by the prosecution of Mr. Brass' credibility. Further, Flowers contends that the State vouched for Mr. Brass during closing argument by indicating that he had "nothing to hide." However, the State's comment was proper because it was commenting on the evidence presented.

For each of his three claims of ineffective assistance of counsel, Flowers fails to show how his counsel's performance fell below an objective standard of reasonableness, and that even if counsel was deficient in performance, he fails to show how the result of his trial would have been different if counsel had objected to this testimony. Because Flowers fails to show actual prejudice, this Court must affirm the denial of Flowers' Post-Conviction Petition for Writ of Habeas Corpus.

ARGUMENT

I.

THE DISTRICT COURT DID NOT ERR IN DENYING FLOWERS' PETITION AS IT WAS PROCEDURALLY BARRED PURSUANT TO NRS 34.726 WITHOUT GOOD CAUSE.

Flowers' Petition, which underlies this appeal, was procedurally barred because it was untimely under NRS 34.726. The Nevada Supreme Court has emphasized that application of the procedural default rules regarding post-conviction petitions is mandatory, and neither the district court nor the parties were empowered to extend the one-year time frame in the instant case. State v. District Court (Riker), 121 Nev. 225, 231-33 112 P.3d 1070, 1074-75 (2005); State v. Greene, 129 Nev. ___, ___, 307 P.3d 322, 326 (2013). Thus, to overcome the mandatory procedural bars, a petitioner must demonstrate both good cause and prejudice which Flowers failed to do. NRS 34.726(1).

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

NRS 34.726 provides that a post-conviction petition "must be filed within one year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within one year after this Court issues its remittitur." Where no appeal is filed, the default rule applies: a petition must be filed within one year after entry of the judgment of conviction. Where a direct appeal is filed but voluntarily dismissed, this Court does not issue a remittitur, but "the one-year time period for

filing a post-conviction petition under NRS 34.726 commences to run from date of entry of this [C]ourt's order granting the motion for voluntary dismissal." Gonzales v. State, 118 Nev. 590, 595, 53 P.3d 901 (2002); NRAP 42(b).

Here, Flowers' Judgment of Conviction was entered on January 16, 2009. 5 AA 1044-45. Flowers appealed. Id. at 1046, 1052. This Court dismissed the appeal pursuant to NRAP 42(b) on September 28, 2011, noting that, in accordance with Gonzales, because no remittitur would issue, the one-year period for filing a post-conviction habeas corpus petition would run from the date of the order, or September 28, 2011. 6 AA 1239. Consequently, Flowers had until September 28, 2012 to file his post-conviction habeas petition. However, Flowers filed his Petition on October 9, 2012. Id. at 1205-20.[4] Thus, Flowers' Petition was over the one-year time bar.

B. Flowers' Did Not Demonstrate Good Cause to Overcome the Procedural Bar.

The petitioner bears the burden to plead and prove facts that demonstrate good cause to excuse the procedural default to his petition. State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003). "In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from

[4] Flowers filed his Supplemental Petition on July 7, 2014, which was within the court's set briefing schedule, but his original Petition was still untimely. 7 AA 1293. A Supplemental Petition timely filed under a briefing schedule set by the court does not save an untimely original Petition. See State v. Powell, 122 Nev. 751, 757, 138 P.3d 453, 457 (2006).

complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994)). This language contemplates that the delay in filing a petition must be caused by a circumstance not within the actual control of the defense team. "An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.'" Id. (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)).

This Court has clarified that, "appellants cannot attempt to manufacture good cause[.]" Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 526 (2003). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Excuses such as the failure of trial counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. See Phelps v. Dir. Nev. Dep't of Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988), superseded by statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

