IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 83917

EDWARD MICHAEL ADAMS,

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 Nancy A. Becker, District Court Judge
District Court Case No. 08C241003

APPELLANT'S OPENING BRIEF

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I. TABLE OF CONTENTS

II. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

NONE

Attorney of Record for Edward Michael Adams:

III. TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

IV. JURISDICTIONAL STATEMENT

On June 28, 2019, Appellant filed a Supplemental Petition for Writ of Habeas Corpus ("Petition"). On December 7, 2021, the Court issued its Finding of Fact, Conclusions of Law and Order. On that same date the Court granted Appellant's Request to Appoint Counsel. Counsel was confirmed on December 7, 2021.

On December 8, 2021, Appellant filed a Notice of Appeal.

This Court has jurisdiction over this matter as an appeal of the District Court's denial of the Appellant's post-conviction claims pursuant to Nev. Rev. Stat. 177.015(3) and (4), and as an appeal of the District Court's denial of Appellant's claims contained in the Petition for Writ of Habeas Corpus pursuant to NRS 34.575.

V. ROUTING STATEMENT

Pursuant to the Nevada Rules of Appellate Procedure (hereinafter, "NRAP") 17(b)(2), this case should not be presumptively assigned to the Court of Appeals because it involves a Category A felony.

VI. STATEMENT OF THE ISSUES

1. Whether the District Court Erred In Not Finding Trial Counsel Ineffective for Failing to Interview Andre Randall Prior to Trial.
2. Counsel for Mr. Adams Adopts All Issues Raised by Mr. Adams in his *pro per* Petition for Writ of Habeus Corpus and Respectfully Requests that This

Court Consider and Issue a Written Decision With Regard to Each of These Arguments.

VII. STATEMENT OF THE CASE

This is an appeal from the District Court's denial of Appellant's claims in his Petition for Writ of Habeas Corpus (Post-Conviction) and Supplemental Post-Conviction Petition for Writ of Habeas Corpus.

On February 12, 2008, the State filed another Information charging Mr. Adams with one count of First Degree Kidnapping with Use of a Deadly Weapon; one count of Battery With Intent To Commit A Crime With Use Of A Deadly Weapon; nine (9) counts of Sexual Assault With A Minor Under Fourteen Years Of Age With Use Of A Deadly Weapon and one count of Open or Gross Lewdness.

On April 16, 2008, the state filed its Notice of Witnesses and Expert Witnesses. On October 21, 2009, the State filed its Supplemental Notice of Witnesses and Expert Witnesses.

On October 28, 2009, the State filed an Amended Information charging Mr. Adams (Appellant) as follows: one count of First Degree Kidnapping With Use of a Deadly Weapon (Felony – NRS 200.310, 200.320, 193.165); one count of Battery With Intent to Commit a Crime With Use of a Deadly Weapon– (Felony NRS 200.400, 193.165); nine counts of Sexual Assault With a Minor Under Fourteen Years of Age With Use of a Deadly Weapon (Felony – NRS 200.364,

200.366, 193.165); and one count of Open or Gross Lewdness (Gross Misdemeanor – NRS 201.210).

On November 2, 2009, Appellant's jury trial commenced. On November 4, 2009, after three (3) days of trial, the jury returned a verdict of guilty of one charge of First Degree Kidnapping; one charge of Battery With Intent to Commit Sexual Assault; seven (7) counts of Sexual Assault; and one count of Open or Gross Lewdness.

Appellant was sentenced on January 13, 2010. On February 2, 2010, the Court entered its Judgment of Conviction (Jury Trial) with the following sentencing: Count 1 – First Degree Kidnapping, life with a minimum parole eligibility of sixty (60) months and pay $2,932.00 in Restitution; Count 2 – Battery With Intent to Commit Sexual Assault – Life with a minimum parole eligibility of sixty (6) months, count 2 to run consecutive to count 1; Count 3- Sexual Assault - life with a minimum parole eligibility of one hundred and twenty (120) months, count 3 to run consecutive to count 2, Count 4 - Sexual Assault - life with a minimum parole eligibility of one hundred and twenty (120) months, count 4 to run consecutive to count 3; Count 5 – Sexual Assault - life with a minimum parole eligibility of one hundred and twenty (120) months, count 5 to run consecutive to count 4; Count 6 – Sexual Assault - life with a minimum parole eligibility of one hundred and twenty (120) months, count 6 to run consecutive to count 5; Count 7

– Sexual Assault - life with a minimum parole eligibility of one hundred and twenty (120) months, count 7 to run consecutive to count 6; Count 8 – Sexual Assault - life with a minimum parole eligibility of one hundred and twenty (120) months, count 8 to run consecutive to count 7; Count 11 – Sexual Assault - life with a minimum parole eligibility of one hundred and twenty (120) months, count 11 to run consecutive to count 8; and to Count 12 – Open or Gross Lewdness – twelve months in the Clark County Detention Center (CCDC), count 12 to run concurrent with balance of counts; with seven hundred thirty-one (731) days credit for time served. Further Ordered, a Special Sentence of Lifetime Supervision is imposed to commence upon release from any term of imprisonment, probation or parole. Additionally, Appellant was ordered to register as a sex offender in accordance with NRS 179D.460 within forty-eight (48) hours after any release from custody.

DIRECT APPEAL

On February 24, 2010, Appellant filed a Notice of Appeal. On direct appeal Appellant raised the following issues:

1. Whether double jeopardy and redundancy principles preclude Appellant's multiple convictions for Sexual Assault, Battery With Intent to Commit Sexual Assault, and Open or Gross Lewdness.

2. Whether the Prosecutor committed repeated acts of misconduct in closing argument, thereby depriving Appellant of a fair trial and violating his rights under the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.

The Nevada Supreme Court affirmed Appellant's conviction on July 26, 2012. The Nevada Supreme Court issued its Remittitur on August 30, 2012 and filed same on September 5, 2012.

