

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD MICHAEL ADAMS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Jun 15 2022 02:10 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 83917

RESPONDENT'S APPENDIX

JAMES A. ORONoz, ESQ.
Nevada Bar #006769
Oronoz & Ericsson, LLC
1050 Indigo, Suite 120
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(702) 878-2889

STEVEN B. WOLFSON
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200 Lewis Avenue
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(702) 671-2500
State of Nevada

AARON D. FORD
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Counsel for Appellant

Counsel for Respondent

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 15th day of June, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

JAMES A. ORONoz, ESQ.
Counsel for Appellant

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

/s/ J. Hall

Employee, Clark County
District Attorney's Office

JV/Maricel Leon/jh

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

October 15, 2012

08C241003

The State of Nevada vs Edward M Adams

October 15, 2012

8:15 AM

State's Request to Appoint Counsel

HEARD BY: Barker, David

COURTROOM: RJC Courtroom 11B

COURT CLERK: Tia Everett

RECORDER: Cheryl Carpenter

PARTIES Kelly Williams, Deputy District Attorney, present on behalf of the State. Defendant
PRESENT: not present in custody with Nevada Department of Corrections.

JOURNAL ENTRIES

- Kelly Williams, Deputy District Attorney, present on behalf of the State. Defendant not present in custody with Nevada Department of Corrections.

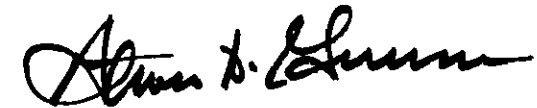
Ms. Williams advised the State is seeking to have the Court appoint counsel based on the fact that the Supreme Court continues to remand cases in which Defendants are serving lengthy sentences. Court noted on 8/30/2012 the Supreme Court affirmed the conviction and Defendant filed his post conviction writ on 9/12/2012. COURT ORDERED, State's Request GRANTED and matter SET for Appointment of Counsel. FURTHER ORDERED, all upcoming hearings set for 11/21/2012 VACATED and will be addressed with new counsel.

NDC

10/22/2012 8:15 AM APPOINTMENT OF COUNSEL

ORDR

JAMES A. ORONoz, ESQ
Nevada Bar No. 6769
ORONoz & ERICSSON LLC
700 SOUTH 3RD STREET
Las Vegas, Nevada 89101
Telephone: (702) 878-2889
Facsimile: (702) 522-1542
jim@oronozlawyers.com
Attorney for Defendant



CLERK OF THE COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,
Plaintiff,

vs.

EDWARD ADAMS,
Defendant.

CASE NO. 08C241003

DEPT. NO. XIX

EX PARTE ORDER OF APPOINTMENT

IT IS HEREBY ORDERED THAT Theodore N. Hariton MD., is appointed to review medical records and investigate issues pertaining to the alleged sexual assault in the above-captioned case.

IT IS FURTHER ORDERED that Dr. Hariton's fees are not to exceed the amount of \$5,000.00 without further order of the court.

AUG 31 2015

DATED this ____ day of ____, 2015.

JUDGE WILLIAM KEPHART

Prepared & Submitted By:

for Judge William Kephart

JAMES A. ORONoz, ESQ.


CLERK OF THE COURT

MOT
JAMES A. ORONOS, ESQ.
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Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY NEVADA

EDWARD ADAMS,
Petitioner,

vs.

THE STATE OF NEVADA,
Respondent.

CASE NO.: 08C241003

DEPT: XIX

**MOTION TO PLACE ON CALENDAR FOR THE PURPOSE OF OBTAINING SANE
EXAM PHOTOGRAPHS FROM THE DISTRICT ATTORNEY'S OFFICE**

COMES NOW, Petitioner, EDWARD ADAMS, by and through his attorney, JAMES A.
ORONOS, ESQ., and hereby requests that the above-entitled matter be placed on the Court's
calendar for the purpose of obtaining the SANE exam photographs from the District Attorney's
office in order to file the Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-
Conviction).

///

///

///

///

1 This Motion is made and based on the pleadings and papers on file herein, as well as any
2 oral arguments of counsel adduced at the time of hearing.

3 DATED this 5th day of May, 2016.

4 /s/ James A. Oronoz
JAMES A. ORONoz, ESQ.
5 Nevada Bar No. 6769
1050 Indigo Drive, Suite 120
6 Las Vegas, Nevada 89145
Attorney for Petitioner
7

8 **NOTICE OF MOTION**

9 YOU, AND EACH OF YOU, will please take notice that the undersigned will bring the
10 foregoing **MOTION TO PLACE ON CALENDAR FOR THE PURPOSE OF**
11 **OBTAINING SANE EXAM PHOTOGRAPHS FROM THE DISTRICT ATTORNEY'S**
12 **OFFICE** on for hearing on the 16 day of May, 2016, at the Clark
13 County Courthouse, 200 Lewis Avenue in District Court, Department XIX at the hour of
14 8: 30 a.m. or as soon thereafter as Counsel may be heard.

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 In order to investigate Mr. Adams' claims thoroughly, counsel requests that this Court
17 direct the district attorney's office to produce the SANE exam photographs in this case. As this
18 Court is aware, Dr. Theodore N. Hariton, MD, has been appointed to review records and assist
19 in the investigation necessary to support Mr. Adams' post-conviction claims. However,
20 Counsel has been unable to obtain the color photographs of the SANE examination, which are
21 key to Dr. Hariton's review.
22
23
24

WHEREFORE, Petitioner prays that this Honorable Court grant this Motion, and direct the State to provide Counsel with the color photographs of the victim's SANE examination.

DATED this 5th day of May, 2016.

Respectfully submitted,

/s/ James A. Oronoz
JAMES A. ORONoz, ESQ.
Nevada Bar No. 6769
1050 Indigo Drive, Suite 120
Las Vegas, Nevada 89145
Attorney for Petitioner

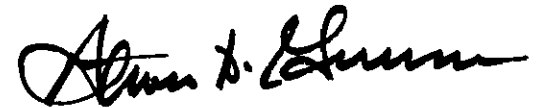
1 **CERTIFICATE OF SERVICE**

2 I hereby certify and affirm that this document was filed electronically with the Nevada
3 State District Court in Clark County, Nevada on May 5, 2016. Electronic service of the
4 foregoing document shall be made in accordance with the Master Service List as follows:
5

6 STEVEN WOLFSON
Clark County District Attorney
200 Lewis Avenue
7 Las Vegas, Nevada 89101
8 Motions@clarkcountyda.com

9 RYAN MACDONALD
Deputy District Attorney
10 200 Lewis Avenue
Las Vegas, Nevada 89101
11 ryan.macdonald@clarkcountyda.com

12
13 By: /s/ Rachael Stewart
14 An employee of Oronoz, Ericsson & Gaffney, LLC
15
16
17
18
19
20
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22
23
24



CLERK OF THE COURT

1 **OPPS**
STEVEN B. WOLFSON
2 Clark County District Attorney
Nevada Bar #001565
3 JAMES R. SWEETIN
Chief Deputy District Attorney
4 Nevada Bar #005144
200 Lewis Avenue
5 Las Vegas, Nevada 89155-2212
(702) 671-2500
6 Attorney for Plaintiff

7
8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA,
11
Plaintiff,
12
-vs-
13 EDWARD ADAMS,
#1969904
14
Defendant.
15

CASE NO: 08C241003
DEPT NO: XIX

16
17 **STATE'S OPPOSITION TO DEFENDANT'S MOTION TO PLACE ON CALENDAR**
FOR THE PURPOSE OF OBTAINING SANE EXAM PHOTOGRAPHS
18 **FROM THE DISTRICT ATTORNEY'S OFFICE**

19 DATE OF HEARING: MAY 16, 2016
TIME OF HEARING: 8:30 AM

20 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
21 District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and hereby
22 submits the attached Points and Authorities in Opposition to Defendant's Motion to Place on
23 Calendar for the Purpose of Obtaining Sane Exam Photographs from the District Attorney's
24 Office.

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

28 //

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On February 12, 2008, the State filed an Information charging Defendant Edward
4 Adams as follows: Count 1 – First Degree Kidnapping with Use of a Deadly Weapon (Felony
5 – NRS 200.310, 200.320, 193.165), Count 2 – Battery with Intent to Commit a Crime with
6 Use of a Deadly Weapon (Felony – NRS 200.400, 193.165), Counts 3 through 11 – Sexual
7 Assault with a Minor Under Fourteen Years of Age with Use of a Deadly Weapon (Felony –
8 NRS 200.364, 200.366, 193.165), and Count 12 – Open or Gross Lewdness (Gross
9 Misdemeanor – NRS 201.210). On October 28, 2009, the State filed an Amended Information
10 with the same charges.

11 On November 2, 2009, Defendant's jury trial commenced. On November 4, 2009, the
12 jury found Defendant guilty of Count 1 – First Degree Kidnapping, Count 2 – Battery with
13 Intent to Commit Sexual Assault, Counts 3, 4, 5, 6, 7, 8 and 11 – Sexual Assault, and Count
14 12 – Open or Gross Lewdness. The jury found Defendant not guilty of Counts 9 and 10.

15 On January 13, 2010, the district court sentenced Defendant as follows: Count 1 – to
16 60 months to life and \$,2932.00 in restitution; Count 2 – to 60 months to life, consecutive to
17 Count 1; Count 3 – to 120 months to life, consecutive to Count 2; Count 4 – to 120 months to
18 life, consecutive to Count 3; Count 5 – to 120 months to life, consecutive to Count 4; Count 6
19 – to 120 months to life, consecutive to Count 5; Count 7 – to 120 months to life, consecutive
20 to Count 6; Count 8 – to 120 months to life, consecutive to Count 7; Count 11 – to 120 months
21 to life, consecutive to Count 8; and Count 12 – to 12 months, concurrent with all other counts.
22 The court also imposed a special sentence of Lifetime Supervision to commence upon release
23 from any term of imprisonment, probation, or parole. The court also ordered Defendant to
24 register as a sex offender after any release from custody. The court entered the Judgment of
25 Conviction on February 2, 2010.

26 Defendant filed his Notice of Appeal on February 22, 2010. The Nevada Supreme
27 Court affirmed Defendant's Judgment of Conviction on July 26, 2012. Remittitur issued on
28 August 21, 2012.

