

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 68140

Electronically Filed
Dec 04 2015 09:29 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

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 REPLY 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

TABLE OF CONTENTS

| | |
|---|------------|
| I. TABLE OF AUTHORITIES..... | iii |
| II. PROCEDURAL HISTORY and RELEVANT FACTS..... | 1 |
| III. ARGUMENT..... | 25 |
| IV. CONCLUSION..... | 25 |
| CERTIFICATE OF COMPLIANCE..... | 26 |
| CERTIFICATE OF SERVICE..... | 28 |

I.
TABLE OF AUTHORITIES
Case Authority

| | |
|--|-------------|
| <i>Anderson v. State,</i> | |
| 121 Nev. 511, 118 P.3d 184 (2005)..... | 16 |
| <i>Browning v. State,</i> | |
| 120 Nev. 347, 91 P.3d 39 (2004)..... | 16 |
| <i>Bullcoming v. New Mexico,</i> | |
| 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011)..... | 6, 7, 8, 14 |
| <i>Colley v. State,</i> | |
| 105 Nev. 235, 773 P.2d 1229 (1989)..... | 1 |
| <i>Crawford v. Washington,</i> | |
| 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) | 6, 7, 9 |
| <i>Kirksey v. State,</i> | |
| 112 Nev. 980, 923 P.2d 1102 (1996)..... | 5 |
| <i>Lisle v. State</i> | |
| 113 Nev. 540, 937 P.2d 473 (1997)..... | 17 |
| <i>Means v. State,</i> | |
| 120 Nev. 1001, 103 P.3d 25 (2004)..... | 5 |
| <i>Melendez-Diaz v. Massachusetts,</i> | |
| 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) | 6, 7, 8, 14 |
| <i>Rowland v. State,</i> | |
| 118 Nev. 31, 39 P.3d 114 (2002)..... | 16, 17 |
| <i>State v. Dist. Court (Riker),</i> | |
| 121 Nev. 225, 112 P.3d 1070 (2005)..... | 2 |
| <i>State v. Powell,</i> | |
| 122 Nev. 751, 138 P.3d 453 (2006)..... | 5, |
| <i>Strickland v. Washington,</i> | |
| 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d (1984) | 3, 4, 5, 15 |
| <i>United States v. De La Cruz,</i> | |
| 514 F.3d 121 (1st Cir. 2008) | 9 |
| <i>United States v. Frederick,</i> | |
| 78 F.3d 1370 (9th Cir. 1996) | 17 |
| <i>United States v. Roberts,</i> | |
| 618 F.2d 530 (9th Cir. 1980) | 17 |
| <i>Valdez v. State,</i> | |
| 124 Nev. 1172, 196 P.3d 465 (2008)..... | 17 |
| <i>Witherow v. State,</i> | |
| 104 Nev. 721, 765 P.2d 1153 (1988)..... | 17 |

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Statutes

NRS § 34.575 1

NRS § 34.726(1)..... 2

U.S. Const. Amend. VI..... 6

Rules

NRAP 17 1

NRAP 28(e)(1) 26

NRAP 32(a)(4)-(6) 26

NRAP 32(a)(6) 26

NRAP 32(a)(7)(A) 27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

II.
PROCEDURAL HISTORY and RELEVANT FACTS

Appellant hereby incorporates the Procedural History and Statement of Facts from Appellant’s Opening Brief. *See*, Appellant’s Opening Brief (AOB) filed October 5, 2015.

III.
ARGUMENT

I. The District Court found good cause to overcome the procedural time bar of NRS 34.726.

Although the State has repeatedly contended that Flowers filed an untimely Petition for Writ of Habeas Corpus (Post-Conviction) under NRS 34.726, the District Court issued an Order on February 26, 2013, finding that Flowers showed both good cause and prejudice to overcome the time bar and allow his Petition to be considered on the merits. AA1270.

Despite the State’s contentions, the State continuously fails to recognize that Flowers clearly met the burden to demonstrate good cause because the District Court already determined that good cause existed. As such, appellate courts will not disturb the trial court’s discretion absent “clear cases of abuse.” Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229 (1989). Further, extraordinary relief to overturn a district court’s decision is not available when the district court “considered the applicable procedural default rules, applied them to a post-

1 conviction habeas petition, and concluded that claims are not procedurally barred.’