POST-CONVICTION PROCEEDINGS

On June 28, 2019, Appellant filed a Supplemental Post-Conviction Petition for Writ of Habeas Corpus ("Supplemental Petition"). On December 7, 2021, the Court issued its Findings of Fact, Conclusions of Law and Order. On December 8, 2021, Appellant filed his Notice of Appeal.

VIII. STATEMENT OF FACTS

The facts presented here reflect a summary of the facts elicited from the State's witnesses at trial in this case.

Amber Valles, the alleged victim, was 15 years of age when she testified at trial. Appellant's Appendix (hereinafter "AA"), Volume II, Bates Number 0337. At the time of the events that occurred in this case, Valles was 13 years of age, and she attended Johnson Junior High School. AA II 0337-0338.

On December 14, 2007, the date of the subject events, Valles attended school and was released from school at 2:15 p.m. AA II 0338. After school, Valles called her mom to ask if she could spend the night with her friend, Cierra, whom Valles had known for "A couple weeks, maybe." AA II 0339. Valles did not know Cierra very well. AA II 0339. However, Valles did not go to Cierra's house

because Cierra's mom said "No." AA II 0339-0340. Valles testified that the call took place around 2:20 p.m. AA II 0340.

After the calls to Valles' and Cierra's respective mothers, Valles planned to walk home, which she did not do very often because her mother usually picked her up from school. AA II 0341-0342. Valles began walking home around 2:30 p.m., after visiting with Cierra for about ten minutes. AA II 0342. By the time Valles began walking home, most of the kids had already left the school. AA II 0342. Valles' house was about three or four blocks away from the school. AA II 0342.

Valles testified that she started by walking through a field that was part of the school. AA II 0343. After exiting the school gate, she walked toward the stoplight on the corner of Alta and Buffalo, and then, she crossed Buffalo and continued walking down Alta. AA II 0343. While she was walking, she spoke with her father on the phone and told him she was walking home. AA II 0344.

Valles testified that as she walked down the street, she first saw Mr. Adams sitting on a wall across the street from her and smoking a cigarette. AA II 0346-0347. Valles testified that she never walked towards Mr. Adams, but she explained that once she approached a stoplight, he got off the wall and crossed over to her side of the street. AA II 0347. Valles claimed that she became scared as he approached her. AA II 0347.

According to Valles, Mr. Adams approached her, put his arm around her shoulder, and turned her around. AA II 0349. She testified that he said, "Don't scream, not to yell, that he had a gun." AA II 0350. She further testified that he threatened to kill her and that she believed him. AA II 0350. Valles never saw a gun, but she believed he had a gun because his left hand stayed in his pocket the entire time. AA II 0351. Valles alleged that Mr. Adams grabbed her left hand, turned her around, and started walking back towards her school. AA II 03528. Valles claimed that Mr. Adams also told her that he needed Valles to come help him babysit his "son or niece or something." AA II 0390-0391.

As they walked down the street, Valles saw her classmate, Jonathan. AA II 0352. She saw someone with Jonathan, but she did not know who it was. AA II 0352. Jonathan testified that he had left school that day with their mutual friend, Angela, and another friend, Aaron. AA II 0432-0433. Valles testified that she was crying and trying to "mouth" to Jonathan "a bunch of times" to help her. AA II 0353. She testified that Mr. Adams walked her away from Jonathan's direction. AA II 0354-0355.

At trial, Jonathan testified that he saw Valles walking with "a guy," and he saw Valles "being held by the right wrist, being sort of dragged, pulled, led up the street." AA II 0435. He testified that "Amber had a scared look on her face, and that's pretty much it." AA II 0436. Jonathan did not call 911 or attempt to intervene

or help Valles. AA II 0441-0442. Jonathan did not see or hear Valles saying anything to him. AA II 0441. Jonathan testified that he "forgot" about the situation after it happened. AA II 0442-0443.

Angela, Valles' friend, also testified that she saw Valles with "a guy." AA III 0462-0463. Angela believed that Valles and "the guy" were trying to "avoid" them. AA III 0463. Angela did not testify that she saw Valles crying or asking for help. Angela asked Jonathan if the man was Valles' father, but Jonathan said "No." AA III 0464. Then, they joked that the guy "could be a rapist or something." AA III 0464-0465. Despite having a cellular phone, neither Angela nor Jonathan decided to call for help. AA II 0473. When Angela initially spoke to the detective, she said that Valles was "chasing after this man trying to keep up with him because he was walking too fast." AA III 0472. At trial, she denied making that statement to the detective. AA III 0472.

Valles testified that Mr. Adams took Valles to a vacant apartment near Charleston and Buffalo. AA II 0356. At trial, Andre Randall, a resident in the apartment complex, testified that he saw Valles and Mr. Adams walking into the vacant apartment. AA III 0679. Randall had known the apartment was vacant because it had recently been cleared out after a fire. AA III 0679. Randall testified that he thought it was strange that they were going into the abandoned apartment, but he did not call the police. AA III 0681. Randall also testified that the "little girl

did not look mad." AA III 0681. Randall remembered telling the police that the man and the girl were not touching each other and were walking side by side. AA III 0684. Randall testified that the girl did not look mad and was not crying, screaming, shaking, or anything at all. AA III 0684. Randall would have called the police if he "had seen a man dragging a girl up those stairs who was crying and shaking." AA III 0685. However, that was not the situation as Randall did not perceive the girl to be upset. AA III 0685.

Detective Gabriel Lebario was the lead detective assigned to the case. During the course of his investigation, he interviewed an individual named Andre Randall. AA III 0580-0581. At trial, Det. Lebario testified regarding the interview with Randall:

Q: Did you ask him about what he saw?

A: Yes.

Q: Did you have him fill out a report?

A: No, I did not.