1 On September 11, 2012, Defendant filed a Post-Conviction Petition for Writ of Habeas
2 Corpus. On October 15, 2012, the court appointed counsel for Defendant. On September 4,
3 2015, this Court entered an Ex Parte Order of Appointment to appoint Dr. Hariton to “review
4 medical records and investigate issues.” On May 5, 2016, Defendant filed a Motion to Place
5 on Calendar for the Purpose of Obtaining SANE Exam Photographs from the District
6 Attorney’s Office (“Motion”). The State herein responds to Defendant’s Motion.

7 ARGUMENT

8 **I. Defendant’s discovery request must be denied because Defendant is not entitled to** 9 **discovery at this juncture.**

10 Defendant requests that this Court direct the District Attorney’s Office to produce the
11 SANE exam photographs in order for Dr. Theodore N. Hariton to review the records and assist
12 in the investigation. Mot. at 2. However, this Court should deny Defendant’s request because
13 he is not entitled to discovery at this juncture. Rules regarding post-conviction discovery are
14 found in NRS 34.780:

15 1. The Nevada Rules of Civil Procedure, to the extent that they
16 are not inconsistent with NRS 34.360 to 34.830, inclusive, apply
to proceedings pursuant to NRS 34.720 to 34.830, inclusive.

17 2. *After the writ has been granted and a date set for the hearing,*
18 *a party may invoke any method of discovery available under the*
19 *Nevada Rules of Civil Procedure if, and to the extent that, the*
judge or justice for good cause shown grants leave to do so.

20 3. A request for discovery which is available under the Nevada
21 Rules of Civil Procedure must be accompanied by a statement of
the interrogatories or requests for admission and a list of any
documents sought to be produced.

22 (emphasis added). As articulated in the statute, any motions for discovery in the context of
23 post-conviction must occur *after* a writ has been granted, an evidentiary hearing has been set,
24 and only on the condition that good cause is shown.

25 NRS 34.780 is adopted from federal law.¹ A habeas petitioner does not enjoy the
26 presumptive entitlement to discovery of a traditional civil litigant. Bracy v. Gramley, 520 U.S.
27 899, 903-05, 117 S. Ct. 1793, 1796-97 (1997). Under the “good cause” standard, a court

28 ¹ See Testimony in regards to Assembly Bill 571, before the Senate Judiciary Committee, 63rd Nev. Leg. Session (1985),
Testimony of Brian Hutchins, Attorney General, and Assemblyman Robert Sader.

1 should grant leave to conduct discovery in habeas corpus proceedings only ““where specific
2 allegations before the court show reason to believe that the petitioner may, if the facts are more
3 fully developed, be able to demonstrate that he is . . . entitled to relief” Id. at 908-909,
4 117 S. Ct. at 1799. In habeas proceedings discovery is only available “in the discretion of the
5 court and for good cause shown” and is not “meant to be a fishing expedition for habeas
6 petitioners to explore their case in search of its existence.” See Rich v. Calderon, 187 F.3d
7 1064, 1067-68 (9th Cir. 1999) (internal quotation marks omitted). Applying the identical good
8 cause standard in federal habeas proceedings, federal circuit courts of appeal “will not find
9 that a district court erred by denying a fishing expedition masquerading as discovery.”
10 Stanford v. Parker, 266 F.3d 442, 460 (6th Cir. 2001).

11 Here, Defendant is not entitled to discovery because this Court has not granted a post-
12 conviction petition. Moreover, Defendant has not obtained this Court’s leave to do so after a
13 showing of good cause. Therefore, Defendant’s discovery request should be denied.

14 CONCLUSION

15 Based upon the foregoing, the State respectfully request that this Court denies
16 Defendant’s Motion to Place on Calendar for the Purpose of Obtaining SANE Exam
17 Photographs from the District Attorney’s Office.

18 DATED this 10th day of May, 2016.

19 Respectfully submitted,

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

22 BY /s/ JAMES R. SWEETIN
23 JAMES R. SWEETIN
24 Chief Deputy District Attorney
Nevada Bar #005144

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CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 10th day of MAY
2016, to:

JAMES ORONoz, ESQ.
jim@oronozlawyers.com

BY /s/ HOWARD CONRAD
Secretary for the District Attorney's Office
Special Victims Unit

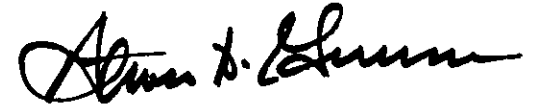
hjc/SVU

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ORDR

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff



CLERK OF THE COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,
Plaintiff,

-vs-

EDWARD ADAMS,
#1969904

Defendant.

CASE NO: 08C241003

DEPT NO: XIX

ORDER DENYING DEFENDANT'S MOTION OF MAY 16, 2016

DATE OF HEARING: MAY 16, 2016
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 16TH day of MAY, 2016, the Defendant not being present, IN PROPER PERSON, the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through NOREEN DEMONTE, Chief Deputy District Attorney, without argument, based on the pleadings and good cause appearing therefor,

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IT IS HEREBY ORDERED that DEFENDANT'S MOTION TO PLACE ON CALENDAR FOR THE PURPOSE OF OBTAINING SANE EXAM PHOTOGRAPHS FROM THE DISTRICT ATTORNEY'S OFFICE, shall be, and is, **DENIED**.

DATED this 23rd day of May, 2016.

Will Kysa
DISTRICT JUDGE

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

BY

for

NOREEN DEMONTE
Chief Deputy District Attorney
Nevada Bar #008213

hjc/SVU


CLERK OF THE COURT

MOT
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Telephone: (702) 878-2889
jim@oronozlawyers.com
Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY NEVADA

EDWARD ADAMS,
Petitioner,

vs.

THE STATE OF NEVADA,
Respondent.

CASE NO.: 08C241003

DEPT: XIX

SECOND MOTION TO PLACE ON CALENDAR FOR THE PURPOSE OF
OBTAINING SANE EXAM PHOTOGRAPHS FROM THE DISTRICT ATTORNEY'S
OFFICE

COMES NOW, Petitioner, EDWARD ADAMS, by and through his attorney, JAMES A. ORONoz, ESQ., and hereby requests that the above-entitled matter be placed on the Court's calendar for the purpose of obtaining the SANE exam photographs from the District Attorney's office in order to file the Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction).

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1 This Motion is made and based on the pleadings and papers on file herein, as well as any
2 oral arguments of counsel adduced at the time of hearing.

3 DATED this 31st day of August, 2016.

4 /s/ James A. Oronoz
5 JAMES A. ORONoz, ESQ.
6 Nevada Bar No. 6769
7 1050 Indigo Drive, Suite 120
8 Las Vegas, Nevada 89145
9 *Attorney for Petitioner*

10 **NOTICE OF MOTION**

11 YOU, AND EACH OF YOU, will please take notice that the undersigned will bring the
12 foregoing **MOTION TO PLACE ON CALENDAR FOR THE PURPOSE OF**
13 **OBTAINING SANE EXAM PHOTOGRAPHS FROM THE DISTRICT ATTORNEY'S**
14 **OFFICE** on for hearing on the ^{1 2} day of SEPTEMBER, 2016, at the Clark
15 County Courthouse, 200 Lewis Avenue in District Court, Department XIX at the hour of
16 8 : 3 0 a.m. or as soon thereafter as Counsel may be heard.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 Although a habeas petitioner is not presumptively entitled to discovery like a traditional
19 civil litigant, this Court may grant leave to conduct discovery upon a finding of good cause. See,
20 NRS 34.780; Bracy v. Gramley, 520 U.S.899, 908-909, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997).

21 Here, Mr. Adams shows good cause for this Court to grant his request to order the
22 district attorney's office to provide digital color photographs of the victim's SANE examination.
23 Mr. Adams submits that the digital color photographs are necessary to determine the viability of
24 his argument that trial counsel was ineffective for failing to request that an independent expert
review the SANE exam evidence prior to trial. Mr. Adams currently seeks to have Theodore N.
Hariton, MD, review the digital color photographs to determine the likelihood that consensual

1 sex occurred between Mr. Adams and the victim, which if true, could have provided support for
2 Mr. Adams' consent defense at trial.

3 To date, Counsel for Mr. Adams has tried diligently to obtain the photographs from the
4 SANE exam by various means, but he has been completely unable to obtain them.¹ Now, Mr.
5 Adams requests that this Court find good cause to order the district attorney's office to produce
6 the digital color photographs.

7 On May 5, 2016, Mr. Adams filed a Motion to Place on Calendar for the Purpose of
8 Obtaining SANE Exam Photographs from the District Attorney's Office. In that motion, Mr.
9 Adams requested that this Court direct the district attorney's office to produce the digital color
10 photographs of the victim's SANE exam. At that time, this Court had already appointed
11 Theodore N. Hariton, MD, to review the records and assist Counsel in investigating Mr. Adams'
12 post-conviction claims. Although Counsel provided Dr. Hariton copies of the black and white
13 SANE exam photographs, Dr. Hariton could not see the victim's injuries clearly enough to
14 make any determinations or be of any assistance in reviewing the evidence.

15 On May 16, 2016, this Court denied Mr. Adams' Motion and orally directed Counsel to
16 visit the evidence vault to obtain the required photographs. Counsel subsequently followed the
17 Court's instructions and reviewed all of the evidence in the vault. However, the evidence vault
18 does not have any of the photographs in its possession.

19 Now, Mr. Adams renews his request for this Court to order the district attorney's office
20 to produce the digital color photographs of the victim's SANE exam. Until Counsel is able to
21 obtain the photographs, he cannot effectively assist Mr. Adams in his post-conviction
22 proceedings because Dr. Hariton cannot review the evidence and provide an opinion as to
23 whether the injuries sustained by the victim could have been the result of consensual sex.

24 _____
¹ Counsel contacted previous counsel, and he visited the evidence vault.

1 CONCLUSION

2 WHEREFORE, Petitioner prays that this Honorable Court grant this Motion, and direct
3 the State to provide Counsel with the color photographs of the victim's SANE examination.