2 State v. Dist. Court (Riker), 121 Nev. 225, 233, 112 P.3d 1070 (2005).

3 Here, the District Court did not abuse its discretion by finding that Flowers
4 demonstrated good cause and prejudice to overcome the procedural time bar. The
5 District Court conducted the applicable procedural default analysis and
6 determined that good cause existed. Therefore, this Court should not disturb the
7 District Court’s determination and should consider this appeal on the merits of the
8 claims.
9

10 In its Answering Brief, the State explains that Flowers filed his Petition
11 shortly after the one-year time limit ended. RAB 17-18. However, Flowers never
12 disputed this point. The District Court found that Flowers met the threshold for
13 showing good cause and prejudice under NRS 34.726(1). Therefore, the State
14 repeated a meritless issue because the issue had already been decided by the
15 District Court. AA1270.
16

17 Additionally, the State re-raises the argument that Flowers did not meet the
18 burden of showing good cause. RAB 18-22. Again, this argument lacks merit
19 because the District Court, which was in a position to hear the procedural
20 circumstances of the case at the time, made the determination that Flowers’
21 showed good cause and prejudice and met the threshold burden. Thus, this Court
22
23
24

1 should regard the District Court's determination and consider this appeal on the
2 merits of Flowers' claims.

3 **II. The District Court erred in denying Flowers' Petition for Writ of Habeas**
4 **Corpus (Post-Conviction)**

5 In its Answering Brief, the State confuses the standards for prejudice that
6 apply to this case. The State relates Flowers' argument that prejudice existed to
7 overcome the time bar to Flowers' argument that prejudice existed to meet the
8 Strickland burden. RAB 22-23. Clearly, the State confused Flowers' arguments
9 and confused the applicable standards in this case.
10

11 First, as discussed above, the District Court found good cause and prejudice
12 to overcome the procedural time bar to allow Flowers to raise his post conviction
13 claims. The prejudice required to overcome the procedural time bar involves
14 showing that the petitioner displays good cause for raising his claims, and by not
15 raising the claims, the petitioner would suffer prejudice if he could refused to
16 allow the claims.
17

18 Second, the Strickland prejudice occurs after the district court finds good
19 cause to allow the petitioner to raise the claims, and in raising the claims, the
20 petitioner must show that trial counsel was deficient and the deficiency caused
21 prejudice to the petitioner in a manner such that the outcome of the case would
22 have been different.
23
24

1 The State confuses these two standards:

2 “A finding of actual prejudice cannot happen without a finding that at
3 least one claim in an underlying petition has merit. The district court
4 seemingly found that prejudice resulted from the court granting an
5 extension of time and the impact that could have had on Flowers’
6 ability to file a timely petition. 6 AA 1292. But actual prejudice,
7 rather, involves the merits of Flowers’ claims and requires a showing
8 that errors of constitutional magnitude infected his trial. Because the
9 district court made no such finding, it did not find actual prejudice
10 existed.” RAB 22-23.

11 To be clear, the District Court found that Flowers exhibited prejudice sufficient to
12 overcome the procedural time bar. That question of prejudice is not in question,
13 and has been addressed on multiple occasions.

14 As for the merits of Flowers’ claims, the District Court erred by failing to
15 find that Flowers met the standard of prejudice required by Strickland because
16 Flowers showed that trial counsel’s errors constituted a deficiency and that
17 deficiency severely prejudiced Flowers to the extent that the outcome of the trial
18 would have been different had Flowers’ trial counsel tried to prevent the
19 Confrontation Clause violations and the prosecutorial vouching.

20 **A. Flowers did not receive effective assistance of trial counsel.**

21 Under Strickland, counsel is ineffective when (1) his performance falls
22 below an objective standard of reasonableness, and (2) the deficient performance
23 prejudiced the defendant to such an extent that the result of trial would have been
24 different. Strickland v. Washington, 466 U.S. 668, 687-688 (1984). Trial

1 counsel's performance becomes deficient when it falls below an objective
2 standard of reasonableness. State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458
3 (Nev. 2006); Means v. State, 120 Nev. 1001, 103 P.3d 25 (Nev. 2004). Although
4 trial counsel should make strategic decisions, those decisions must satisfy the
5 standard of being reasonable within the parameters of the representation.
6
7 Strickland, 466 U.S. at 691.

8 Trial counsel's deficient performance prejudices the defendant when there
9 is a "reasonable probability" that but for counsel's errors, "the result of the trial
10 would have been different." Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102,
11 1107 (Nev. 1996).