Here, Flowers failed to establish good cause to overcome the NRS 34.726 time bar for several reasons. First, Flowers implied in his Petition that post-

conviction counsel's inability to secure the file from Flowers[5] was good cause for his failure to comply with the procedural rules. 6 AA 1216. By definition, Flowers' difficulties to obtain the file from himself cannot constitute an impediment external to the defense. Hathaway, 119 Nev. at 251, 71 P.3d at 506; Hood, 111 Nev. at 338, 890 P.2d at 798. Just as counsel's failure to send a prisoner his files does not constitute good cause excusing the prisoner from filing a timely petition, nor is counsel's inability to obtain the file from his client or the prison. Hood, 111 Nev. at 338, 890 P.2d at 798. Notably, Flowers' only substantive claims appear to be ineffective assistance of trial counsel for failure to provide him with a complete copy of his file, and ineffective assistance of appellate counsel for informing him of his low probability of success on direct appeal. 6 AA 1205-20. However, neither of these grounds would require a copy of the State's or defense's file. Further, given that Flowers was able to supplement his initial Petition and add further claims, there is no reason why Flowers could not file a timely initial petition and his arguments failed to explain how his counsel's inability to obtain the State's file prevented him from filing a timely petition. Also, Flowers seems to imply that the parties' stipulations regarding discovery and briefing should be considered good cause. Id. But, as discussed above, the district court is required by NRS 34.810(1)(b) to apply

[5] Post-Conviction counsel originally tried to contact the Special Public Defender's Office to get a copy of Flowers' file, but that office informed counsel that they mailed the original case file to Flowers in Ely State Prison. 6 AA 1251.

procedural bars and a stipulation by the parties cannot empower a court to disregard these statutory requirements. Haberstroh, 119 Nev. at 180, 69 P.3d at 681.

Also, the Amended Judgment of Conviction here is not good cause for the delay in filing. Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004). Because the claims presented have no relation to the proceeding leading to the amendment, the Amended Judgment is not good cause. Nor, as Sullivan requires, was the amendment substantive, but rather, was clerical to reflect what actually transpired at the sentencing hearing. See 5 AA 1050-51.

Moreover, in Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), this Court rejected a habeas petition that was filed only two days late, pursuant to the "clear and unambiguous" mandatory provisions of NRS 34.726(1). Gonzales reiterated the importance of filing a petition within the one-year mandate, absent a showing of "good cause" for the delay in filing. Id. Therefore, the one-year time bar is strictly construed. Here, the District Court found that Flowers' Petition was filed within a "reasonable" time of the deadline (eleven days late). 6 AA 1291-92. However, NRS 34.726 and Gonzalez do not allow the district court to make such a finding.

On January 17, 2013, the district court issued a minute order finding that: 1) NRS 34.726 does not address instances where a pending appeal is dismissed and no remittitur is issued from this 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 district 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. 6 AA 1291-92. On April 29, 2015, the parties argued both the Petition and Supplemental Petition, and the district court denied Flowers' Petition on the merits. 7 AA 1379. Despite the district court's error in finding Flowers demonstrated good cause under NRS 34.726(1), it nonetheless properly denied Flowers' Petition and this Court must affirm the decision on appeal. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) ("If a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal."). As discussed above, Flowers failed to establish good cause to overcome the procedural delay, and thus the district court should have denied his Petition as untimely.

II.
THE DISTRICT COURT DID NOT ERR IN DENYING FLOWERS' PETITION ON THE MERITS

To the extent this Court agrees with the district court and finds good cause did exist to delay Flowers's Petition, it must affirm the denial of his Petition because Flowers failed to make an adequate showing of actual prejudice. A finding of actual prejudice cannot happen without a finding that at least one claim in an underlying

petition has merit. The district court seemingly found that prejudice resulted from the court granting an extension of time and the impact that could have had on Flowers' ability to file a timely petition. 6 AA 1292. But actual prejudice, rather, involves the merits of Flowers' claims and requires a showing that errors of constitutional magnitude infected his trial. Mazzan v. Warden, Nev. State Prison, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851 (1995) (quoting Carrier, 477 U.S. at 496, 106 S. Ct. 2639). Because the district court made no such finding, it did not find actual prejudice existed. Also, Flowers, as discussed below, did not make the findings necessary in his Petition to establish prejudice to overcome the procedural time bar. As such, this Court must affirm the denial of Flowers' Post-Conviction Petition.