Q: So, would you be able to recall exactly what he had told you?

A: Not exactly word for word, no.

Q: Now, had he spoken with you about possibly seeing some people that may have matched that description?

A: Yes, he did.

Q: Okay. And did he say he actually made contact with him?

A: I believe he said he saw two people matching the description. And I believe he said what's up or hello or something like that. Something to that effect.

Q: But nothing else noteworthy in regards to his description of what happened?

A: No.

Q: And there wasn't a report prepared in regards to what he would eventually testify to?

A: No.

Q: Why not?

A: Well, I mean, at that point, you know, I didn't see any need to – to get a report from him.

AA III 0580-0581.

Mr. Adams and Valles allegedly entered the apartment through the unlocked door. AA II 0357. The apartment did not have running water or electricity. AA II 0406-0407. Candles lit the apartment. AA II 0358. Valles testified that Mr. Adams took the battery out of Valles' phone and told her to sit on the couch and then take off her clothes. AA II 0360-0361.

Valles claimed that Mr. Adams took off his clothes, lubricated his penis, and directed Valles to lie down on the floor. AA II 0361, 0390. She further testified

that Mr. Adams first inserted his fingers into Valles' vagina, and then, inserted his penis. AA II 0363-0364. She claimed that he then told her to get onto the couch, and again, inserted his fingers and his penis into her vagina. AA II 0364-0365. According to Valles, she "told him to stop, that it hurt," but he did not stop. AA II 0365. She testified that he then bent her over the couch and inserted something into her anus, but she did not know what it was. AA II 0367.

Valles also testified that after he finished, Mr. Adams told Valles to get dressed and gave her a towel to "wipe" herself down. AA II 0368-0370.

Mr. Adams then returned her phone battery and told her not to call the police. AA II 0376-0377.

Valles claimed that she then left the apartment, went to McDonalds on the corner of Charleston and Buffalo, and then, her mom called her. AA II 0377-0378[1] When her mother arrived, Valles told her that "He—he put his thing in me." AA II 0378. Her mother then called the police. AA II 0378.

The police took Valles and her mother to the hospital for an examination. AA II 0380. Amy Coe, the SANE nurse, performed the examination on Valles. AA IV 0704-0706. The samples taken during the examination later tested positive for the presence of Mr. Adams' semen. AA III 0660-0662. Amy Coe testified that a person having consensual sex who had never had sexual intercourse before would

[1] Notably, Valles did not attempt to call her mother or the police.

also be susceptible to the same injuries as the injuries found on Valles. AA IV 0720, 0736.

At the close of trial, Defense Counsel argued that the State's evidence supported the conclusion that any encounter between Mr. Adams and Valles was consensual, and therefore, Mr. Adams was not guilty of the charged crimes of multiple counts of sexual assault, kidnapping, and battery, but rather, that he was guilty of statutory sexual seduction.

IX. SUMMARY OF THE ARGUMENT

Mr. Adams appeals the denial of his Petition for Writ of Habeas Corpus involving claims of ineffective assistance of counsel, namely: Trial Counsel's failure to investigate and interview a key witness (Andre Randall) prior to trial.

X. ARGUMENT

I. WHETHER THE DISTRICT COURT ERRED IN NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO INTERVIEW ANDRE RANDALL PRIOR TO TRIAL.

i. Deficient Performance

Counsel's performance was deficient because Counsel failed to investigate and interview a key witness, Andre Randall, prior to trial. The discovery produced by the State included a Case Notes report regarding a material witness who saw Mr. Adams and Valles together on the date of the incident. AA III 595. The investigating officers entered the Case Notes on December 20, 2017, six days after

the incident. The Case Notes produced by the State in discovery, did not provide the name of the witness but indicated the following:

> A canvas of the other condos revealed an eye-witness who saw the victim and suspect walk towards this abandoned condo. The witness is a physically fit and tall BMA who passed so close to the suspect (they crossed paths) he recalls greeting the suspect with "What's up?" The girl's description matches the victim's description. This witness stated the two were not touching and the girl didn't appear to be in distress nor emotional. When we interviewed the victim previously, she told us the only person she saw while with the suspect was her friend Jonathon. It is unknown why the victim doesn't recall this witness or failed to tell us about him. It is unknown why she didn't ask him for help.

AA III 595.

Although the Case Notes were part of the discovery, the State did not produce the name of the witness in the discovery. Moreover, Defense Counsel knew about this potentially exculpatory report during his trial preparations but did not seek the identity of the witness until nearly two years after the incident. On October 21, 2009, Counsel filed "Defendant's Motion to Dismiss Based Upon the State's Failure to Preserve Exculpatory Evidence, and Motion to Dismiss Due to the State's Failure to Provide Brady Material." The very next day, October 22, 2009, Counsel sent the defense investigator an email indicating that the State believed it had found the missing witness and provided the name, Andre Randall. The handwritten notes on the email (possibly notes from either Counsel or the investigator) indicated that the address provided was "no good." AA I 0068.

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Five days later, at calendar call on October 27, 2009, Counsel withdrew the Motion to Dismiss and stated:

> "Oh, Judge, the defense is actually withdrawing that motion. I spoke with Mr. Hendricks and we have come to an agreement regarding the witness at issue and getting some leeway during the cross-examination regarding that witness—during the cross-examination of the detective."

AA I 0071.

Despite learning the name of the material witness on October 22, 2009, the case file is devoid of any indication that Defense Counsel attempted to locate or interview Andre Randall beyond checking the validity of the address provided by the State. According to the Motion to Dismiss filed on October 21, 2009, Counsel knew that the investigating detectives spoke to a witness who "described the demeanor of the young girl as normal, unemotional, and unafraid." AA I 0058. In other words, the Motion to Dismiss makes clear that Counsel knew the materiality and the exculpatory value of Randall's statement.