12
13 Here, trial counsel's performance fell below an objective standard of
14 reasonableness because trial counsel did not protect Flowers from the
15 Confrontation Clause violations, nor did he protect Flowers from the
16 impermissible prosecutorial vouching. Clearly, had counsel protected Flowers by
17 objecting to the violations, counsel would have raised the issues at the trial level
18 and preserved the issues for appeal. Trial counsel did not raise the issues, and thus,
19 Flowers suffered the prejudice of blatant constitutional violations, which had they
20 been raised, would have undoubtedly affected the result of the trial.
21

22 ///

23 ///

1 **1. The District Court erred by failing to find that Flowers’ trial counsel**
2 **was ineffective for failing to object to the improper testimony of Dr.**
3 **Simms and Ms. Paulette.**

4 The State provides an outline of the case facts from Melendez-Diaz and
5 Bullcoming in an attempt to distinguish the instant case from the leading United
6 States Supreme Court precedential cases. Melendez-Diaz v. Massachusetts, 557
7 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009); Bullcoming v. New Mexico,
8 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011). However, the State desperately
9 misplaces its distinctions.

10 In Melendez-Diaz, the United States Supreme Court relied upon Crawford v.
11 Washington, to determine “a core class of testimonial statements,” which,
12 essentially, are out-of-court statements that cannot be admissible unless the
13 declarant appears for trial or the defendant previously cross-examined the
14 declarant. Melendez-Diaz, 557 U.S. at 310. As thoroughly discussed in
15 Appellant’s Opening Brief and the Respondent’s Answering Brief, testimonial
16 out-of-court statements must be barred unless the declarant (witness who made the
17 statement) appears for trial, or if the declarant is unavailable for trial, the
18 defendant had a prior opportunity to cross-examine the declarant. Crawford v.
19 Washington, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); U.S.
20 Const. Amend. VI.

1 Contrary to the State’s position, the law is clear. If a statement is made
2 under circumstances in which it would be reasonable to believe that the statement
3 would later be used to establish a fact in a criminal trial, the statement cannot be
4 admissible in court without being made directly from the original declarant.
5
6 Melendez-Diaz, 557 U.S. at 310; Crawford, 541 U.S. at 51. To make the point
7 abundantly clear, an autopsy report *created in the presence of homicide detectives*
8 and a DNA report *created for the sole purpose of solving a homicide investigation*
9 must fall within the purview of testimonial evidence that the Sixth Amendment,
10 Crawford, Melendez-Diaz, and Bullcoming intended to preclude. See Bullcoming,
11 131 S.Ct at 2717-2718.

12
13 Because the Sixth Amendment and all applicable case law supports the
14 preclusion of testimonial statements and forensic reports (which, in and of
15 themselves are inherently testimonial statements) without the presence of the
16 declarant, violates the accused’s Sixth Amendment right to confront witnesses
17 against him. Bullcoming, 131 S.Ct. at 2710, 2715; Melendez-Diaz 557 U.S. at 329.
18 Even further, the Supreme Court explained that the Sixth Amendment protects the
19 accused from introducing an unavailable scientist’s testimonial report through
20 another scientist at trial. Bullcoming, 131 S.Ct. at 2710.

21
22 The question presented is whether the Confrontation Clause permits
23 the prosecution to introduce **a forensic laboratory report containing**
24 **a testimonial certification**—made for the purpose of proving a
particular fact—**through the in-court testimony of a scientist who**

1 **did not sign the certification or perform or observe the test**
2 **reported in the certification. We hold that surrogate testimony of that**
3 **order does not meet the constitutional requirement.** *The accused's*
4 *right is to be confronted with the analyst who made the certification,*
5 *unless that analyst is unavailable at trial, and the accused had an*
6 *opportunity, pretrial, to cross-examine that particular scientist.*
7 Bullcoming, 131 S.Ct. at 2710.

8 Again, it bears repeating that the law is not ambiguous. An accused enjoys the
9 unqualified constitutional right to confront every scientist, in this case a coroner
10 and a DNA analyst, who conducts forensic testing that would be reasonably
11 anticipatable to be used against him in a criminal trial.

12 The State incorrectly argues that Bullcoming and Melendez-Diaz are
13 distinguishable because they both involve the admission of a forensic or written
14 report and “the instant case does not involve the admission of another scientist’s
15 report.” RAB 30. Evidently, the State has not read Appellant’s Opening Brief
16 because the Opening Brief explained that Dr. Knoblock conducted the autopsy
17 and prepared the autopsy report, but the State did not call Dr. Knoblock for trial.
18 AOB 32-35. Further, Appellant’s Opening Brief explained that Ms. Paulette
19 testified regarding the contents of Mr. Wahl’s DNA report (clearly, an analyzed
20 scientific report prepared in conjunction with the *homicide* investigation). AOB
21 37-40. Therefore, this case is not distinguishable from Melendez-Diaz or

1 Bullcoming because it falls within the parameters of supporting an absent doctor /
2 analyst's testimonial report through a surrogate witness.¹