A. Defendant Received Effective Assistance from Trial Counsel

In Flowers' appeal, he claims the district court erred by not finding that trial counsel was ineffective for 1) failing to object to the testimony of Dr. Simms and Ms. Paulette claiming their testimony was in violation of Crawford v. Washington;[6] and for 2) failing to object to the prosecution's improper vouching for the credibility of its own witnesses. OB 26, 42. However, Flowers received effective assistance of counsel.

[6] Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004).

"A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review" by this Court. Evans v. State, 117 Nev. 609, 622, 28 P.2d 498, 508 (2001). "However, the district court's purely factual findings regarding [claims] of ineffective assistance of counsel are entitled to deference on subsequent review by this [C]ourt." Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004).

Claims of ineffective assistance of counsel are analyzed under the two-pronged test articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), wherein the defendant must show: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. Id. at 687, 104 S. Ct. at 2064. Nevada adopted this standard in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356. 371,130 S. Ct. 1473, 1485 (2010). The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). Further, "[e]ffective counsel does not mean errorless counsel, but rather counsel whose

assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

The court begins with 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, 1011-12, 103 P.3d 25, 32-33 (2004). The role of a court in considering alleged ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

In considering whether trial counsel was effective, the court must determine whether counsel made a "sufficient inquiry into the information . . . pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996) (citing Strickland, 466 U.S. at 690–91, 104 S. Ct. at 2066). Then, the court will consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Id. (citing Strickland, 466 U.S. at 690–91, 104 S. Ct. at 2066). Counsel's strategy decision is a "tactical" decision and will be "virtually

unchallengeable absent extraordinary circumstances." Id. 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. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

This analysis does not indicate that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

In order to meet the prejudice prong of the test, the defendant must 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). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2052).

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1. Flowers' Trial Counsel was not Ineffective for Failing to Object to the Testimony of Dr. Simms and Ms. Paulette.

Defendant alleges his confrontation rights were violated because the State presented expert findings during two State's witnesses' testimonies without calling that specific expert to testify at trial, and his counsel never objected. 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, 124 S. Ct. at 1369 (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 2081-82 (1985)).

However, the United States Supreme Court failed to define the scope of "testimonial" statements in Crawford. Crawford, 541 U.S. at 68, 124 S. Ct. 1354 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."). Yet, the United States Supreme Court did describe three formulations of a "core class" of testimonial statements: 1) Ex-parte in-court testimony or its functional equivalent, such as affidavits, custodial examinations, or similar pretrial statements that a declarant would reasonably expect to be used for prosecution; 2) Extrajudicial statements contained in formal testimonial materials such as affidavits, depositions, prior testimony, or confessions; and 3) Statements made under circumstances where it is reasonable to believe the statement will be available for later use at trial. Id. at 51–52, 124 S. Ct. 1354.

In his Petition and Appeal, Flowers relies on Melendez-Diaz v. Mass., 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. OB 28-31. Melendez-Diaz involved a drug trafficking case in which the defendant allegedly stashed cocaine in the police vehicle on his way to jail. 557 U.S. at 305, 129 S. Ct. at 2530. After forensic analysts performed tests, they submitted signed, notarized certificates

reporting their findings, including identifying the substance as cocaine. Id. at 2531. The defendant objected to submission of the certificates asserting it would violate the Confrontation Clause; however, the certificates were admitted. Id. None of the analysts testified during the defendant's trial. Id. The Supreme Court held that under such circumstances—where the prosecution proved an element of the offense by a sworn certificate, rather than by live testimony at trial (or a showing of witness unavailability and the prior opportunity for cross-examination)—the admission of the certificates amounted to error under a straightforward application of Crawford's holding. Id. at 2542. The certificates in Melendez-Diaz were prepared "specifically for use at the [defendant's] trial . . . ." Id. at 2540. Their "sole purpose" was to provide prima facie evidence of the composition, quality, and the net weight of the narcotic analyzed. Id. at 2533.

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. The Supreme Court explained that laboratory and forensic reports constituted testimonial evidence because a surrogate witness could not convey the original observations outlined in the document. Id. 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

deprived defendant of his constitutional right to cross examine the witness who created the testimonial evidence against him. Id. at 2715-16.