4 DATED this 31st day of August, 2016.

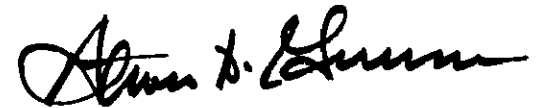
5 Respectfully submitted,

6 /s/ James A. Oronoz
7 JAMES A. ORONoz, ESQ.
8 Nevada Bar No. 6769
9 1050 Indigo Drive, Suite 120
10 Las Vegas, Nevada 89145
11 *Attorney for Petitioner*
12
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STEVEN WOLFSON
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101
Motions@clarkcountynyda.com

By: /s/ Rachael Stewart
An employee of Oronoz, Ericsson & Gaffney, LLC



CLERK OF THE COURT

1 **OPPS**
STEVEN B. WOLFSON
2 Clark County District Attorney
Nevada Bar #001565
3 JAMES R. SWEETIN
Chief Deputy District Attorney
4 Nevada Bar #005144
200 Lewis Avenue
5 Las Vegas, Nevada 89155-2212
(702) 671-2500
6 Attorney for Plaintiff

7
8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA,
11
Plaintiff,
12
-VS-
13 EDWARD ADAMS,
#1969904
14
Defendant.
15

CASE NO: 08C241003
DEPT NO: XIX

16
17 **STATE'S OPPOSITION TO DEFENDANT'S SECOND MOTION TO PLACE**
ON CALENDAR FOR THE PURPOSE OF OBTAINING SANE EXAM
18 **PHOTOGRAPHS FROM THE DISTRICT ATTORNEY'S OFFICE**

19 DATE OF HEARING: SEPTEMBER 12, 2016
TIME OF HEARING: 8:30 AM

20 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
21 District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and hereby
22 submits the attached Points and Authorities in Opposition to Defendant's Motion Second
23 Motion to Place on Calendar for the Purpose of Obtaining Sane Exam Photographs from the
24 District Attorney's Office.

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

28 //

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On January 31, 2008, the State filed an Information charging Defendant Edward Adams
4 as follows: Count 1 – First Degree Kidnapping with Use of a Deadly Weapon (Felony – NRS
5 200.310, 200.320, 193.165), Count 2 – Battery with Intent to Commit a Crime with Use of a
6 Deadly Weapon (Felony – NRS 200.400, 193.165), Counts 3 through 11 – Sexual Assault with
7 a Minor Under Fourteen Years of Age with Use of a Deadly Weapon (Felony – NRS 200.364,
8 200.366, 193.165), and Count 12 – Open or Gross Lewdness (Gross Misdemeanor – NRS
9 201.210). On October 28, 2009, the State filed an Amended Information with the same
10 charges.

11 On November 2, 2009, Defendant's jury trial commenced. On November 4, 2009, the
12 jury found Defendant guilty of Count 1 – First Degree Kidnapping, Count 2 – Battery with
13 Intent to Commit Sexual Assault, Counts 3, 4, 5, 6, 7, 8 and 11 – Sexual Assault, and Count
14 12 – Open or Gross Lewdness. The jury found Defendant not guilty of Counts 9 and 10.

15 On January 13, 2010, the district court sentenced Defendant as follows: Count 1 – to
16 60 months to life; Count 2 – to 60 months to life, consecutive to Count 1; Count 3 – to 120
17 months to life, consecutive to Count 2; Count 4 – to 120 months to life, consecutive to Count
18 3; Count 5 – to 120 months to life, consecutive to Count 4; Count 6 – to 120 months to life,
19 consecutive to Count 5; Count 7 – to 120 months to life, consecutive to Count 6; Count 8 – to
20 120 months to life, consecutive to Count 7; Count 11 – to 120 months to life, consecutive to
21 Count 8; and Count 12 – to 12 months, concurrent with all other counts.

22 The court also imposed a special sentence of Lifetime Supervision to commence upon release
23 from any term of imprisonment, probation, or parole. The court also ordered Defendant to
24 register as a sex offender after any release from custody. The court entered the Judgment of
25 Conviction on February 2, 2010.

26 Defendant filed his Notice of Appeal on February 22, 2010. The Nevada Supreme
27 Court affirmed Defendant's Judgment of Conviction on July 26, 2012. Remittitur issued on
28 August 21, 2012.

1 On September 11, 2012, Defendant filed a Post-Conviction Petition for Writ of Habeas
2 Corpus. On October 15, 2012, the court appointed counsel for Defendant. On September 4,
3 2015, this Court entered an Ex Parte Order of Appointment to appoint Dr. Hariton to “review
4 medical records and investigate issues.” On May 5, 2016, Defendant filed a Motion to Place
5 on Calendar for the Purpose of Obtaining SANE Exam Photographs from the District
6 Attorney’s Office (“Motion”). On May 10, 2016, the State filed its opposition and the Court
7 denied Defendant’s motion on May 16, 2016. The Court entered its order denying Defendant’s
8 Motion on June 1, 2016.

9 On August 31, 2016, Defendant filed a Second Motion to Place on Calendar for the
10 Purpose of Obtaining SANE Exam Photographs from the District Attorney’s Office (“Second
11 Motion”). The State’s response to Defendant’s Second Motion follows.

12 **ARGUMENT**

13 **I. DEFENDANT’S SECOND MOTION IS BARRED BY THE DOCTRINE OF** 14 **RES JUDICATA**

15 Defendant’s Second Motion is barred by the doctrine of res judicata. In fact, most of
16 the instant motion is identical to his previous Motion to Place on Calendar for the Purpose of
17 Obtaining SANE Exam Photographs from the District Attorney’s Office filed on May 5, 2016.
18 Defendant repeatedly alleges that he needs the color photographs from the SANE exam so that
19 his expert can review them to help determine if his prior counsel was ineffective. Defendant’s
20 petition was heard and denied by the court on May 16, 2016. Defendant’s Second Motion is
21 pending with this court but is not cognizable as Defendant failed to request leave of the court
22 to file such motion. As such, Defendant is further estopped from raising these claims again
23 pursuant to the principles of res judicata. See Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005)
24 (recognizing the doctrine’s applicability in the criminal context); see also York v. State, 342
25 S.W.3d 528, 553 (Tex. Crim. Appl. 2011). Accordingly, by simply continuing to file motions
26 with the same arguments, his motion is barred by the doctrine of res judicata. Id.; Hall v. State,
27 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, this Court should deny Defendant’s
28 Second Motion.

1 **II. DEFENDANT’S DISCOVERY REQUEST MUST BE DENIED BECAUSE**
2 **DEFENDANT IS NOT ENTITLED TO DISCOVERY AT THIS JUNCTURE.**

3 Defendant again requests that this Court direct the District Attorney’s Office to produce
4 the SANE exam photographs in order for Dr. Theodore N. Hariton to review the records and
5 assist in the investigation. Mot. at 2-3. However, this Court should deny Defendant’s newest
6 request because he is still not entitled to discovery at this juncture. Rules regarding post-
7 conviction discovery are found in NRS 34.780, which in pertinent part states:

8 *2. After the writ has been granted and a date set for the hearing,*
9 *a party may invoke any method of discovery available under the*
10 *Nevada Rules of Civil Procedure if, and to the extent that, the*
judge or justice for good cause shown grants leave to do so.

11 (emphasis added). As articulated in the statute, any motions for discovery in the context of
12 post-conviction must occur *after* a writ has been granted, an evidentiary hearing has been set,
13 and only on the condition that good cause is shown.

14 NRS 34.780 is adopted from federal law.¹ A habeas petitioner does not enjoy the
15 presumptive entitlement to discovery of a traditional civil litigant. Bracy v. Gramley, 520 U.S.
16 899, 903-05, 117 S. Ct. 1793, 1796-97 (1997). Under the “good cause” standard, a court
17 should grant leave to conduct discovery in habeas corpus proceedings only ““where specific
18 allegations before the court show reason to believe that the petitioner may, if the facts are more
19 fully developed, be able to demonstrate that he is . . . entitled to relief”” Id. at 908-909,
20 117 S. Ct. at 1799. In habeas proceedings discovery is only available “in the discretion of the
21 court and for good cause shown” and is not “meant to be a fishing expedition for habeas
22 petitioners to explore their case in search of its existence.” See Rich v. Calderon, 187 F.3d
23 1064, 1067-68 (9th Cir. 1999) (internal quotation marks omitted). Applying the identical good
24 cause standard in federal habeas proceedings, federal circuit courts of appeal “will not find
25 that a district court erred by denying a fishing expedition masquerading as discovery.”
26 Stanford v. Parker, 266 F.3d 442, 460 (6th Cir. 2001).

27 //

28

¹ See Testimony in regards to Assembly Bill 571, before the Senate Judiciary Committee, 63rd Nev. Leg. Session (1985),
Testimony of Brian Hutchins, Attorney General, and Assemblyman Robert Sader.

1 Here, Defendant's request has no merit, demonstrates no good cause, and is untimely
2 under NRS 34.780 because this Court has not examined Defendant's claims and determined,
3 if true, that he would be entitled to relief. Until that determination has occurred, Defendant's
4 request is untimely and should not be considered by the Court. Moreover, if the Court
5 determines that Defendant is not entitled to relief, then there will be no evidentiary hearing,
6 nor discovery ordered. See NRS 34.770(1); 34.780(2).

7 Additionally, Defendant's claim that color photos will help him determine whether he
8 and the victim engaged in consensual sex is based on a false premise. The presence or absence
9 of injuries does not demonstrate consent or non-consent. Indeed, SANE nurse Amy Coe
10 testified to that fact at trial. Reporter's Transcript (RT), 84 (November 4, 2009). Over 90% of
11 sexual assault examinations result in no findings of injury, even when the victim is a child.
12 Furthermore, there were more than physical findings from the SANE examination that showed
13 the victim's lack of consent:

- 14 1. An independent witness saw Defendant physically forcing
15 the victim into his apartment. RT 101-103 (November 3,
2009).
- 16 2. There was no prior relationship between Defendant and his
17 victim. RT 27, 47-48 (November 3, 2009).
- 18 3. Defendant used tape to bind his victim, which was found at
19 the crime scene. RT 37-38, 54, 114 (November 3, 2009).
- 20 4. Defendant disabled victim's cell phone, which was
21 corroborated by her mother's inability to contact her. RT
22 26, 44, 114-115 (November 3, 2009).
- 23 5. There was blood in the victim's pants corresponding to
24 injuries to her vagina. RT 76 (November 4, 2009).

25 See also, Declaration of Arrest, attached as State's Exhibit 1. Thus, even if this Court were
26 inclined to grant discovery and the requested material somehow supported Defendant's
27 proposed claim, he would still not be entitled to relief in a post-conviction context based on
28 the totality of the evidence. Therefore, Defendant cannot establish prejudice from the lack of
such discovery. Moreover, Defendant is not entitled to discovery because this Court has not
granted a post-conviction petition and Defendant has not obtained this Court's leave to do so

1 after a showing of good cause. Indeed, Defendant fails to demonstrate a scintilla of good cause.
2 Therefore, Defendant's Second Motion should be denied.

3 **CONCLUSION**

4 Based upon the foregoing, the State respectfully request that this Court denies
5 Defendant's Second Motion to Place on Calendar for the Purpose of Obtaining SANE Exam
6 Photographs from the District Attorney's Office.