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

4 In Respondent's Answering Brief, the State provides that "Dr. Simms'
5 testimony included information gleaned from Dr. Knoblock's coroner's reports of
6 Sheila and Coote. 2 AA 378-393." RAB 30. Here, the State agrees with Flowers'
7 position that Dr. Simms testified regarding the contents of Dr. Knoblock's reports,
8 despite the hugely important fact that Dr. Simms did not attend the autopsy. The
9 State argues that Dr. Simms used Dr. Knoblock's reports to develop his own
10 independent expert opinion on Sheila's murder, and as such, he would have been
11 able to testify as an expert witness. However, the problem with the State's theory
12 arises because the State did not offer Dr. Simms' testimony as an independent
13 expert opinion regarding the reliability and methodology of Dr. Knoblock's
14 findings. RAB 31.²

17 To support its position, the State relies upon U.S. v. De La Cruz, 514 F.3d
18 121 (1st Cir. 2008) to argue that an autopsy report can be made during the
19 ordinary course of business. Further, the State urges this Court to adopt the
20 position that an autopsy report is not testimonial pursuant to Crawford. The State
21 additionally argues that a coroner has a legally imposed duty to conduct an
22

23 ¹ On RAB 30, the State footnotes that "Neither the autopsy nor DNA report were

24 ² This issue is explained very clearly on AOB 34.

1 autopsy when an unnatural death occurs, which inherently would mean that an
2 autopsy report is not “produced solely or even primarily for the purposes of
3 gathering evidence for a future criminal investigation.” RAB 32.

4 Although the State correctly asserts that not every autopsy leads to a
5 criminal investigation, the State’s position does not change the reality that
6 coroners conduct autopsies to find out why and how a person died. Accordingly, if
7 autopsy is the standard procedure for deciphering the cause of an unnatural death,
8 then the reasonable conclusion would be to assume that a criminal investigation
9 would likely and imminently begin as the result of the autopsy report.
10

11 This Court has not previously ruled on this issue, and Flowers requests this
12 Honorable Court to consider into the policy implications associated with the
13 State’s position. It is explicitly clear that Dr. Knoblock conducted the autopsy
14 report in this case pursuant to and in conjunction with a homicide investigation.
15 Under no circumstances could Dr. Knoblock have reasonably believed that his
16 autopsy report would not be used in conjunction with a criminal trial. As such, the
17 State violated Flowers’ right to confront Dr. Knoblock as a witness and to cross
18 examine him regarding the contents and conclusions made in the autopsy report.
19
20

21 In addition to the fact that Dr. Simms testified as a surrogate witness for Dr.
22 Knoblock, the State maintains the position that Dr. Simms qualified as an expert
23 and testified as an expert in the field of autopsy examinations, despite the fact that
24

1 Dr. Knoblock's actual report was inadmissible. RAB 34. The State's argument
2 fails on the simple notion that Dr. Simms did not confine the trial testimony to his
3 own expert opinion regarding the autopsy procedures and ultimate conclusions
4 about the autopsy. Dr. Simms expressly testified regarding information contained
5 in Dr. Knoblock's report. That testimony regarding the contents of the report
6 transcended the realm of expert admissibility by diving into the realm of
7 inadmissible and testimonial hearsay. Because Dr. Simms did not confine his
8 testimony strictly to expert opinions, his testimony violated the Confrontation
9 Clause, and he acted as a surrogate witness testifying about the contents of Dr.
10 Knoblock's report.
11

12 By allowing this testimony, Flowers' trial counsel failed to protect Flowers'
13 constitutional right to confront Dr. Knoblock as a witness. Protecting
14 constitutional rights falls within the fundamental duties of a competent attorney.
15 Additionally, Flowers suffered the prejudice of having an autopsy essentially read
16 into the record without Dr. Knoblock, the declarant, being present to read his own
17 autopsy report. Despite the fact that the jury did not see the actual document, the
18 jury heard the contents of the document through Dr. Simms, who should have
19 strictly been an expert witness as opposed to a lay witness presenting inadmissible
20 testimonial hearsay evidence. Therefore, Flowers suffered the prejudice of the jury
21 hearing inadmissible evidence through an impermissible surrogate witness.
22
23
24

1 ***b. Ms. Paulette’s testimony regarding the DNA evidence.***

2 The District Court erred by failing to find that trial counsel was ineffective
3 for failing to object to Ms. Paulette’s surrogate testimony regarding the opinions
4 in Mr. Wahl’s DNA report prepared for the Marilee Coote matter, a completely
5 separate case.
6