Instead of taking measures to locate and interview Andre Randall, Counsel simply made an agreement with the State to allow "leeway" when questioning the detective at trial. In light of the potentially exculpatory value of Randall's testimony, Counsel should have taken additional measures to locate Randall. It is inexplicable that Counsel would make an agreement for "leeway" while cross-

examining the detective before first attempting to locate Randall. By withdrawing the Motion to Dismiss, Counsel withdrew a significant Brady issue in exchange for an illusory promise of "leeway."

On November 3, 2009, at the end of the second day of trial, the State announced that they found Andre Randall and intended to produce him as a witness on the third and final day of trial. AA III 0610-0611. The State noted for the record that the "black male" was not on the witness list, but that they "found him so that he's available to defense counsel." AA III 0610. The State further elaborated:

> Mr. Hendricks: He's going to be here tomorrow morning at 10:00 a.m. My concern is this, is he's not on our witness list, but we would still like to call him. And I want to make sure that defense counsel doesn't have an objection because they're actually the ones who wanted him and made a motion to – to dismiss the whole case because they didn't have him.

AA III 0610-0611.

At that point, Defense Counsel agreed to allow the State to produce Randall as a witness.

> Mr. Maningo: Yeah, that's fine. I don't have an objection. I'm not worried about – **I know that the reason he wasn't on**

the witness list at the time is because neither one with of us knew who this person was. AA III 0611

The Court agreed to allow Randall to testify. The State then indicated that it would make Randall available to speak with Defense Counsel the next morning before testifying.

Randall's testimony proved valuable to the defense. He testified that the girl "didn't even look mad." AA III 0681, 0684. He also agreed that the man (Adams) "wasn't dragging the girl or pulling her along or anything like that." AA III 0684. In fact, he testified that the girl was "Just walking—walking along. I thought it was normal day, you know, coming home from school." AA III 0684. He testified that he would have "called the cops" if he had seen "a man dragging a girl up those stairs who was crying and shaking." AA III 0685.

Knowing that Randall's testimony would be material and exculpatory, Counsel should have objected to the State's late disclosure and requested a continuance of the trial to have adequate time to interview Randall and develop the defense strategy. Under Brady v. Maryland, "[s]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Furthermore, "Brady has no good faith or inadvertence defense." Gantt v.

Roe, 389 F.3d 908, 912 (9th Cir. 2004). The Ninth Circuit has consistently held that this type of due process violation may be cured by a "belated disclosure" of the evidence "***so long as the disclosure occurs 'at a time when disclosure would be of value to the accused.***"' United States v. Gamez-Orduno, 235 F.3d 453, 461 (9th Cir. 2000) (emphasis added).

In Gamez-Orduno, the district court granted the defendant a two-month continuance to afford the defendant "ample time to prepare" for his hearing. Id. at 462. On appeal, the Ninth Circuit found that "Because of the continuance, disclosure ultimately 'occurred at a time when it [was] of value to the accused.'" Id. at 462, *citing* United States v. Span, 970 F.2d 573, 583 (9th Cir. 1992).

Additionally, in Tennison v. City and County of San Francisco, the Ninth Circuit relied on Gamez-Orduno to find that a Brady violation may be cured by late disclosure "so long as the disclosure occurs at a time *when disclosure would be of value to the accused.*" 570 F.3d 1078, 1093 (9th Cir. 2009), *citing* Gamez-Orduno, 235 F.3d at 461. The Tennison Court reasoned that Tennison had been prejudiced because he learned about a tape of a material statement on the second to last day of a hearing, which was "much too late for the disclosure to be of value to him." Tennison, 570 F.3d at 1093.

The instant case is similar to Tennison in that the State produced Randall, a material and exculpatory witness, on the last day of trial. Randall's testimony was

material because he testified regarding Mr. Adams and Valles' demeanor leading up to the incident in question, which differed substantially from Valles' allegations that Mr. Adams forced her and dragged her to the apartment. Additionally, Randall's testimony constituted exculpatory evidence because Randall explained that Valles was not in duress, which supported the defense theory of consent. Because Randall was such a valuable witness, Counsel would have needed sufficient time to interview Randall and prepare the defense strategy. Accordingly, the State's production of Randall as a witness on the last day of trial did not allow Randall to be a valuable witness for the defense. Therefore, Counsel should have requested a continuance of the trial to allow time to interview Randall and adequately assess the exculpatory value of his testimony before proceeding further with the trial.

Had Counsel located and interviewed Randall at the outset of the case or requested a continuance once the State located Randall, Counsel could have done a more thorough investigation, fleshed out the defense narrative, and used Randall's testimony effectively. The detectives interviewed Randall on December 20, 2007, which was 685 days (1 year, 10 months, and 15 days) before he testified at trial. Counsel should have taken measures to locate Randall or compel the State to produce him as a witness long before trial.

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When the State produced Randall as a witness on the third day of trial, Counsel did not have time to prepare to examine Randall. Although Randall's testimony was ultimately favorable for the defense, Counsel was not in a position to use that testimony effectively. Had Counsel interviewed Randall at the outset or sought a continuance that allowed him sufficient time for preparation, there is a high probability that Counsel would have been in a position to corroborate Randall's powerfully exculpatory testimony.

To reiterate, Mr. Adams was charged by way of Information on January 31, 2008. The record does not show that Counsel made any attempts to locate Randall until October 22, 2009, which was only eleven (11) days before trial. AA I 0068. In other words, Counsel did not adhere to his duty to "conduct careful factual and legal investigations and inquiries with a view to developing matters of defense" because he waited until eleven (11) days before trial to search for a material and potentially exculpatory witness. *See*, Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 433, 537 P.2d 473 (1975).