7 DATED this 6th day of September, 2016.

8 Respectfully submitted,

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

11 BY /s/ JAMES R. SWEETIN
12 JAMES R. SWEETIN
13 Chief Deputy District Attorney
Nevada Bar #005144

14
15
16
17
18 **CERTIFICATE OF SERVICE**

19 I hereby certify that service of the above and foregoing was made this 6th day of
20 SEPTEMBER 2016, to:

21 JAMES ORONOS, ESQ.
22 jim@oronozlawyers.com

23
24 BY /s/ HOWARD CONRAD
25 Secretary for the District Attorney's Office
26 Special Victims Unit

27
28 hjc/SVU

EXHIBIT “1”

VEGAS METROPOLITAN POLICE DEPARTMENT
DECLARATION OF ARREST

ID#: 1969904

EVENT: 071214-1983

TRUE NAME:	DATE OF ARREST:	TIME OF ARREST:
ADAMS, EDWARD	01/12/08	1445 Hours

OTHER CHARGES RECOMMENDED FOR CONSIDERATION:

THE UNDERSIGNED MAKES THE FOLLOWING DECLARATIONS SUBJECT TO THE PENALTY FOR PERJURY AND SAYS:
That I am a peace officer with the Las Vegas Metropolitan Police Department, Clark County, Nevada,
being so employed for a period of 10 YEARS.

That I learned the following facts and circumstances which lead me to believe that ADAMS, EDWARD
committed (or was committing) the offense of **6cts. SEXUAL ASSAULT VICTIM UNDER 14 YEARS;**
1 ct. KIDNAP 1ST DEGREE; 1 ct. Battery with Intent To Commit Sexual Assault ; 1 ct. Open and
Gross Lewdness at the location of 1111 WARBONNET (#1/204) WAY LAS VEGAS, NEVADA 89117.

That the offense occurred at approximately 1430 hours-1545 hours on the 14th day of December, 2007.

That on December 14th, 2007 at approximately 1556 hours, LVMPD dispatch received a call from a ,
Louise Valles. Valles was reporting that her thirteen year old daughter, Amber Valles had just been
kidnaped and sexually assaulted while coming home from school. Valles described that Amber was
walking home from school and was approached by a White Male Adult who told her he had a gun.

LVMPD Officers arrived at 7221 Roe Court Las Vegas, NV 89145 and made contact with thirteen year
old Amber Valles, DOB: 10/12/1994 and her mother Louise Valles, DOB: 01/20/1972. Officer J. Riddle
P#9306 then learned the following information from Amber:

ON 12/14/07 AMBER VALLES; DOB: 10/12/94 STATED THAT SHE BECAME THE VICTIM OF A
SEXUAL ASSAULT WHEN AN UNKNOWN MALE FORCED HER TO HIS APARTMENT AND
FORCED HER TO DIGITAL AND VAGINAL INTERCOURSE.

AMBER STATED SHE HAD CALLED HER MOTHER FROM SCHOOL, JOHNSON MIDDLE
SCHOOL LOCATED AT 7701 DUCHARME AND ASKED IF SHE COULD WALK HOME TODAY.
AMBER STATED THAT SHE INTENDED TO WALK TO A FRIEND'S HOUSE. PLAY BASKETBALL
AND STAY THE NIGHT. THE FRIEND'S PARENTS TOLD AMBER THAT TONIGHT WAS NOT A
GOOD NIGHT. SCHOOL LETS OUT AT 1415 HRS AND AT APPROXIMATELY 1430 HRS AMBER
BEGAN TO WALK HOME. WHILE ON ALTA EAST OF BUFFALO SHE WAS APPROACHED BY
WMA WHO GRABBED AMBER BY THE HAND AND STATED, "DON'T SCREAM, DON'T RUN. I
HAVE A GUN." THE SUSPECT THEN TOLD AMBER THAT HE NEEDED HELP CARING FOR A
BABY BECAUSE HIS NIECE JUST YELLS AT IT. THEY BOTH THEN WALKED APPROXIMATELY
20 MINUTES TO AN UNKNOWN APARTMENT EAST OF CIMARRON ON THE SOUTH SIDE OF
CHARLESTON. AMBER STATED THAT WHEN THEY ARRIVED AT THE, WHAT APPEARED TO
BE VACANT APARTMENT, THE SUSPECT USED NO KEY AND WALKED RIGHT IN. IN THE
APARTMENT, AMBER ONLY SAW A COUCH AND CANDLES. THE SUSPECT THEN LIT ONE
CANDLE AND FORCED AMBER TO THE GROUND AND BEGAN PENETRATING HER VAGINA
WITH HIS FINGERS. THE SUSPECT THEN ATTEMPTED SEVERAL TIMES TO PENETRATE
AMBER'S VAGINA WITH HIS PENIS AND AMBER STATED, "BUT IT WASN'T WORKING".
AMBER STATED THE SUSPECT TOOK HER PHONE BATTERY OUT AND THREW IT ON THE
COUCH. THE SUSPECT MADE AMBER BEND OVER AND ATTEMPTED TO INSERT HIS PENIS
AGAIN. AMBER STATED THAT SHE WAS NOT SURE IF HE EVER MADE PENETRATION WITH

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LAS VEGAS METROPOLITAN POLICE DEPARTMENT
DECLARATION OF ARREST CONTINUATION
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HIS PENIS BUT MADE A STATEMENT THAT INSINUATED HE HAD. THE SUSPECT THEN WET A TOWEL AND TOLD AMBER TO WIPE HER VAGINA. THE SUSPECT TOLD AMBER TO CALL HIM "FRED." THE SUSPECT THEN TOLD AMBER TO LEAVE AND NOT TO CALL ANYONE UNTIL SHE GOT TO MCDONALD'S (LOCATED AT 7851 W. CHARLESTON). AMBER COMPLIED CALLING HER MOTHER WHO THEN CALLED THE POLICE.

Officer J. Riddle transported Amber to UMC (1800 W. Charleston) to conduct a S.A.N.E. exam.

Patrol Officers made contact with Jonathan Cerbani; DOB: 09/07/1995 who stated that he recalls seeing Amber walking with a white male , who was holding Amber by the right arm, "one hand in his pocket like he had a gun." Jonathan described that the guy was wearing a gray sweatshirt, light blue pants and he had something hanging from the top of his left eye. He described him as bald but had some hair around his head. Jonathan described that Amber had a scared look on her face.

That I, Detective G. Lebario P#5849 along with Sgt. B. Smith P#4991 responded to UMC and conducted the follow-up interview with Amber and her mother, Louise Valles.

That we first conducted a recorded interview with Amber who stated the following; which is not verbatim:

That on December 14th , 2007 she got out of school at 1415 hours. She was talking with her friend Sierra and they were talking about her possibly spending the night at Sierra's house. Amber states she called her mother and asked for permission to walk home from school, Amber states her mom told her that it would be fine. Amber states Sierra's mom then told them "no" because they had other plans that evening. Amber then states she walked home and was walking east bound on Alta from Buffalo when she was approached by a white male adult who had also crossed Alta from Buffalo with her. Amber stated the male followed her, then came up from behind her and told her that "he has a gun and if she did not do everything he told her, he would kill her." Amber states that he then grabbed her hand and turned around and walked back up to Alta and crossed over to Buffalo. Amber states that they walked to Charleston and Buffalo on the left side of the street (east side of Buffalo walking southbound). Amber states she saw her friend Jonathan and attempted to whisper to him for "help". Amber states she then asked the suspect, "what are you doing with me?" and he told her that he was just taking her to his house with his niece and his 1 year old son so that she could help him with his son because his niece just yells at him. Amber states she asked if she could just go home and he told her to stop asking him because that was just making him mad. Amber states they walked to an apartment complex called the "Eleven/Eleven". She states they walked to an unknown building and went up to the second floor.

Amber states the suspect just opened the door without a key. She states as she walked in she saw a black leather couch along with candles. She states he lit the candles with matches he removed from his pockets. He then told her to take off her clothes and stand up, he then put her on the floor and got on top of her. He then tried to put his "private" in hers . His clothes were on the floor and she noticed that he had a bruise on the side of his stomach. She states she was laying on her back and she said he took his "private" and "tried to stick it in hers" with his hands. She kept telling him to "stop" and he would not say anything he just laid on top of her and made "like bouncing motions." The suspect then told her to sit on the couch, got on top of her and tried the same thing. She states he got on top of her and again was putting his "private" into her "private." She states during this time he just kept his hands on the couch and lasted about three minutes. She states she continued to ask him to "stop" but he would tell her to "shut up" and he threatened to tape her mouth shut, which he did with blue tape that was on the counter. She states this happened while she was on the couch. She states after he was done he grabbed a white towel from the floor and told her to wipe herself and put her clothes on. She states she put her underwear and bra in her back pack and walked out of the apartment. She

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states the suspect told her to call him , "Fred." She stated that the suspect actually took her cell phone from her and took the battery out when they walked into the apartment. Amber states she was missing for one hour and was finally able to call her mom when she left the apartment.

Amber described the male as a white adult ; 5' 7" between 25-45 years of age , bald with a band aid across the left side of his forehead. She said he had crooked teeth and a red goatee. He was wearing a black hooded sweatshirt and blue "silky pants." She described that he was wearing a black string around his neck. She described his shoes to be "crappy", "dirty" , black and white in color and possibly Nike's. She noticed that the male had a bruise and hair on his stomach.

She states when she was leaving he told her that he would go to jail so she better not call the cops or anybody. She then left and called her mom around 1536 hours and told her to pick her up at McDonald's.

After the interview with Amber a SANE exam was performed by Amy Coe, NP, SANE-A, at UMC. The following comes from the Nurse Notes:

Amber is a 13 year old female who states she was sexually assaulted by an unknown white adult male at approximately 1510 hours , 12/14/07.

She was walking home from school when she was approached and led by the suspect to his apartment. He ordered her to take off her clothes. She denies struggling or physical assault.

He grabbed her by the neck to restrain her. He digitally penetrated her vagina for approximately 30 seconds. Then he vaginally penetrated her with his penis for 30 seconds. Then he digitally penetrated her again for 15 seconds and vaginally penetrated her with his penis for 25 seconds. The whole time she is telling him "to stop," "it hurts," and "get off of me."

He removes his penis from inside the vagina for approximately 15 seconds. He masturbates himself. She continued to tell him "No." He told her to shut up. He taped her mouth and hands close. After less than a minute she tears off the tape.