7 In the Respondent’s Answering Brief, the State purports that Ms. Paulette
8 conducted her independent analysis and testified as an expert on the DNA report
9 generated by Mr. Wahl for the Marilee Coote case. RAB 35-36. To clarify the
10 issue, Ms. Paulette correctly testified regarding the DNA analysis for the Sheila
11 Quarles matter (the instant case), but Ms. Paulette was not involved in the DNA
12 testifying for the Marilee Coote case. Despite the State’s contentions that Ms.
13 Paulette “did her own re-testing of DNA evidence in Coote’s case,” Ms. Paulette
14 should not have introduced the contents of Mr. Wahl’s DNA report. RAB 36. The
15 District Court judge allowed evidence of the Coote case at trial to show
16 similarities and motive. Although Ms. Paulette testified to the contents of her own
17 report for the Quarles case, she became a surrogate witness to introduce the
18 contents of Mr. Wahl’s report in the Coote case.
19
20

21 The State also articulates that Ms. Paulette would necessarily be an expert
22 because Mr. Wahl’s DNA report was not admitted into evidence, and as such, Ms.
23 Paulette could only testify regarding her own independent opinion. The State’s
24

1 position does not make sense. The jury heard Ms. Paulette testify as a witness
2 regarding her own report, and then, the jury heard Ms. Paulette testify about Mr.
3 Wahl's DNA analysis. There would be no way for the jury to differentiate
4 between Ms. Paulette's testimony regarding her own report and her surrogate
5 testimony regarding Mr. Wahl's report.
6

7 The State also raises the point that Flowers' trial counsel objected to Ms.
8 Paulette's testimony on hearsay grounds. This point is clearly irrelevant because
9 trial counsel did not raise the objection to prevent the constitutional violation.
10 Trial counsel did not object to the clear Confrontation Clause violation that
11 occurred when the State used Ms. Paulette to introduce Mr. Wahl's report, which
12 would otherwise have been admissible.
13

14 Additionally, the State explains that Ms. Paulette testified about DNA
15 processes and procedures. RAB 36. Further, the State makes a point to note that
16 Ms. Paulette used a chart stipulated by the defense. RAB 36. Here, the State's own
17 contentions solidify the fact that trial counsel was ineffective for failing to protect
18 Flowers from the State's introduction of evidence through a witness that Flowers
19 could not cross-examine.
20

21 It does not matter that Flowers cross-examined Ms. Paulette. The State tries
22 to complicate the issue by making nonsensical circular arguments. The necessary
23
24

1 points to address are that Mr. Wahl's DNA report was testimonial and that
2 Flowers did not cross-examine Mr. Wahl.

3 Again, the State attempts to distinguish the instant case from Melendez-
4 Diaz and Bullcoming by arguing that unlike these precedential cases, Mr. Wahl's
5 DNA report was not introduced into evidence. To articulate clearly, the issue is
6 not whether the jury saw Mr. Wahl's report. The monstrous issue remains that the
7 State used Ms. Paulette as a surrogate witness to introduce the contents of the
8 otherwise inadmissible DNA report as evidence of Flowers motive and to draw
9 similarities between two separate cases.
10

11 Additionally, the State argues that Flowers did not suffer prejudice because
12 "there is no dispute that Flowers' DNA was found inside Coote, as well as inside
13 Sheila, and he fails to give any explanation as to how his DNA ended up inside of
14 her." RAB 38. Clearly, the State raises points that deviate from the issue at hand.
15 Disputing the DNA inside of two vaginas does not answer the problem arising
16 from the Confrontation Clause violation. The violation occurred because Ms.
17 Paulette testified to the contents of a report she did not prepare. The kind of DNA
18 inside the victims is irrelevant to the fact that the State introduced the DNA
19 evidence from Coote's case through Ms. Paulette as a surrogate witness.
20
21

22 Because trial counsel did not protect Flowers from this surrogate testimony
23 and did not protect Flowers from the back-door admission of an inadmissible
24

1 testimonial report, trial counsel's performance fell below the objective standard of
2 reasonableness mandated by Strickland and the United States and Nevada
3 constitutions. Therefore, Flowers undoubtedly suffered prejudice when the jury
4 heard forensic DNA evidence from an inadmissible report through the mouth of a
5 surrogate witness. This Court can clearly see that the State violated Flowers' Sixth
6 Amendment right to confront Mr. Wahl as a witness against him and that trial
7 counsel failed to protect Flowers fundamental right.

9 **2. The District Court erred by failing to find that Flowers' trial counsel**
10 **was ineffective for failing to object to the improper testimony of its own**
11 **witness, George Brass.**

12 The State asserts the position that Quarles and George Brass had a
13 consensual sexual relationship, which explains why Brass' DNA was present
14 inside Quarles' body. RAB 39. The problem with the State's theory, and the basis
15 for the vouching claim, stems from the fact that the State presented no evidence at
16 trial to show that Quarles was having a non-consensual relationship with Flowers.
17 The State used the police officers' testimony to create the theory that Quarles had
18 one consensual sexual suitor instead of two consensual sexual suitors.