In sum, had Randall's identity been conveyed to the defense early on, as required by Brady and progeny, Counsel would have been in a position to properly develop the defense theme and locate additional evidence to corroborate the exculpatory statement. Absent this critical step, Counsel was not in a position to make the strategic decision to withdraw the Motion to Dismiss or to negotiate

"leeway" for cross-examining the detective. Counsel's decisions to withdraw his Motion, not seek a continuance, and bargain for the illusory result of "leeway," were fundamentally unreasonable choices not within the ambit of acceptable trial strategy and undeniably detrimental to Mr. Adams' right to a fair trial.

ii. Prejudice

The result of the trial would have been different if Counsel had interviewed Randall before trial and used Randall's testimony to develop the defense narrative. Counsel could have used Randall's testimony to discredit the State's witnesses who testified that Valles was in distress and being dragged by Mr. Adams. Although the jury heard from Randall at trial, Mr. Adams did not have the benefit of preparing his defense knowing that Randall would be available to testify. Accordingly, the outcome of the trial would have been different if Counsel had developed the defense narrative around Randall's testimony. Counsel would have been able to cross-examine the State's witnesses and set up the defense knowing that Randall's testimony would corroborate the narrative.

Therefore, Mr. Adams suffered prejudice because the result of the trial would have been different had Counsel interviewed Randall prior to trial because Counsel would have been able to give the jury evidence to support the defense narrative while effectively undermining the credibility of the State's witnesses. Consequently, Mr. Adams' conviction must be overturned.

2. COUNSEL FOR MR. ADAMS ADOPTS ALL ISSUES RAISED BY MR. ADAMS IN HIS *PRO PER* PETITION FOR WRIT OF HABEAS CORPUS AND RESPECTFULLY REQUESTS THAT THIS COURT CONSIDER AND ISSUE A WRITTEN DECISION WITH REGARD TO EACH OF THESE ARGUMENTS.

Mr. Adams filed a *pro per* Petition for Writ of Habeas Corpus on September 11, 2012. In his Petition, Mr. Adams raised the following issues.

1. The conviction against Mr. Adams must be reversed because Counsel caused a structural error by failing to remove Juror No. 7 (Prospective Juror No. 156) from the jury panel after Juror No. 7 disclosed that she knew the presiding judge socially and knew one of the investigating officers.

In his *pro per* Petition, Mr. Adams contended that he received ineffective assistance of counsel for counsel's failure to remove Juror No. 7 from the jury panel.

Counsel for Mr. Adams supplements the *pro per* Petition with the following case law regarding structural error, ineffective assistance of counsel, and the right to an impartial jury.

A structural error occurs when the error is "so intrinsically harmful [to the concept of a fair trial] as to require automatic reversal...without regard to their effect on the outcome [of the proceeding.]" Knipes v. State, 124 Nev. 927, 934, 192 P.3d 1178 (2008). A structural error means that the "government is not entitled to deprive the defendant of a new trial by showing that the error was 'harmless beyond a reasonable doubt.'" Weaver v. Massachusetts, 137 S.Ct. 1899, 1910, 198

L.Ed.2d 420 (2017), *citing*, Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Accordingly, in the case of a structural error, the defendant is entitled to reversal "regardless of the error's actual 'effect on the outcome.'" Weaver, 137 S.Ct. at 1910.

When a structural error is raised for the first time under an ineffective-assistance claim, the petitioner bears the burden to show (1) the attorney's deficient performance, and (2) prejudice. Weaver, 137 S.Ct. at 1910. To establish deficient performance, the defendant must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Wiggins v. Smith, 539 U.S. 510, 521 (2003) (*quoting* Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To show prejudice, "the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.'" Weaver, 137 S.Ct. at 1911, *citing*, *Strickland*, 466 U.S. at 694. The petitioner can show prejudice by showing either that (1) there was a reasonable probability that but for counsel's errors, the result of the proceeding would have been different; or (2) counsel's errors rendered the trial fundamentally unfair. Weaver, 137 S.Ct. at 1911.

The trial in this case was fundamentally unfair because Counsel's errors caused a violation of Mr. Adam's constitutional right to an impartial jury. The Sixth Amendment to the Constitution guarantees an accused the right to be judged by an impartial jury, which means that juror can "lay aside his impression or

opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Moreover, a prospective juror should be removed for cause when the prospective juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Preciado v. State, 130 Nev. 40, 44, 318 P.3d 176 (2014).

In this case, Counsel caused a structural error by failing to challenge Juror No. 7 remaining on the jury panel after she disclosed that she had known the judge socially and knew one of the State's witnesses. Specifically, trial counsel was deficient for failing to challenge Juror No. 7, Mrs. Clayton's suitability to sit on the jury when she admitted that she had known the trial judge socially for twenty (20) years, that she had worked with the judge's wife as a deputy attorney general, and that she admitted that she knew LVMPD Crime Scene Analyst Shayla Joseph. Given her relationship with the judge, her knowing one of the State's witnesses, and her having worked as a prosecutor for the State of Nevada, Trial Counsel should have challenged Juror No. 7's ability to be unbiased and should have sought her removal from the jury panel.

Accordingly, Juror No. 7, Mrs. Clayton was a biased juror. Her presence on the jury panel undermined the integrity of the proceeding and rendered the trial fundamentally unfair. Mr. Adams had the unequivocal constitutional right to be

judged by unbiased triers of fact. The Constitution does not provide that any jurors can be biased because one biased juror will taint the entire group. In this case, Juror No. 7 could not have been impartial, and her presence on the jury rendered the trial fundamentally unfair. Therefore, a structural error exists, and the judgment against Mr. Adams should be reversed. Mr. Adams must receive a new trial.

2. Mr. Adams' rights were violated because the State failed to preserve a recording of an interview with an eyewitness, Andre Randall, who would have provided exculpatory evidence for Mr. Adams.

In the *pro per* Petition, Mr. Adams asserted that that his Fifth, Sixth, and Fourteenth Amendment rights were violated because law enforcement failed to preserve an interview of an eyewitness, Andre Randall, whose testimony at trial proved to be exculpatory for Mr. Adams.