Both Melendez-Diaz and Bullcoming are distinguishable from the instant case as they involved the admission of a forensic or written report. The instant case does not involve the admission of another scientist's report.[7] Furthermore, neither Melendez-Diaz nor Bullcoming addressed autopsy 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.

a. Dr. Simms' testimony regarding Sheila's autopsy

Flowers alleges that the district court should have concluded that his trial counsel was ineffective for failing to object to Dr. Simms' testimony because Flowers alleges the autopsy report he testified about constitutes testimonial evidence, and thus Dr. Simms should not have been allowed to testify as to its contents. OB 32. Dr. Simms' testimony included information gleaned from Dr. Knoblock's coroner's reports of Sheila and Coote. 2 AA 378-93. Dr. Knoblock is a forensic pathologist that formerly worked in the Clark County Medical Examiner's

[7] The Court emphasized in Melendez-Diaz that its 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. Neither the autopsy nor DNA report were admitted as evidence in the instant case.

Office. Id. at 378. Dr. Knoblock authored the coroners' reports while he worked at that office. Id. at 379. However, Dr. Simms formed his own expert opinions on the two murders after an independent review of the materials (autopsy photographs, toxicology screen, autopsy findings). Thus, Flowers' claim that Dr. Simms' testimony violates the Confrontation Clause is without merit.

In United States v. De La Cruz, 514 F.3d 121 (1st Cir. 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.

514 F.3d 121, 133. 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).

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 investigation for use at trial. NRS 259.050 describes the

duties of coroners: "[w]hen 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). 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, this Court stated, "[a] county coroner is obligated to perform its services. . .the county coroner's duty is to investigate the cause of death…" 126 Nev. Adv. Op. 29, 236 P.3d 4, 9 (2010). 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.[8] 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) ("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.").

[8]This is consistent with Dr. Simms' testimony that the police department, as opposed to the medical examiner, is responsible for collecting forensic evidence associated with a deceased victim, in cases where a death is suspicious. 2 AA 389-91.

In Nardi v. Pepe, 662 F.3d 107, 111–12 (1st Cir. 2011), the First Circuit revisited the De La Cruz holding in light of Melendez-Diaz, and Bullcoming and found an autopsy report and a doctor's opinion in partial reliance upon it, did not violate the Confrontation Clause. 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 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.

Furthermore, because Dr. Simms testified as to his own opinion based on the autopsy report and photographs, his testimony was based on his independent review and did not run afoul of the Confrontation Clause as he was available, and was cross examined. See Williams, 132 S. Ct. at 2221 ("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.") Expert witnesses can testify "within the scope of [their specialized] knowledge," based on facts or data "made known to (them) at or before

the hearing," that are "of a type reasonably relied upon by experts in forming opinions or inferences," and therefore "need not be admissible in evidence." NRS 50.275, 50.285; Estes v. State, 122 Nev. 1123, 1141, 146 P.3d 1114, 1126 (2006). In addition, Nevada law allows an expert to testify as to the basis of his or her opinion. NRS 50.305.

In this case, Dr. Simms' testimony constituted expert testimony because he is experienced and qualified to make such opinions. 2 AA 378. Dr. Simms relied in part on information found in other expert's reports in reaching his opinion. Id. at 379. Thus, in accordance with Estes and NRS 50.305, Dr. Simms properly gave the basis of his opinion, even if the reports were arguably inadmissible. Dr. Simms reviewed Dr. Knoblock's reports, toxicology screens, and the autopsy photographs and subsequently agreed with Dr. Knoblock's findings as stated in the coroner's reports. Id. at 379, 380, 388. Additionally, Dr. Simms worked in the same office in the same position as Dr. Knoblock, and therefore could testify to the office procedures and was subject to cross-examination about them. 2 AA378.