19
20 The State did not present Brass to support his own alibi at trial, nor did the
21 State present any corroborating evidence to show Brass' credibility regarding his
22 alibi except the testimony of police officers. The State argues that Flowers makes
23 bare and naked allegations that do not warrant relief. Again, the State misses the
24

1 point of the argument. The sheer evidence that Brass had sex with Quarles on the
2 day she died should have made Brass an alternative suspect in the case.

3 During the trial, the State elicited testimony from Detective Vaccaro and
4 Detective Long that constituted vouching for Brass' credibility. Additionally,
5 during closing arguments, the State explicitly vouched for Brass' credibility by
6 drawing a comparison between Brass' admission that he had sex with Sheila
7 Quarles the day she died, and Flowers' election to exercise his Fifth Amendment
8 right to remain silent. Thus, during its closing argument, the State persistently
9 described Brass as a trustworthy individual, thereby vouching for his credibility in
10 direct opposition to Flowers' election to remain silent thereby implying that
11 Flowers necessarily had something to hide.
12

13
14 It is established that a prosecutor may not vouch for the credibility of its
15 own witness. Browning v. State, 120 Nev. 347, 358-359, 91 P.3d 39, 48 (2004);
16 Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). Further, a
17 prosecutor vouches by placing the "prestige of the government behind the witness"
18 and provides "personal assurances of [the] witness's veracity." Browning, 120
19 Nev. at 359; Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114 (2002).
20

21 As the State noted, in Rowland, the Nevada Supreme Court held that
22 describing an inmate witness as a "man of integrity" and "honor" constituted
23 prosecutorial misconduct. Rowland, 118 Nev. at 39. However, the State clearly
24

1 neglected the remainder of the Rowland opinion. In Rowland, the Court reasoned,
2 “even asserting that the defendant is lying is equally impermissible.” Id. See also,
3 Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153 (1988) (“The
4 characterization of testimony as a lie is improper argument.”).

5
6 Nevada has adopted the Ninth Circuit’s logic regarding prosecutorial
7 vouching, “Analysis of the harm caused by vouching depends in part on the
8 closeness of the case.” Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481
9 (1997); (citing U.S. v. Frederick, 78 F.3d 1370, 1378 (9th Cir.1996); Ref. U.S. v.
10 Roberts, 618 F.2d 530, 534 (1980). Further, “If the issue of guilt or innocence is
11 close, if the state’s case is not strong, prosecutor misconduct will probably be
12 considered prejudicial.” Rowland, 118 Nev. at 38. As a result, if the question
13 regarding innocence or guilt is close, then the reviewing courts will be more likely
14 to reverse the case based upon prejudicial vouching. Nevada has adopted a two-
15 pronged analysis to determine the propriety of a prosecutor’s conduct: (1)
16 determine “whether the prosecutor’s conduct was improper,” and (2) determine
17 “whether the improper conduct warrants reversal.” Valdez v. State, 124 Nev. 1172,
18 1188, 196 P.3d 465, 476 (2008).

19
20
21 In this case, the State incorrectly claims that Flowers did not explain how
22 the State’s elicited testimony from Detective Vaccaro constituted improper
23 vouching. Flowers explained the following:
24

1 In addition, during the direct examination of Detective James Vaccaro,
2 the prosecutor vouched to the jury that Mr. Brass should not have
3 been considered a prime suspect to the murder and sexual assault.
4 Detective Vaccaro retired in 2007, but Mr. Brass did not admit to
5 having sex with the victim until a detective approached him in 2008.
6 Accordingly, Detective Vaccaro did not have any personal knowledge
7 regarding Mr. Brass's admission because Detective Vaccaro had
8 already retired at the time of Mr. Brass's admission. Therefore, the
9 prosecutor used the prestige of the government when it used Detective
10 Vaccaro's position as a representative of law enforcement to make Mr.
11 Brass's story more believable.
12 AOB 46-47.

13 Further, in the Statement of Facts of the Appellant's Opening Brief, Flowers
14 provided the direct portion of Detective Vaccaro's testimony in which the State
15 elicited responses to vouch for Mr. Brass:

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

18 Q- "Now, if Mr. Brass—or assuming Mr. Brass admitted or told
19 detectives that he had sexual contact with Miss Quarles on the day of
20 her death, the room or the location that the intercourse took place
21 wouldn't be particularly relevant in the investigation, would it, if it
22 was a consensual relationship?"