Then he digitally penetrates her anus and penetrates her anally with his penis for approximately 10 seconds. He gets up off of her and he tells her to put her clothes on and leave. He told her "not to tell anybody."

Amber also disclosed to Coe that the suspect had tied her wrist with blue tape and used lotion for lubrication with digital and penile penetration.

(Please see Rose Heart Report Case # 071214-1983) Coe noted that Amber did have an abrasion at 6 o'clock posterior fourchette; she noted oozing from abrasion. Used toluidine dye; she used balloon method to visualize hymenal laceration at 6 o'clock with bleeding; anal laceration at 6 o'clock.

That I then conducted a recorded interview with Amber's mom, Louise Valles. Valles stated that she picked Amber up at McDonald's and she told her that a man had forced her into an apartment and had done "sexual acts" and "raped" her. She states she had been continually been trying to call her on her cell phone and it would just ring or go to voice mail. She stated that on today's date Amber had called her after school and asked for permission to walk home from school with her friend. She sates amber shoul;d have been home by 1445 hours and when she did not return home by 1520 hours she started to worry. She states she just started calling and calling her cell phone. She states that she

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finally got a hold of her around 1540 hours and Amber sounded upset and told her that she was scared to just pick her up at the McDonald's. She said she finally picked her up at the Sinclair Gas Station, located at Buffalo and Charleston.

She said after she picked up Amber she disclosed that she was approached by an unknown male who told her that he had a gun and walked her over to an unknown apartment. Amber told Valles, "he put his thing in me, mom." She states that when she picked Amber up she did not have all her clothes on. She said Amber was just crying and sobbing when she picked her up.

That after we left UMC hospital Amber along with her mother, Valles directed Detectives to 1111 Warbonnet Way, Las Vegas, NV, 89117 (Eleven/Eleven Condos). Amber described that she walked into a building that was right off of Charleston Blvd.. She remembered the complex was not gated and remembered walking through some rocks. Amber pointed out a certain building but could not confirm it was the building or apartment where the sexual assault had taken place.

On 12/15/07 Detectives returned to 1111 Warbonnet and made contact with the property manager. The Property manager remembered a vacant apartment on the complex that she distinctly remembered had a black leather couch and candles. She stated the building was had sustained fire a few months prior and was uninhabited. Property Manager then directed us to Building #1 / Apartment #204 and gave written consent to process the apartment for evidence.

That on 12/15/ 07 at approximately 1730 hours , Crime Scene Analyst J. Fried P# 8174 and R. McPhail P#3326 arrived to process the apartment. The following is a summary of the Crime Scene Report prepared by CSI R. McPhail P# 3326:

THE SCENE: The scene was located inside apartment #204, on the second floor of building #1 , in the southwest corner of the building. The building had sustained fire damage at some point in time and appeared to be uninhabited. There was no obvious electricity inside the building and apartment #204 had no lights, heating, or water service. The lock to the front (south facing) entry door to the residence was disabled with paper wedge inside the receiver for the lock tongue of the doorknob, making entry possible by simply pushing the door inward. When entry was made a lit candle was observed in a glass jar, on the floor of the living room in front of the couch. There was very little fire damage inside apartment# 204 but there was water damage to the ceiling in the northwest (master) bedroom.

The residence was void of all furnishings except for a black leather couch which was located on the south side of the living room, a set of drawers located on the north side of the south bedroom, and there was a dining table with blue colored masking tape around it, securing the leafs of the table, located inside the patio area on the west side of the living room.

THE LIVING ROOM:

In addition to the couch on the south side of the living room other items of interest included a dirty, white colored bath towel located on the floor at the east end of the couch; a pair of white colored Nike sports shoes, with spider webs inside of them, located on the floor near the candle in front of the couch; a black colored nylon pouch with a white colored stain on it, located on the couch (east end) ; and a pair of white colored house slippers and a wad of blue colored masking tape located on the floor in front of the couch.

PHOTOGRAPHY:

Digital photos were exposed showing the scene location and overall condition of the apartment. The locations of the recovered items of evidence and the locations of the recovered latent prints.

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That on 01/12/08 Detectives located Edward Adams; ID# 1969904 at 3150 Meade Las Vegas, NV 89102, under event# 080112-1887.

That Adams was taken into custody and brought back to the ISD office located 4750 W. Oakey Las Vegas, NV 89102.

That I Detective Lebario P#5849 along with Detective R. Jaeger P# 5587 conducted a recorded interview with Adams. Adams initially was under the impression that we were investigating a Domestic Dispute that was reported by his wife under event# 080108-1828. While being transported by Detectives Jaeger P#5587 and Davis P#5163 Adams was asked to consent to a Buccal Swab to collect DNA. Adams replied, "DNA, do you think I raped someone." Adams was advised that we needed the DNA to compare with DNA found on a door that had been punched in. Adams stated he would consent to the collection of a Buccal Swab. Prior to the interview Adams was advised of his Miranda rights and he stated that he wanted to clear things up reference the allegations his wife had made.

I then informed Adams that we not really there to investigate the Domestic Dispute but rather a sexual assault involving a young girl. Adams did not deny the allegations but rather said I did not hurt no little girl. Adams stated, "I am invoking my rights to an Attorney." At which point we terminated the interview and advised Adams that he was under arrest.

Adams was charged with **one count of Kidnaping/ First Degree** due to the fact that he did willfully seize, confine, entice, decoy, abduct, conceal or carry away , thirteen year old Amber Valles for the purpose of sexually assaulting her. By threatening that he had a gun and coercing her to go with by threats to her life if she should run or try to get away.


Six counts of Sexual Assault Victim Under 14 Years due to the fact that he sexually assaulted thirteen year old Amber Valles against her will. By digitally penetrated her vagina for approximately 30 seconds (1 ct.) ; Vaginally penetrated her with his penis for 30 seconds (1ct.) ; digitally penetrated her vagina again for 15 seconds (1ct.) ; vaginally penetrated her with his penis for 25 seconds (1ct); digitally penetrates her anus (1ct); penetrates her anally with his penis for approximately 10 seconds (1ct).

One count of Battery with The Intent to Commit Sexual Assault due to the fact that he grabbed her by the neck to restrain her and after sexually assault her.

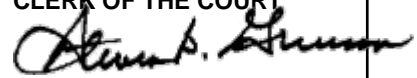
Open and Gross Lewdness due to the fact that he did masturbate himself in front of Amber.

Wherefore, Declarant prays that a finding be made by a magistrate that probable cause exists to hold said person for preliminary hearing (if charges are a felony or gross misdemeanor) or for trial (if charges are misdemeanor).

Declarant


G. LEBARIO

RA030



RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

EDWARD ADAMS
#1969904

Defendant.

CASE NO: **08C241003**

DEPT NO: **XIX**

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

DATE OF HEARING: **NOVEMBER 13, 2019**
TIME OF HEARING: **8:30 AM**

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

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

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RA031

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On February 12, 2008, the State filed an Information charging Defendant Edward
4 Adams as follows: Count 1 – First Degree Kidnapping with Use of a Deadly Weapon (Felony
5 – NRS 200.310, 200.320, 193.165), Count 2 – Battery with Intent to Commit a Crime with
6 Use of a Deadly Weapon (Felony – NRS 200.400, 193.165), Counts 3 through 11 – Sexual
7 Assault with a Minor Under Fourteen Years of Age with Use of a Deadly Weapon (Felony –
8 NRS 200.364, 200.366, 193.165), and Count 12 – Open or Gross Lewdness (Gross
9 Misdemeanor – NRS 201.210). On October 28, 2009, the State filed an Amended Information
10 with the same charges.

11 On November 2, 2009, Defendant's jury trial commenced. On November 4, 2009, the
12 jury found Defendant guilty of Count 1 – First Degree Kidnapping, Count 2 – Battery with
13 Intent to Commit Sexual Assault, Counts 3, 4, 5, 6, 7, 8 and 11 – Sexual Assault, and Count
14 12 – Open or Gross Lewdness. The jury found Defendant not guilty of Counts 9 and 10.

15 On January 13, 2010, the district court sentenced Defendant as follows: Count 1 – to
16 60 months to life and \$2932.00 in restitution; Count 2 – to 60 months to life, consecutive to
17 Count 1; Count 3 – to 120 months to life, consecutive to Count 2; Count 4 – to 120 months to
18 life, consecutive to Count 3; Count 5 – to 120 months to life, consecutive to Count 4; Count 6
19 – to 120 months to life, consecutive to Count 5; Count 7 – to 120 months to life, consecutive
20 to Count 6; Count 8 – to 120 months to life, consecutive to Count 7; Count 11 – to 120 months
21 to life, consecutive to Count 8; and Count 12 – to 12 months, concurrent with all other counts.
22 The court also imposed a special sentence of Lifetime Supervision to commence upon release
23 from any term of imprisonment, probation, or parole. The court also ordered Defendant to
24 register as a sex offender after any release from custody. The court entered the Judgment of
25 Conviction on February 2, 2010.

26 Defendant filed his Notice of Appeal on February 22, 2010. The Nevada Supreme
27 Court affirmed Defendant's Judgment of Conviction on July 26, 2012. Remittitur issued on
28 August 21, 2012.

1 On September 11, 2012, Defendant filed a Post-Conviction Petition for Writ of Habeas
2 Corpus. On October 15, 2012, the court appointed counsel for Defendant. On September 4,
3 2015, the Court entered an Ex Parte Order of Appointment to appoint Dr. Hariton to “review
4 medical records and investigate issues.” On May 5, 2016, Defendant filed a Motion to Place
5 on Calendar for the Purpose of Obtaining SANE Exam Photographs from the District
6 Attorney’s Office (“Motion”). The State filed an opposition to the motion on May 10, 2016.
7 The Court denied Defendant’s motion on May 16, 2016. The order denying the motion was
8 filed on June 1, 2016.

9 On August 31, 2016, Defendant filed a second Motion to Place on Calendar for the
10 Purpose of Obtaining SANE Exam Photographs from the District Attorney’s Office (“Second
11 Motion”). The State filed an opposition to the second motion on May 10, 2016. The Court
12 denied Defendant’s motion on September 6, 2016. The order denying the motion was filed on
13 June 1, 2016. On September 12, 2016, the Court granted the motion in part and ordered the
14 State to provide the photographs in their possession.

15 On June 28, 2019 Defendant filed a Supplemental Post-Conviction Petition for Writ of
16 Habeas Corpus. The State responds herein.