Counsel for Mr. Adams supplements the *pro per* Petition with the following case law concerning law enforcement's duties to preserve exculpatory evidence.

Law enforcement officers have a duty to preserve material exculpatory evidence. Daniels v. State, 114 Nev. 261, 266-267, 956 P.2d 111 (1998). "Evidence is material when there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different." Jackson v. State, 128 Nev. 598, 613, 291 P.3d 1274, 1284 (2012).

After showing that the evidence was material, the defendant must show that "the failure to gather evidence was the result of negligence or bad faith." Id.

> When mere negligence is involved, no sanctions are imposed, but the defendant can still examine the prosecution's witnesses about the investigative deficiencies. When gross negligence is involved, the defense is entitled to a presumption that the evidence would have been unfavorable to the State. In cases of bad faith, we conclude that dismissal of the charges may be an available remedy based upon the evaluation of the case as a whole. *Daniels*, 114 Nev. at 267.

Moreover, under Brady v. Maryland, the United States Supreme Court held that "[s]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87.

a. Andre Randall's Statement was Material Evidence

As part of the investigation into Valles' allegations, the LVMPD detectives interviewed Andre Randall, a resident of the apartment complex. The detectives made an entry in their Case Notes about this interview on December 20, 2007, just six days after the alleged incident between Mr. Adams and Valles.

The Case Notes produced by the State in discovery show that Randall told the detectives that he had walked closely to Mr. Adams and Valles and that "the two were not touching and the girl didn't appear to be in distress nor emotional." At trial, Det. Lebario, the lead detective, testified that he did not have Randall fill out a report, did not prepare a report himself, and did not record the interview.

AA III 580-581. To the contrary, Randall testified at trial that the detectives knocked on his door with "A little recorder" and conducted a taped interview. AA III 677.

At trial, Randall explained that Valles was walking freely with Mr. Adams. Randall testified at trial that he saw Valles walking with Mr. Adams, and that she did not look "mad." AA III 681. Randall even testified that he recalled telling the police that Valles and Mr. Adams were walking side by side and not touching each other. AA III 684.

Randall's testimony was material and favorable for the defense. Additionally, Randall clearly testified at trial that the detectives arrived at his house with a recorder and conducted a taped interview. That recording was never provided to the defense. The investigating detectives should have preserved the recording and given it to the State to turn over to the defense. Had the defense been provided this evidence, the result of the trial would have been different because Counsel could have used Randall's recorded statement to develop a more comprehensive theory of defense.

Although the State produced Randall as a witness for trial, confronting Randall only at trial was not enough. Had the defense been provided the recording of the interview, Defense Counsel could have done a more thorough investigation prior to trial. Moreover, the defense could have used the recorded interview to flesh

out the defense theory and develop the trial strategy. Although Defense Counsel knew the basic premises of Randall's interview because of the Case Notes entry, Defense Counsel was not privy to the details of the interview. The Case Notes do not indicate how long the detectives spoke with Randall or what other information Randall may have provided to the detectives. Additionally, Defense Counsel could not have known whether Randall forgot or omitted any details during the nearly two-year span between the time of the incident and trial. Had the recording been preserved and provided to the defense, there is a reasonable probability that the outcome of the trial would have been different because Counsel could have used the recording to structure the theory of defense.

b. The Officers Chose not to Preserve the Recording of Randall's Statement in Bad Faith

The investigating detectives chose not to preserve Randall's statement in bad faith. The detectives knew that the evidence was material, favorable for the defense, and would affect the outcome of the proceedings because the detectives' noted inconsistencies between Valles' allegations and Randall's statement in their Case Notes. *See*, Jackson, 128 Nev. at 613. In the Case Notes produced by the State in discovery, the detectives wrote:

> When we interviewed the victim previously, she told us the only person she saw while with the suspect was her friend Jonathon. It is unknown why the victim doesn't recall this witness or failed to tell us about him. It is unknown why she didn't ask him for help.

At trial, Detective Lebario, the lead detective assigned to the case testified that Randall did not say anything "noteworthy" and that "I didn't see any need to—to get a report from him." AA III 581. However, Randall specifically testified that the detectives went to his house with a recorder and took a recorded statement. AA III 679.

Given the materiality of Randall's statement, the detectives should have preserved the recording and provided it to the State to turn over to the defense. Because the detectives knew the statement was material, made a recording, and did not preserve the recording, they acted in bad faith, and the charges against Mr. Adams should have been dismissed. At this stage in the proceedings, this issue must be explored in an evidentiary hearing to determine the extent of the detectives' bad faith.

Even if the court does not find that the detectives acted in bad faith, the court should find that the detectives' failure amounted to gross negligence. The detectives knew that the evidence would be favorable for Mr. Adams, but they chose not to preserve a recorded statement. Consequently, Mr. Adams should have been entitled to an instruction at trial that the evidence would have been unfavorable to the State.

Although the State produced Mr. Randall as a witness on the last day of trial, Mr. Adams was prejudiced because his Counsel did not have the recording of

Randall's statement to use in preparing for trial. *See*, Daniels, 114 Nev. at 267, *citing* Howard v. State, 95 Nev. 580, 582, 600 P.2d. 214, 215-216 (1979). Having a material witness appear on the last day of trial does not satisfy the mandates of due process. The detectives knew Randall's testimony was material, and they should have given the recording to the State to turn over to the defense. Due process could have only been satisfied by the defense receiving this material evidence in a timely fashion so that the defense could have used the information in fashioning the defense strategy. Consequently, this Court should reverse the conviction against Mr. Adams and grant Mr. Adams a new trial.

3. Mr. Adams' right to effective assistance of counsel was violated because Counsel failed to investigate the case and failed to prepare the case for trial.