23 A- "Not with regard to that sexual contact with regard to Mr.
24 Brass."

25 Q- "Okay. So if he said that he had sex with her on the floor of
26 one of the rooms in Debra Quarles' apartment, knowing that doesn't
27 necessarily tell you who killed Sheila Quarles later on?"

28 A- "I think that the correct answer to that would be that it wasn't
29 important until we knew more about that sexual activity and whether
30 or not he was a suspect in our case. So I don't know if that's a
31 confusing answer, but when we learned about him as a suspect or not

1 a suspect in our case, when he did not develop as a suspect in our case,
2 then that location that the consensual sex took place wasn't of any
3 importance to us."

4 Q- "I mean—yeah, I guess that's my question." It doesn't tell you
5 any more about the investigation or how she was killed if he says I
6 had sex with her on the living room floor, on the kitchen floor or on
7 the bedroom floor? That doesn't tell you anything about who killed
8 Sheila Quarles, does it?"

9 A- "No. I mean, he could have said he had sex with her at a
10 location other than the apartment even, for that matter. The fact that
11 he said that he had sexual contact with her, but then showed additional
12 information—or additional investigation showed us that he wasn't a
13 suspect in that, where they had sex wasn't of importance to us; and, at
14 that point, I think that was beyond my time there anyway. So in my
15 experience, that wouldn't have been important to me."

16 Q- "And the fact that someone has sex with another individual on a
17 floor or on a carpet, that wouldn't necessarily mean that sperm or
18 some kind of DNA would end up on the carpet by virtue of the sexual
19 activity, would it?"

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

Q- "Maybe, maybe not?"

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

AA0444

See also, AOB 23-24.

Detective Vaccaro had no personal knowledge of Brass' admission that he
had sex with Shelia Quarles on the day she died. Detective Vaccaro testified that

1 he retired in 2007. AA0440. In August of 2008, Brass admitted to having sex
2 with Sheila Quarles on the day she died. AA0440. As such, Detective Vaccaro
3 could not have personal knowledge regarding Brass' affairs because he was no
4 longer working as a detective at the time of Brass' admission. AA0440.

5
6 Despite the fact that Detective Vaccaro did not have personal knowledge
7 regarding Brass' admission, the State asked Detective Vaccaro to make
8 assumptions about the situation and develop incorrect conclusions based upon
9 those assumptions. Detective Vaccaro admitted to lacking personal knowledge of
10 Brass' admission and to having heard about the admission on a second-hand basis.
11 AA0440, AA0444. Knowing that Detective Vaccaro did not have personal
12 knowledge about Brass' admission, the State repeatedly asked Detective Vaccaro
13 questions to ensure that Brass' admission would not make Brass a suspect in the
14 criminal investigation. AA0444.

15
16 The State's questioning lead Detective Vaccaro to vouch for the police
17 officers' decision not to investigate Brass as a potential suspect in Sheila Quarles'
18 homicide. Logically, Detective Vaccaro would answer the State's questions in a
19 manner that supported the other officers' decision to exclude Brass as a suspect
20 and failure to inquire further into his admission. Thus, the State used Detective
21 Vaccaro to vouch for the credibility of the other officers' failure to question Brass
22 as a potential subject to Sheila Quarles' murder. In turn, the State used this
23
24

1 questioning as a mechanism to take suspicion away from Brass and to convey
2 Brass as a credible individual in order to convict Flowers despite the closeness of
3 the case.

4 As a result of the prosecutor's line of questioning, the State created a
5 situation in which Flowers suffered prejudice. This is a very close case because
6 the victim had sex with two men on the day she died. However, the police and the
7 prosecutors only chose to investigate one potential suspect, despite the fact that in
8 2008, Brass explicitly disclosed the fact that he slept with Sheila Quarles on the
9 day she died. The prosecutors knew that Detective Vaccaro had retired in 2008
10 when Brass provided this admission, and the prosecutors questioned Detective
11 Vaccaro about Brass despite Detective Vaccaro's lack of personal knowledge
12 about the situation. This line of questioning certainly constitutes improper
13 vouching.

14 Additionally, the State cannot argue that it did not elicit any "personal
15 assurances" when questioning Detective Long about Brass' willingness to discuss
16 Sheila Quarles. For example, the State repeatedly questioned Detective Long
17 about Brass' voluntary conversation about Sheila Quarles. AOB 47; AA0550,
18 AA0558. The State used Detective Long's explanation as to why Brass was not a
19 suspect to build Brass' credibility. Detective Long, as a law enforcement agent,
20 holds a public position and represents the prestige of the government. Therefore,
21
22
23
24

1 by demonstrating that Detective Long supported the decision to exclude Brass as a
2 suspect, the State used Detective Long as a representative of government prestige
3 to support the contention that Brass was credible because he voluntarily spoke
4 with Detective Long.