17 **STATEMENT OF FACTS**

18 On December 14, 2007, thirteen-year-old A.V. was released from school at 2:15 p.m.
19 Jury Trial Transcript Day 2, November 3, 2009, at 4. After plans to spend the night at a friend’s
20 house had fallen through, she decided to walk home. Id. at 5. Her house was only a few blocks
21 from the school. Id. at 8. At some point between the school and her house, A.V. came into
22 contact with Defendant. Id. at 11. He was sitting on a wall across the street from A.V. smoking
23 a cigarette when she first noticed him. Id. at 12. A.V. did not consider him to be attractive. Id.
24 She described Defendant as mostly bald with a goatee, crooked teeth, and a band-aid over his
25 eyebrow. Id. at 14-15. He was wearing a black hooded sweatshirt and blue pants. Id. at 14.

26 A.V. crossed the street but did not walk towards Defendant. Id. at 13. However, he
27 began to walk to her side of the street and started following behind her. Id. A.V. felt scared
28 and continued to walk. Id. Defendant came up behind her, put his arm on her shoulder and

1 turned her towards him. Id. at 15. He told her not to scream or yell because he had a gun. Id.
2 A.V. complied because she was afraid he would kill her. Id. at 17. Defendant's left hand was
3 in his pocket, and it appeared as if he had a gun. Id. He then grabbed A.V. by the hand and
4 started leading her back towards the school. Id. at 17-18.

5 As Defendant was taking A.V. down the street, they passed two of A.V.'s schoolmates.
6 Id. at 18. Jonathan C. saw Defendant dragging A.V. up the street by her wrist. Id. at 101. A.V.
7 had a scared look on her face. Id. at 102. Defendant's hand was in his pocket holding something.
8 Id. at 103. Jonathan thought it may have been a gun. Id. at 105. As they passed by A.V.
9 mouthed the words "help me" to Jonathan. Id. at 19. Angela A. also saw Defendant holding
10 A.V.'s hand and thought it looked as if they were trying to avoid her as they walked by. Id. at
11 129.

12 Defendant took A.V. to an abandoned apartment unit on the second floor of the
13 building. Id. at 23. The apartment had been damaged by a fire and all utilities had been
14 disconnected. Id. at 151. Defendant had never leased the apartment. Id. at 152. A.V. noticed a
15 black couch, several lit candles, a black bag, and a pair of Nike shoes. Id. at 24-25. After
16 locking the apartment door, Defendant told A.V. to sit on the black couch. Id. at 26. He also
17 took the battery out of A.V.'s cell phone so she could not call for help. Id. A.V. also saw
18 Defendant take something out of his pocket and wedge it underneath the couch cushions. Id.
19 at 28.

20 Defendant made A.V. remove her clothes and get on the floor. Id. at 28-29. He then
21 removed his own clothes, got on top of her, and digitally penetrated her vagina. Id. at 29. A.V.
22 had never had any kind of sexual contact before. Id. at 27. She told Defendant that what he
23 was doing was causing her pain. Id. at 30. However, he told her to shut up. Id. Defendant then
24 penetrated A.V.'s vagina with his penis, which caused her further pain. Id.

25 Defendant stopped having intercourse with A.V. and made her sit on the couch again.
26 Id. As she was sitting up, he digitally penetrated her. Id. at 31. She again told him that it was
27 painful and asked him to stop. Id. Defendant then penetrated A.V.'s vagina again. Id. He then
28 stopped and made A.V. move back to the floor. Id.

1 Defendant placed himself on top of A.V. again and penetrated her vagina with his penis.
2 Id. at 32. He also digitally penetrated her vagina. Id. Defendant then proceeded to force A.V.
3 to bend over the couch. Id. As she was bent over, he digitally penetrated her anus while
4 standing behind her. Id. at 32-33. Defendant had also rubbed his penis in front of A.V. and put
5 lotion on to his penis as he was touching himself. Id. at 56. Defendant put lotion on his penis
6 both while he was touching himself and prior to penetrating her. Id. Defendant had also used
7 blue painter's tape to bind A.V.'s hands and to tape her mouth shut. Id. at 37. Defendant did
8 not use a condom. Id. at 35. A.V. continually told Defendant that he was hurting her and asked
9 him to stop throughout the ordeal. Id. at 39.

10 After Defendant was finished sexually assaulting A.V., he told her to get dressed. Id.
11 He then went into the kitchen and retrieved a damp towel which he told A.V. to use to wipe
12 herself off. Id. at 37. Defendant told her she could leave and threw her phone back at her. Id.
13 at 43. He also warned her not to call the police and to wait until she got to a nearby McDonald's
14 restaurant before she called for someone to pick her up. Id.

15 A.V.'s mother, Louise, had been trying to call A.V. when she noticed that she was late.
16 Id. at 44. A.V. finally answered and asked her to come pick her up. Id. A.V. was crying, her
17 hair was messy, and she did not have all of her clothing on. Id. A.V. told her mother what had
18 happened, and Louise called 911. Id.

19 A.V. was taken to the hospital and was given a sexual assault exam. Jury Trial
20 Transcript Day 3, November 4, 2009, at 53-54. A.V. had abrasions in her vagina consistent
21 with how she described the encounter and her hymen was lacerated. Id. at 69. A.V. had
22 experienced bleeding from her vagina which stained the crotch of her pants. Id. a 76. There
23 was also a discharge from her anus and injuries to her anus. Id.

24 A.V. could not remember exactly where the apartment was located, however eventually
25 the correct apartment was found. Jury Trial Transcript Day 2, November 3, 2009, at 228-230.
26 When crime scene analysts arrived at the apartment, they found the opened package of hand
27 lotion, candles, blue painter's tape, and the shoes A.V. had described. Id. at 161-69. Defendant
28 was eventually identified as the perpetrator because his fingerprints were found in the

1 apartment. Id. at 234. Defendant's prints were found on an open lotion packet, two glass candle
2 jars, and the interior sliding glass door. Jury Trial Transcript Day 3, November 4, 2009, at 47-
3 49. A.V.'s prints were found on the interior front door. Id. A gun was not found. Id. at 178.

4 A DNA analysis was conducted on the sexual assault kit. Id. at 8. Defendant's sperm
5 was detected on the vaginal and cervical swabs. Id. at 8-9. Defendant's sperm was also detected
6 on the rectal and anal swabs. Id. at 8-10. Both A.V.'s and Defendant's DNA were found on
7 the towel located in the apartment. Id. at 12-14. Defendant's DNA was also located on A.V.'s
8 pants and shirt. Id. at 18-19. Finally, both A.V.'s and Defendant's DNA was found on the
9 couch cushions. Id. at 19-21.

10 Defendant's defense at trial was that this was a consensual sexual encounter. Jury Trial
11 Transcript Day 1, November 2, 2009, at 242. He elicited testimony from Jonathan C. that A.V.
12 had not said anything to him as she passed by with Defendant and that he had not called the
13 police. Jury Trial Transcript Day 2, November 3, 2009, at 107-08. Defendant also elicited
14 testimony from Angela A. that she had previously told police that A.V. appeared to be chasing
15 after Defendant and that she had also not called the police. Id. at 138. Witness Andre Randle
16 testified that he saw A.V. and Defendant walk into the vacant apartment. Jury Trial Transcript
17 Day 3, November 4, 2009, at 28-33. He testified he thought it was strange, but A.V did not
18 appear to be angry, crying, or screaming. Id. Defendant also presented several character
19 witnesses who testified that he was not a violent person. Id. at 110-117.

20 ARGUMENT

21 **I. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL**

22 **A. Standard Of Review**

23 The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal
24 prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his
25 defense." The United States Supreme Court has long recognized that "the right to counsel is
26 the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686,
27 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
28 (1993).

1 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
2 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of
3 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865
4 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel’s
5 representation fell below an objective standard of reasonableness, and second, that but for
6 counsel’s errors, there is a reasonable probability that the result of the proceedings would have
7 been different. 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068; Warden, Nevada State Prison
8 v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part
9 test). “[T]here is no reason for a court deciding an ineffective assistance claim to approach
10 the inquiry in the same order or even to address both components of the inquiry if the defendant
11 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

12 The court begins with the presumption of effectiveness and then must determine
13 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
14 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
15 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
16 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
17 537 P.2d 473, 474 (1975).

18 Counsel cannot be ineffective for failing to make futile objections or arguments. See
19 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
20 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
21 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
22 (2002).

23 Based on the above law, the role of a court in considering allegations of ineffective
24 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
25 whether, under the particular facts and circumstances of the case, trial counsel failed to render
26 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
27 (1978). This analysis does not mean that the court should “second guess reasoned choices
28 between trial tactics nor does it mean that defense counsel, to protect himself against

1 allegations of inadequacy, must make every conceivable motion no matter how remote the
2 possibilities are of success.” Id. To be effective, the constitution “does not require that
3 counsel do what is impossible or unethical. If there is no bona fide defense to the charge,
4 counsel cannot create one and may disserve the interests of his client by attempting a useless
5 charade.” United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

6 “There are countless ways to provide effective assistance in any given case. Even the
7 best criminal defense attorneys would not defend a particular client in the same way.”
8 Strickland, 466 U.S. at 689, 104 S.Ct. at 689. “Strategic choices made by counsel after
9 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
10 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
11 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel’s
12 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s
13 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

14 Even if a defendant can demonstrate that his counsel’s representation fell below an
15 objective standard of reasonableness, he must still demonstrate prejudice and show a
16 reasonable probability that, but for counsel’s errors, the result of the trial would have been
17 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
18 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
19 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-
20 89, 694, 104 S. Ct. at 2064-65, 2068).

21 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the
22 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of
23 the evidence.” Means, 120 Nev. at 1012, 103 P.3d at 33. Furthermore, claims of ineffective
24 assistance of counsel asserted in a petition for post-conviction relief must be supported with
25 specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v.
26 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked” allegations are not
27 sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant
28 part, “[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure

1 to allege specific facts rather than just conclusions may cause your petition to be dismissed.”
2 (emphasis added).

3 **B. Petitioner’s Counsel Was Not Ineffective For Allowing A Juror To Remain On**
4 **The Panel Who Knew The Judge And One Witness Because The Juror Was Able**
5 **To Remain Fair And Impartial.**

6 The Nevada Supreme Court has held that it is improper for Petitioner to make factual
7 assertions without “adequately cit[ing] to the record in his briefs or provide this court with an
8 adequate record.” Thomas v. State, 120 Nev. 37, 43, 83 P.3d 818, 822 (2004). Here, Petitioner
9 has failed to cite to any record in support of his claim of ineffective assistance of counsel.
10 Instead of supporting his assertions with the record, Petitioner just makes these assertions that
11 because Juror 7 remained on the jury, it resulted in his conviction. This is not supported with
12 any evidence from the record, and thus, should be rejected.