Flowers thus fails to demonstrate how 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 definite case law to demonstrate that any such objection would have been sustained and there is significant persuasive authority finding coroner's reports to be nontestimonial. 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, Flowers has not established a reasonable probability that, but for counsel's error in failing to object to the testimony, the result of his trial would have been different. Strickland, 466 U.S. at 687, 104 S. Ct. at 2052. It is unclear how Dr. Simms' testimony prejudiced Flowers and he fails to allege what portion of Dr. Simms' testimony was prejudicial. Rather, Flowers alleges prejudice on the basis that counsel's failure to object heightened the standard of review on appeal. OB 36. However, this fact alone does not show that Flowers suffered any prejudice, as he fails to show that the State caused actual prejudice or a miscarriage of justice, and fails to demonstrate how his substantial rights were affected to warrant a reversal of the denial of his Petition. As such, the district court did not err in finding that counsel was effective as the autopsy report was not testimonial, and Dr. Simms' testimony was properly admitted regardless.

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

Flowers alleges that the district court erred by failing to find that his trial counsel was ineffective for failing to object to part of Ms. Paulette's testimony because Mr. Wahl's DNA report constituted testimonial evidence. OB 37. In this case, Ms. Paulette testified at trial about a DNA report on DNA found in the Coote

case that was authored by Thomas Wahl, a DNA analyst who formerly worked in the LVMPD forensic lab. 4 AA 635. Counsel objected to this testimony based on hearsay grounds and was overruled at trial. 4 AA 635-36. Yet, Ms. Paulette testified to her own independent opinion in this case, and did her own re-testing of DNA evidence in Coote's case as well as this case. Id. at 636-37. Thus, Flowers' 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. Here, the DNA Report was never specifically introduced at trial and was not an affidavit made in lieu of testimony. Rather, Ms. Paulette reviewed the report and re-tested some of the DNA, testified she agreed to the report's findings, and was subject to cross-examination about it. 4 AA 631-37. Also, she testified as to what made up a DNA profile and how the LVMPD forensic laboratory acquired DNA evidence to create a profile.[9] Id. at 631-35. Further, she explained how she compared DNA profiles to see if she found a match. Id. She even used a chart, stipulated to by the defense, to aid the jury with the DNA evidence. Id. at 632. She testified as to how DNA material is preserved in her laboratory and discussed the statistics of the DNA findings and what it meant per lab policy. Id. at 631-35. During cross-examination, Ms. Paulette

[9] Ms. Paulette testified to the procedures of the LVMPD forensics laboratory, the same laboratory Mr. Wahl worked at when he authored the DNA report, and she was subject to cross-examination about that. See generally 4 AA 631-40.

testified as to why testing was done over a period of time instead of all at once. Id. at 637-38. She also testified regarding possible DNA mixtures. Id.

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

Ms. Paulette's testimony about the DNA results performed by someone else is not akin to the affidavit-like certificates of analysis used in Melendez-Diaz. Whereas the certificates of analysis in Melendez-Diaz were "functionally identical to live, in court testimony," the test results here served as a partial basis for the independent opinion of a testifying expert. Melendez-Diaz, 557 U.S. 305, 129 S. Ct. 2527. Ms. Paulette testified about the results of DNA testing in a lab where she was employed as a DNA analyst. 4 AA 631-40. Additionally, she even re-tested some of the DNA evidence found in Coote's case and even reworked Flowers' DNA sample

to create her own DNA profile for him. Id. at 633, 636-37.

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

To the extent Mr. Wahl's report is testimonial in nature and Ms. Paulette's testimony thereto was improper, Flowers 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. Ms. Paulette testified to her own independent findings regarding the presence of Flowers' semen on the carpet inside Coote's apartment. 3 AA 543- 45, 549; 4 AA 637. As there is no basis for excluding testimony as to the carpet sample, Flowers cannot demonstrate prejudice from the remainder of Ms. Paulette's testimony. Furthermore, even if Ms. Paulette was excluded from testifying about the DNA Report, there is no dispute that Flowers' DNA was found inside Coote, as well as inside Sheila, and he fails to give any explanation as to how his DNA ended up inside of her. Sheila was sexually assaulted in a violent manner, similar to Coote, and her sexual assault occurred really close in time to her murder. Also, Flowers' own DNA expert did not dispute LVMPD's forensic laboratory method of extracting DNA and agreed with the statistical calculations made by Ms. Paulette in both Sheila's and Coote's cases. 4 AA 644-45. Notably, the only allegation of prejudice is counsel's failure to object

caused the heightened standard of review of plain error on direct appeal. OB 41-42. However, this fact alone does not show that Flowers suffered any prejudice, as he fails to show that counsel's decision to not object on Confrontation grounds caused actual prejudice or a miscarriage of justice, and he fails to demonstrate that his substantial rights were affected to warrant a reversal of the denial of his Petition. As such, the district court did not err in finding that counsel was effective as the DNA report was not testimonial, and Ms. Paulette's testimony was properly admitted.