5
6 The State impermissibly drew a comparison between Flowers exercising his
7 right to remain silent and Brass' willingness to talk. The State explicitly used
8 Detective Long's testimony to show that Brass spoke to Detective Long, despite
9 the fact that he could have refused to discuss Sheila Quarles. This sent a powerful
10 message to the jury that the State believed Brass was more credible than Flowers
11 because Brass' willingness to talk to the police precluded his viability as a suspect
12 to Sheila Quarles' death. Thus, a lay jury would be more likely to believe the
13 prosecutor's logic as to which man could have committed the murder. However,
14 based on the scientific evidence presented, a reasonable jury could not have
15 determined which man had sex with Sheila Quarles first on the day she died,
16 which demonstrates the closeness of this case. Therefore, the prosecutor
17 impermissibly vouched for Brass' credibility in juxtaposition to Flowers' exercise
18 of his right to remain silent, when in fact, Brass was a legitimate suspect in Sheila
19 Quarles' death.

22 Further, the State incorrectly contends that labeling Brass as having
23 "nothing to hide" simply invited the jury "to draw such the reasonable inference
24

1 that's [sic] Mr. Brass' testimony was truthful based on the totality of the evidence'
2 during the closing arguments. RAB 51. The State's contentions fail. The State
3 continuously told the jury that Brass could not be the killer because Brass
4 voluntarily discussed his relationship with Sheila Quarles with detectives. AOB
5 48-49. AA0739. Additionally, the State explained that Brass did not evade the
6 police and displayed a cooperative demeanor. Id. AA0739-AA0740. Further, the
7 State drew conclusions that the evidence absolutely vilified Flowers because
8 Flowers did not voluntarily speak with law enforcement. Id.

10 By comparing Brass' willingness to testify against Flowers' choice to
11 exercise his right to remain silent, the prosecutor's statements infected the
12 proceedings with unfounded conclusions regarding Flowers' culpability. As such,
13 the prosecutors' vouching was improper because it bolstered the credibility of a
14 state witness to improve the likelihood of convicting Flowers. This was a close
15 case, as shown by the DNA evidence. Thus, the prosecutors seized the opportunity
16 to highlight Flower's refusal to speak to the police in an effort to convince the jury
17 that Flowers was guilty because he elected to remain silent rather than cooperate
18 with the police.
19
20

21 The State argues that it was simply providing the facts to the jury in a
22 manner such that the jury could function as the lie detector and determine the
23 credibility of the witnesses. RAB 41. This argument is inapplicable to this case.
24

1 The State presented improper conclusions, which allowed the jury to heed to
2 emotional prompts and attribute credibility to Brass, when in fact, Brass did not
3 merit that credibility. The State's comparison of Brass' admission with Flowers'
4 silence provided the jury with an opportunity to attribute unwarranted credibility
5 to Brass and to ignore him as an alternate suspect.
6

7 As previously stated, the facts presented to the jury made this a very close
8 case. Flowers and Brass each had sex with Sheila Quarles on the day she died.
9 Thus, the State impermissibly resorted to vouching in order to give them an
10 unwarranted advantage in convicting Flowers because the State did not have
11 concrete facts upon which to convict Flowers.
12

13 Accordingly, trial counsel's deficiency stemmed from the failure to object
14 to the State's impermissible vouching, which irrevocably prejudiced Flowers'
15 right to a fair trial. Had trial counsel objected to the State's vouching, the result of
16 the trial would have been different because the jury would have seen Brass as an
17 alternate suspect rather than a credible witness. Given the closeness of the case,
18 the State's vouching, which constituted prosecutorial misconduct, cannot be
19 considered harmless. Thus, had the court sustained an objection to the State's
20 vouching, the outcome of the case would have been different.
21
22
23
24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

IV.
CONCLUSION

As stated in the Opening Brief, 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 his claims.

Respectfully submitted this 3rd day of December, 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

1 I further certify that this brief complies with the type volume limitations of
2 NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points
3 or more and contains 6,103 words. I understand that I may be subject to sanctions
4 in the event that the accompanying brief is not in conformity with the
5 requirements of the Nevada Rules of Appellate Procedure.
6

7 Dated this 3rd day of December, 2015.

8 Respectfully submitted,

9 By: /s/ James A. Oronoz
10 JAMES A. ORONoz, ESQ.
11 Nevada Bar No. 6769
12 700 South Third Street
13 Las Vegas, Nevada 89101
14 Telephone: (702) 878-2889
15 *Attorney for Norman Flowers*
16
17
18
19
20
21
22
23
24

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4