13 Moreover, Petitioner has failed to demonstrate that the juror was not fair and impartial.
14 During voir dire, the juror acknowledges to the judge that she can be fair and impartial despite
15 knowing him:

16 PROSPECTIVE JUROR NO. 156: Your Honor, I’m juror number
17 156. You and I have met socially several times over the past 20
18 years. I worked with your wife at the Attorney General’s office
19 back in the 1990s.

20 THE COURT: Okay. Anything about that association or relation
21 that might cause you to –

22 PROSPECTIVE JUROR NO. 156: No, sir.

23 THE COURT: -- judge this case unfairly or be – you wouldn’t

24 PROSPECTIVE JUROR NO. 156: No.

25 THE COURT: -- affect your ability to be fair and impartial?

26 PROSPECTIVE JUROR NO. 156: No.

27 THE COURT: All right. Thank you very much.

28 Jury Trial Transcript Day 1, November 2, 2009, at 17-18.

The juror then affirms again to the State that she can still remain fair and impartial
despite knowing the judge:

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1 MR. HENDRICKS: One last question. You said that you were
2 familiar with Judge Barker and his wife.

3 PROSPECTIVE JUROR NO. 156: Yes, yes.

4 MR. HENDRICKS: Is that going to affect you in any way in being
5 able to make a just decision in regards to both defense and the
6 State?

7 PROSPECTIVE JUROR NO. 156: No.

8 Jury Trial Transcript Day 1, November 2, 2009, at 96-87.

9 Additionally, the juror acknowledges that she can be fair and impartial despite knowing
10 the State's witness, Shayla Joseph:

11 MR. HENDRICKS: Thank you, Judge. State calls Shayla Joseph.

12 JUROR NO. 7: Excuse me, your Honor. I realize I know Shayla
13 Joseph. Just met her one time socially.

14 THE COURT: Okay.

15 JUROR NO. 7: I'm recognizing the name now.

16 THE COURT: Parties approach.

17 (Off-record bench conference).

18 . . .

19 THE COURT: Record should reflect we're outside the presence of
20 the jury. Record should further reflect that parties approached after
21 Juror No. 7, Ms. Clayton, indicated that she had knowledge,
22 independent familiarity with the previous witness, Ms. Joseph, that
23 was just called. And parties agreed to address this issue out – well,
24 after the witness had completed her testimony.

25 It would be my inclination to call Ms. Clayton back in to – inquire
26 as to her – the base of her knowledge. I'll give each side an
27 opportunity to inquire and make decisions on whether or not you
28 want to challenge her as consequence of this disclosure.

MR. HENDRICKS: No, I think that's a great idea just to – just to
have that on the record. Just to make sure Mr. Maningo and the
defendant's rights are preserved just in case.

MR. MANINGO: Agreed.

THE COURT: That's exactly what I want to do. Could you go ask
Danny to bring in Juror No. 7, please.

(Juror No. 7 present)

1 THE COURT: Thank you. Record will reflect Ms. Clayton's
2 returned to the courtroom, Juror No. 7.

3 Ms. Clayton, you indicated that you had some previous knowledge
4 or you know Ms. Joseph, the previous witness called, so we've
5 taken you outside the presence of the rest the jury to inquire about
6 how you know Ms. Joseph. Could you tell us a little bit about that
7 relationship?

8 JUROR NO. 7: When I – since we're having crime scene
9 examiners here, and I heard her name and I thought oh, my God,
10 I've met – we have a – Shayla and I have a mutual friend named
11 Tim Speese (phonetic), who's a police officer. And I met Shalya
12 once, perhaps twice, over the summer socially at – I mean, at a bar,
13 you know, just because we have mutual friends. And she and I
14 spoke a few minutes.

15 I don't even think she probably would have even recognized me,
16 honestly. But she has a distinctive name. And again, when
17 (indiscernible) and again, she's not somebody that I consider to be
18 – you know, she is somebody that I met once, possibly twice and
19 we have a very good mutual friend.

20 THE COURT: All right. State, any inquiry of Ms. Clayton as a
21 consequence of that disclosure?

22 MR. HENDRICKS: No. Thanks, Judge.

23 THE COURT: Ms. Clayton, anything about that contact, as you
24 described with Ms. Joseph, that might affect your ability to be fair
25 and impartial in this case?

26 JUROR NO. 7: No, not at all.

27 THE COURT: Mr. Maningo, any questions?

28 **MR. MANINGO: Ms. Clayton, just because you have – you've
met that witness in your social life, would you give her
testimony more weight than you would any other witnesses?**

JUROR NO. 7: No, sir.

MR. MANINGO: Okay, then – I have no problem.

JUROR NO. 7: I apologize, Judge.

THE COURT: It's all right. That's what it's all about. Thank you.
We'll be with you in just a few minutes.

Jury Trial Transcript Day 2, November 3, 2009, at 199-200, 212-214 (emphasis added).

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1 There is nothing in the record that Petitioner cites to that demonstrates the juror could
2 not remain fair and impartial despite knowing Judge Barker and the State's witness. Instead,
3 the issue of knowing Judge Barker is brought to the Court's attention many times, and each
4 time, the juror explains that she can remain fair and impartial to Petitioner. Moreover, when
5 the juror realized that she had briefly met the State's witness only one time, she brought it to
6 the Court's attention and again, affirmed that she could remain fair and impartial. Petitioner
7 does not give any reason to indicate why she was not fair and impartial or why she would have
8 been unable to remain fair and impartial. Therefore, this claim should be denied.

9 **C. There Is No Support From The Record That Petitioner's Counsel Failed To**
10 **Investigate The Case Or Was Not Prepared For Trial.**

11 Petitioner contends that trial counsel failed to conduct adequate pretrial discovery,
12 including but not limited to failing to fully, competently, investigate the facts, circumstances,
13 and legal issues surrounding the offense. A defendant who contends that his attorney was
14 ineffective because he did not adequately investigate must show how a better investigation
15 would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 87
16 P.3d 533 (2004). Such a defendant must allege with specificity what the investigation would
17 have revealed and how it would have altered the outcome of the trial. United States v. Porter,
18 924 F.2d 395, 397 (1st Cir. 1991) (quoting United States v. Green, 882 F.2d 999, 1003 (5th
19 Cir. 1989)).

20 Here, Petitioner's claim, which is not even addressed in the body of his Supplemental
21 Petition, fails as he has not alleged with adequate specificity what further investigation or
22 additional facts would have come to light and how this would have changed the outcome of
23 the trial. He alleges that his counsel told him he was not properly prepared because he did not
24 have a second chair and had to juggle" during trial. Supplemental Petition, at 27. This claim is
25 not supported by the record, and there is no mention of any specific facts suggesting counsel
26 was not prepared for trial. In fact, the record in this case demonstrates how prepared trial
27 counsel was by filing many pre-trial motions, thoroughly cross-examining each of the State's
28 witnesses, and even calling three (3) character witnesses to testify on behalf of Petitioner.

1 Petitioner argues the fact that counsel did not find Mr. Randall through a preliminary
2 investigation, but the District Attorney found him on the first day of trial. Petition for Writ of
3 Habeas Corpus (Post-Conviction), at 9. Again, this is a bare and naked allegation because
4 Randle still testified at trial, and counsel even had the opportunity to meet with Randle the
5 morning before his trial testimony. In fact, trial counsel even conducted a thorough cross-
6 examination of Detective Gabriel Lebario emphasizing that the detective did not do a report
7 of his interview with Randle or provide his name in his report:

8 Q (MR. MANINGO): Okay. And making reports is an important
9 part of your job –

10 A (DETECTIVE LEBARIO): Yes.

11 Q: -- is that fair to say?

12 A: Yes, sir.

13 Q: Okay. You have to document when you do certain things or
14 when you speak to people, correct?

15 A: Yes.

16 ...

17 Q: You spoke to another individual who – who lived in a nearby
18 apartment building, correct?

19 A: Yes.

20 Q: Okay. And this is the person that – that you described as the
21 adult black male, correct?

22 A: Yes.

23 Q: And the reason we refer to this gentleman that way, in your
24 report you don't list his name, correct?

25 A: Right.

26 Q: And that's because you had taken notes and kept those notes
27 separate, correct?

28 A: Well, written, yes.

 Q: Okay. When you spoke to Mr. Randall, he gave a description
of seeing two people together that matched the description of Mr.
Adams and Amber?

 A: Yes.

1 Q: Okay. He also noted that the two individuals he saw were not
2 touching one another, correct?

3 A: Right.

4 Q: And he noted that they were not emotional, and that the girl was
5 not emotional?

6 A: Correct.

7 Q: He also noted that the girl did not appear to be in any distress.

8 A: Correct.

9 . . .

10 Q: You just spoke to him about the two individuals that he saw
11 that day?

12 A: Yes.

13 Q: Okay. I think you said earlier that there was no need to get a
14 report from him at that time.

15 A: At the time, yes.

16 Q: Okay. You did, however, none of the details of what he told
17 you in your – in your report, correct?

18 A: Yes.

19 Q: Okay.

20 A: My case notes.

21 Jury Trial Transcript Day 2, November 3, 2009, at 259-262.

22 Therefore, counsel took the time to prepare by fully cross-examining the detective about
23 not providing Randle's name or details of his interview with him, and counsel was able to meet
24 with Randle before his testimony before cross-examining him at trial. Therefore, Petitioner's
25 bare allegations do not and cannot demonstrate prejudice and, therefore, this claim is
26 absolutely without merit. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. As such, this claim
27 should be denied.

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1 **D. Petitioner’s Counsel Was Not Ineffective For Failing To Investigate Or Challenge**
2 **The State’s Late Disclosure Of Witness Andre Randle Because, In Fact, Counsel**
3 **Did Challenge The Late Disclosure In His Motion To Dismiss, And Cross-**
4 **Examined Randle At Trial.**

5 “Bare” and “naked” allegations are not sufficient to warrant post-conviction relief, nor
6 are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d
7 222, 225 (1984). “A claim is ‘belied’ when it is contradicted or proven to be false by the record
8 as it existed at the time the claim was made.” Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228,
9 1230 (2002).