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

Flowers alleges that the district court erred by refusing to find that his trial counsel was ineffective for failing to object to the State's improper vouching of George Brass. OB 42. Mr. Brass and Sheila were having a consensual sexual relationship, and his DNA was also found in her body, along with Flowers', which is why Flowers argues the State offered testimony of police officers to support Mr. Brass' credibility. 3 AA 559-60, 4 AA 635. However, Flowers' 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, this 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. This Court reasoned that this characterization of the witness's testimony "amount[ed] 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." Id.

Here, Flowers alleges that the State vouched for Mr. Brass during Detective Vaccaro's testimony. OB 46. However, Flowers 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, Flowers' 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.

Flowers also contends the State vouched for Mr. Brass during Detective Long's testimony by eliciting evidence that Mr. Brass could have refused to speak with Detective Long had he so chose. OB 47, 3 AA 550. However, Detective Long's testimony is in no way a "personal assurance" by the prosecution of Mr. Brass' credibility. There was no evidence that the prosecutor wanted to establish that Mr. Brass could not have possibly lied about his involvement with Sheila's murder. Therefore, this does not constitute vouching.

Finally, Flowers argues the State vouched for Mr. Brass during closing argument by indicating that Mr. Brass had "nothing to hide." OB 48. Here, 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, as he truthfully told police he was having a consensual sexual relationship with Sheila and had sex with her the morning of her murder. 3 AA 559-60. This type of argument during closing 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 United States v. Scheffer, 523 U.S. 303, 313, 118 S. Ct. 1261, 1266-67 (1998) ("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). As such, Flowers fails to show that his trial counsel's performance fell below an objective standard of reasonableness.

Furthermore, even if counsel was deficient for failing to object to the State's comments, Flowers fails to demonstrate that, but for counsel's failure, the result of

his trial would have been different. Strickland, 466 U.S. at 687, 104 S. Ct. at 2052. Although Flowers contends this was a very close case because both he and Mr. Brass had sex with Sheila the day she died, the evidence against Flowers 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. 2 AA 379-80, 385. Moreover, Sheila was sexually assaulted very close in time with her death. Id. at 380-81. Therefore, the person who murdered Sheila was likely the person who sexually assaulted her. Id. at 385-86.

Ms. Paulette testified that a mixture of DNA was found on Sheila's body through a vaginal swab, and that Flowers could not be excluded as a source when over 99.99% of the population could be excluded. 4 AA 634-35. She also testified that George Brass could not be excluded as the other source of DNA found on Sheila. Id. at 635. While Flowers 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. 3 AA 564. Specifically, the police investigated Mr. Brass' alibi and found 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.[10] Id. There was

[10] Debra spoke with Sheila on the telephone at approximately 1:00 p.m. and returned from the grocery store at approximately 3:00 p.m. to find Sheila's body. Accordingly, Shelia's murder occurred sometime in the interim. See 3 AA 415-16.

no indication that anyone changed Mr. Brass' time record. Id. Moreover, the Wal-Mart where Mr. Brass worked was located a good distance away from Sheila's apartment with no convenient driving route. Id. at 601-02. Accordingly, although the consensual nature of Mr. Brass' contact with Shelia was important to the defense's theory, there was corroborating evidence to support Mr. Brass's testimony. Thus, the State did not engage in any vouching, and any objection would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

CONCLUSION

Because Flowers' confrontation rights were not violated and the above testimony was properly admitted, Flowers failed to show how his counsel was ineffective during trial, or how he was prejudiced by this testimony. Therefore, the State respectfully requests that Flowers' Denial of his Post-Conviction Petition for Writ of Habeas Corpus be AFFIRMED.

Dated this 3rd day of November, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 10,503 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 3rd day of November, 2015.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 3rd day of November, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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