In his *pro per* Petition, the Appellant alleged that Trial Counsel was ineffective for failing to conduct an adequate pretrial investigation AA IV 919.

A defense attorney's failure to conduct an adequate investigation denies his client the Sixth Amendment right to the effective assistance of counsel. *Strickland*, 466 U.S. 668; *see also*, Warner v. State, 102 Nev. 635, 638, 729 P.2d 1359, 1361 (1986). Moreover, in Nevada, effective counsel must "conduct careful factual and legal investigations and inquiries with a view to developing matters of defense in order that he may make informed decisions on his client's behalf."

Jackson, 91 Nev. at 433, *citing*, *In re* Saunders, 2 Cal. 3d 1033, 472 P.2d 921, 926 (1970), *holding modified by* People v. Duvall, 9 Cal. 4th 464, 886 P.2d 1252 (1995).

Here, Trial Counsel was ineffective for failing to conduct a pretrial investigation that would have forced the prosecutor to disclose a key witness that was not identified until later in the second day of trial, when the State announced they were planning on calling him to testify on the third and final day of trial. AA III 610- 611. Had Trial Counsel done the investigation, Trial Counsel would have known about the witness prior to trial and could have developed the defense theory knowing what the witness would testify to. The Appellant suffered prejudice as a result of Trial Counsel's failures because he could have prepared for trial effectively and developed his defense differently.

As such, the District Court erred by denying the Appellant's claim as meritless. At a minimum, the District Court should have conducted an evidentiary hearing to expand the record on this issue.

4. Mr. Adams' right to an impartial jury was violated because the Court allowed the State to show pictures of Mr. Adams in jail clothes.

In the *pro per* Petition, Mr. Adams asserted that his Fifth, Sixth, and Fourteenth Amendment rights under the U.S. Constitution were violated because he did not receive an impartial jury.

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Counsel for Mr. Adams supplements the *pro per* Petition with the following case law concerning a defendant's right to be judged by an impartial jury.

The Sixth Amendment to the Constitution guarantees an accused the right to be judged by an impartial jury, which means that a juror can "lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin, 366 U.S. at 723. Accordingly, a prospective juror should be removed for cause when the prospective juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Preciado, 130 Nev. at 44.

Mr. Adams contends that his right to an impartial jury was violated because the State showed a photograph of Mr. Adams in jail clothes to the jury. Although Mr. Adams objected at trial, he raises this issue as a habeas issue because there were attorneys on the jury panel who would have known that he wore jail clothes in the photograph. Accordingly, Mr. Adams submits that the trial court allowed his rights to be violated because the attorneys on the jury panel would have explained to the other jurors that Mr. Adams was incarcerated during the photograph, and this discussion would have prejudiced the jury. Therefore, this Court should reverse Mr. Adams' conviction and grant him a new trial.

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5. Mr. Adams' rights were violated because he was convicted on multiple counts for the same conduct.

In his *pro per* Petition, Mr. Adams argued that his Fifth, Eighth, and Fourteenth Amendment rights under the U.S. Constitution were violated because he was convicted on multiple counts for the same conduct.

Counsel for Mr. Adams supplements the *pro per* Petition with the following case law concerning double jeopardy and the redundancy principles.

Although the Nevada Supreme Court reviewed this issue on direct appeal, Nevada's legislature has shown that it does not intend "to separately punish multiple acts that occur close in time and make up one course of criminal conduct." Wilson v. State, 121 Nev. 345, 356, 114 P.3d 285, 293 (2005). Moreover, the courts have declared convictions redundant when "the facts forming the basis for two crimes overlap, when the statutory language indicates one rather than multiple criminal violations was contemplated, and when legislative history shows that an ambiguous statute was intended to assess one punishment." Id.

The distinction turns on whether the defendant committed a single act or separate, individual acts. Id. at 356. In Wilson, the Nevada Supreme Court relied on Crowley v. State, 120 Nev. 30, 83 P.3d 282 (2004) and reversed Wilson's conviction by determining that the four pictures of child pornography were taken in a short period of time and that they constituted one single violation. Wilson, 121 Nev. at 357-358.

In Crowley v. State, the Nevada Supreme Court found that Crowley's convictions were redundant because "Crowley's act of rubbing the male victim's penis on the outside of his pants was a prelude to touching the victim's penis inside his underwear and the fellatio." 120 Nev. 30, 34, 83 P.3d 282, 285 (2004).

Here, the Nevada Supreme Court relied upon Crowley and Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 549-550 (1990), to uphold Mr. Adams' conviction. However, the Nevada Supreme Court erred in finding that the facts of the case supported convictions on separate charges. The facts of the case do not support this finding.

Nevada law has shown that the Double Jeopardy clause extends to redundant convictions. Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749 (2003) (*overruled on other grounds by* Jackson v. State, 128 Nev. 598, 291 P.3d 1274 (2012)). Given these principles, Mr. Adams' case is most like Crowley because the act of inserting a finger before the penis was not a separate act, but rather, a prelude to the sexual act as a whole. Mr. Adams' actions were not interrupted. *See*, Wright, 106 Nev. at 650 (The Court affirmed convictions for both attempted sexual assault and sexual assault because the accused stopped his actions during the time that a car passed the area). *See also*, Crowley, 120 Nev. at 33-34.

Likewise, the battery and kidnapping charges are also redundant because they stemmed from the same act of Mr. Adams allegedly grabbing Valles' arm and

forcing her to go with him. The State charged Mr. Adams with both battery with intent to commit a crime and first-degree kidnapping for the same conduct. As discussed on direct appeal, the battery with intent to commit a crime was a lesser-included offense of the first-degree kidnapping. Although the Nevada Supreme Court held that Mr. Adams' claim on appeal was without merit, Mr. Adams suffered from being convicted twice for the same conduct, thus violating the Double Jeopardy Clause.

Accordingly, the Nevada Supreme Court upheld Mr. Adams' conviction in violation of the Double Jeopardy clause and redundancy principles of the Fifth Amendment to the U.S. Constitution. For these reasons, Mr. Adams' convictions must be reversed because the redundant convictions violate Mr. Adams' constitutional right against double jeopardy.

6. Mr. Adams' rights were violated because the prosecutor shifted the burden of proof to the defense and injected his personal feelings about Mr. Adams into the arguments. Although the Court sustained Mr. Adams' objections, the prosecutor continued to interject his own opinion into the trial.

In his *pro per* petition, Mr. Adams asserted that his rights were violated because the prosecutor continuously shifted the burden of proof to the defense during the closing arguments, misstated evidence, commented on Mr. Adams' failure to produce evidence, and injected his personal feelings into the argument. On direct review, the Nevada Supreme Court found that Mr. Adams had not demonstrated prejudice such that the improper comments would "infect the

proceedings with unfairness as to make the results a denial of due process." Browning v. State, 124 Nev. 517, 533, 188 P.3d 60, 72 (2008). Mr. Adams contends that the prosecutor's improper comments during trial shifted the burden of proof, misstated the evidence, and injected his personal feelings into the proceedings. For these reasons, Mr. Adams was prejudiced and did not receive a fair trial. Therefore, the conviction must be reversed.

7. Mr. Adams' rights to an impartial jury and a fair trial were violated because the Court allowed a juror to remain on the jury after the juror disclosed that she knew the judge socially and knew the crime scene analyst involved in the case.

In his *pro per* Petition, Mr. Adams contended that his Fifth, Sixth, and Fourteenth Amendment rights under the U.S. Constitution were violated because he did not receive an impartial jury.

Counsel for Mr. Adams supplements the *pro per* Petition with the following case law concerning the right to an impartial jury.

The Sixth Amendment to the Constitution guarantees an accused the right to be judged by an impartial jury, which means that a juror can "lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin, 366 U.S. at 723. Likewise, a prospective juror should be removed for cause when the prospective juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Preciado, 130 Nev. at 44.

Here, Mr. Adams submits that his right to an impartial jury was violated because the Court allowed Ms. Clayton, Juror No. 7 (Prospective Juror No. 156), to remain on the jury even after she disclosed that she knew the Judge socially and knew LVMPD Crime Scene Analyst Shayla Joseph.

On the first day of trial, Ms. Clayton, Prospective Juror No. 156 (Later Juror No. 7) disclosed that she knew the trial judge personally.

> Prospective Juror No. 156: "Your Honor, I'm juror number 156. You and I have met socially several times over the past 20 years. I worked with your wife at the Attorney General's office back in the 1990s."

AA I 95-96.

Ms. Clayton made the record clear that she knew the judge socially, was a former prosecutor for the state of Nevada, and knew the crime scene analyst in the case. These personal relationships would cause Ms. Clayton to give more credence to the State's evidence, and ultimately would have influenced the remainder of the jury. As a former prosecutor, the other jurors would have looked to Ms. Clayton for guidance, and her guidance would not have been impartial. This would have impacted the other jurors to the extent that they could not have been able to lay aside their opinions to render a verdict based on the evidence. Consequently, the

jury was not impartial. For this reason, the conviction must be reversed, and Mr. Adams must receive a new trial.

8. Mr. Adams suffered cruel and unusual punishment because he was convicted and punished for multiple counts for the same conduct.

In his *pro per Petition*, Mr. Adams contended that his Fifth, Eighth, and Fourteenth Amendment rights under the U.S. Constitution were violated because he was convicted on multiple counts of sexual assault that occurred out of the same incident.

Counsel for Mr. Adams supplements the *pro per* Petition with the following case law concerning cruel and unusual punishment.

The Eighth Amendment requires the district court to consider the individual to be sentenced, as well as the charged crime. Martinez v. State, 114 Nev. 735, 737, 961 P.2d 143 (1998); U.S. Const. amend. VIII. The Eighth Amendment mandates that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." "The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

The Nevada Supreme Court has explained "a sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense

as to shock the conscience." Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246 (2004), *quoting*, Blume v. State, 112 Nev. 472, 475, 915 P.2d 282 (1996).

Here, Mr. Adams was convicted of redundant counts of sexual assault, in violation of the Double Jeopardy Clause of the Fifth Amendment. *Supra*, at 26. Because the charges against Mr. Adams were redundant, he sustained multiple convictions for the same conduct. As a result, the sentencing court imposed consecutive sentences for each count.

As explained in Wilson, the Nevada legislature has shown that it does not intend to "separately punish multiple acts that occur close in time and make up one course of criminal conduct." 121 Nev. at 345. However, this is precisely what happened in this case. The jury convicted Mr. Adams on multiple counts for the same conduct, and the court imposed consecutive sentences on each count.

Consequently, Mr. Adams' consecutive sentences are disproportionate because he is serving multiple sentences for the same conduct. Therefore, Mr. Adams has been subjected to cruel and unusual punishment, and his conviction must be reversed.

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XI. CONCLUSION

Appellant respectfully requests that this Court vacate his conviction and order a new trial or, in the alternative, remand the matter back to District Court for an evidentiary hearing on the issues presented by Appellant.

Respectfully submitted this 20th day of April 2022.

By: _____

JAMES A. ORONOZ, ESQ.
Nevada Bar No. 6769
Attorney for Appellant

XII. CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the type volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more and contains 9088 words. I understand that I may be subject to sanctions in the event that the accompanying brief in not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 20th day of April 2022.

Respectfully submitted,

By: _____

JAMES A. ORONOZ, ESQ.
Attorney for Appellant

XIV. CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 20th, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD
Nevada Attorney General

STEVEN B. WOLFSON
Clark County District Attorney

By /s/ *Jan Ellison*
Oronoz & Ericsson, LLC