10 In order to satisfy the Strickland standard and establish ineffectiveness for failure to
11 investigate, a defendant must allege *in the pleadings* what information would have resulted
12 from a better investigation or the substance of the missing witness’ testimony. Molina v. State,
13 120 Nev. 185, 192, 87 P.3d 533, 538 (2004); State v. Haberstroh, 119 Nev. 173, 185, 69 P.3d
14 676, 684 (2003). It must be clear from the “record what it was about the defense case that a
15 more adequate investigation would have uncovered.” Id. A defendant must also show how a
16 better investigation probably would have rendered a more favorable outcome. Id.

17 Here, Petitioner claims that trial counsel should have objected to the late disclosure of
18 State’s witness Andre Randle. In fact, counsel filed a Motion to Dismiss on October 20, 2009,
19 (Petitioner’s own Exhibit D) arguing that the State should turn over the “tall, physically fit,
20 adult black male.” Motion to Dismiss, at 3-4. Counsel argued in the Motion that the detectives
21 did not follow up with the mystery witness, and that the state should produce the witness to
22 testify at trial. Id. at 4. By counsel filing this motion prior to trial, he was objecting and
23 challenging the fact that the State had not produced Mr. Randle.

24 Then, during trial, when the State did produce the witness, the State allowed counsel to
25 not only cross-examine Mr. Randle, but also speak with him beforehand:

26 MR. HENDRICKS: Okay. Now, I don’t think either one of us, I’m
27 not sure though, has this – this black male adult listed on our
28 witness list. But as you know, he was not interviewed at the time
 other than just what was reflected in his case notes. We’ve now
 contacted him. We tracked him down. We found him so he’s
 available to defense counsel.

1 He's going to be here tomorrow morning at 10:00 a.m. My concern
2 is this, is he's not on our witness list, but we would still like to call
3 him. And I want to make sure that defense counsel doesn't have
4 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. Now we have him. I want to make sure it's okay
we can call him.

5 THE COURT: Defense position.

6 MR. MANINGO: Yeah, that's fine. I don't have an objection. I'm
7 not worried about – I know that the reason he wasn't on the witness
8 list at the time is because neither one with of us knew who this
person was.

9 THE COURT: Well, hearing no objection from the defense, the
10 State calling the witness, even though the witness wasn't identified
on their witness list, so –

11 MR. HENDRICKS: **And I'll make him available in the morning**
12 **so Jeff can speak with him also beforehand** just -- just to know
what we're getting.

13 Jury Trial Transcript Day 2, November 3, 2009, at 276-77 (emphasis added).

14 Now, Petitioner is arguing that counsel should have expended all resources to find this
15 unidentified witness. But then Petitioner argues that when the witness is actually produced at
16 trial, counsel should have challenged the late disclosure of the witness and not agreed to let
17 him testify. Petitioner's argument as to why counsel was ineffective at trial is based on the fact
18 that he should have found this witness before trial, and the witness would have produced
19 exculpatory evidence during his trial testimony. It is a roundabout argument to claim that
20 counsel should have found him, then when the State actually did find him, counsel should have
21 objected and not let him testify because he would testify to exculpatory evidence.

22 Moreover, it is utter speculation that Randle's testimony would have somehow been
23 different at trial had counsel conducted a more in-depth pre-trial interview of the witness, when
24 Petitioner admits that Randle's testimony was favorable to the defense. Trial counsel had time
25 before Randle's testimony to discuss his testimony with him and essentially have a pre-trial
26 interview. Counsel also had the opportunity to cross-examine Randle and question him in-
27 depth about how difficult it is to remember an event from two (2) years ago, that the witness
28 did not write anything down or take any notes after the event, about his interactions with

1 Petitioner and the victim, and about the Petitioner and the victim's demeanor entering the
2 vacant apartment. See Jury Trial Transcript Day 3, November 4, 2009, at 31-33. Even on
3 direct-examination, Randle testified that, "She didn't even look mad or nothing." Id. at 29. On
4 cross-examination, he says. "They was just walking normal." Id. at 33. Therefore, there was
5 no prejudice to Petitioner because, as Petitioner admits, Randle's testimony was favorable to
6 the defense.

7 By the end of trial, counsel had the opportunity to present the exculpatory evidence
8 through cross-examination because Randle ultimately testified during trial. Moreover, on
9 direct-examination, Randle's testimony confirmed the victim's classmates, Jonathan and
10 Angela's, testimony that they saw the two walking together. Even though counsel was unable
11 to locate Randle prior to trial, counsel filed the Motion to Dismiss contesting the fact the State
12 had not produced the witness, was still allowed the opportunity to cross-examine him during
13 his trial testimony, and even discuss his testimony with him the morning before he testified.
14 Therefore, there was no prejudice to Petitioner by Randle's testimony.

15 It simply cannot be said that trial counsel did not make sufficient inquiries into
16 information about Randle and his testimony after having the opportunity to speak with him
17 before his testimony and cross-examine him at trial. The record belies Petitioner's claim of
18 failure to investigate and shows that counsel did everything Petitioner claims should have been
19 done. Therefore, this claim is without merit and should be denied.

20 **E. Claims 2 And 4-12 Are Waived Because They Should Have Been Raised On Direct**
21 **Appeal.**

22 NRS 34.810(1) reads:

23 The court shall dismiss a petition if the court determines that:

24 (a) The petitioner's conviction was upon a plea of guilty or
25 guilty but mentally ill and the petition is not based upon an
26 allegation that the plea was involuntarily or unknowingly
entered or that the plea was entered without effective assistance
of counsel.

27 (b) The petitioner's conviction was the result of a trial and the
28 grounds for the petition could have been:

...

1 (2) Raised in a direct appeal or a prior petition for a writ of
2 habeas corpus or postconviction relief.

3 unless the court finds both cause for the failure to present the
4 grounds and actual prejudice to the petitioner.

5 The Nevada Supreme Court has held that “challenges to the validity of a guilty plea and
6 claims of ineffective assistance of trial and appellate counsel must first be pursued in post-
7 conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be
8 pursued on direct appeal, or they will be *considered waived in subsequent proceedings.*”
9 Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added)
10 (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). “A
11 court must dismiss a habeas petition if it presents claims that either were or could have been
12 presented in an earlier proceeding, unless the court finds both cause for failing to present the
13 claims earlier or for raising them again and actual prejudice to the petitioner.” Evans v. State,
14 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001).

15 Here, Petitioner’s Claims 2 and 4-12 should have been raised on a direct appeal because
16 they do not challenge the validity of a guilty plea or allege ineffective assistance of counsel.
17 NRS 34.810(1); Franklin, 110 Nev. at 752, 877 P.2d at 1059. Petitioner does not allege good
18 cause or prejudice for not bringing these claims on direct appeal and raising them for the first
19 time in these habeas proceedings. Therefore, they are all waived and must be dismissed.

20 **F. Petitioner’s Pro Per Claims Fail Because They Should Have Been Raised On**
21 **Appeal As Discussed Above**

22 As discussed above, the Petitioner’s Pro Per claims fail because they should have been
23 raised on appeal and are therefore waived. Petitioner now raises these claims again in his
24 Supplemental Petition, however, they are still waived for the exact reason stated above.
25 Therefore, these same claims must be dismissed.

26 **G. Cumulative Error Does Not Apply To Ineffective Assistance Of Counsel**

27 Petitioner asserts a claim of cumulative error in the context of ineffective assistance of
28 counsel. The Nevada Supreme Court has never held that instances of ineffective assistance of
counsel can be cumulated; it is the State’s position that they cannot. However, even if they

1 could be, it would be of no consequence as there was no single instance of ineffective
2 assistance in Petitioner's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir.
3 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined
4 to be error, not the cumulative effect of non-errors."). Furthermore, Petitioner's claim is
5 without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1)
6 whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity
7 of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Furthermore,
8 any errors that occurred at trial were minimal in quantity and character, and a defendant "is
9 not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d
10 114, 115 (1975). There was no error in this case let alone cumulative error. Therefore, this
11 claim must be denied.

12 **H. Petitioner Is Not Entitled To An Evidentiary Hearing**

13 A defendant is entitled to an evidentiary hearing only if his petition is supported by
14 specific factual allegations, which, if true, would entitle her to relief. Marshall v. State, 110
15 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). "The judge or justice, upon review of the return,
16 answer and all supporting documents which are filed, shall determine whether an evidentiary
17 hearing is required." NRS 34.770(1). Further, "[i]f the judge or justice determines that the
18 petitioner is not entitled to relief and an evidentiary hearing is not required, the judge or justice
19 shall dismiss the petition without a hearing." NRS 34.770(2).

20 Here, there is no reason to expand the record because Defendant's claims are not
21 cognizable in a post-conviction petition and Defendant fails to present specific factual
22 allegations that would entitle him to relief. Marshall, 110 Nev. at 1331, 885 P.2d at 605. As
23 such, Defendant's request for an evidentiary hearing should be denied.

24 //

25 //

26 //

27 //

28 //

1 **CONCLUSION**

2 For the above reasons, the State respectfully requests that Defendant's Supplemental
3 Petition for Writ of Habeas Corpus be DENIED in its entirety.

4 DATED this 26th day of September, 2019.

5 Respectfully submitted,

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

9 BY /s/ TALEEN PANDUKHT
10 TALEEN PANDUKHT
11 Chief Deputy District Attorney
12 Nevada Bar #005734
13
14
15
16
17

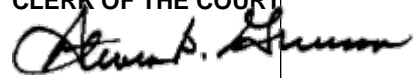
18 **CERTIFICATE OF SERVICE**

19 I hereby certify that service of the above and foregoing was made this 26th day of
20 SEPTEMBER, 2019, to:

21 JAMES ORONoz, ESQ.
22 jim@oronozlawyers.com

23 BY /s/ HOWARD CONRAD
24 Secretary for the District Attorney's Office
25 Special Victims Unit
26
27

28 hjc/SVU



RPLY

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Attorneys for Petitioner

**DISTRICT COURT
CLARK COUNTY, NEVADA**

EDWARD ADAMS,

Petitioner,

vs.

RENEE BAKER, in her official capacity as
the Warden of the LOVELOCK
CORRECTIONAL CENTER; JAMES
DZURENDA, in his official capacity as
Director of the Nevada Department of
Corrections; and the STATE OF NEVADA

Respondents.

CASE NO. 08C241003

DEPT. NO. XIX

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

Petitioner, EDWARD ADAMS, by and through his counsel of record, JAMES A. ORONoz, ESQ., and RACHAEL E. STEWART, ESQ., hereby files this Reply to State's Response to Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) pursuant to NRS Chapter 34. This Reply, including the following Points and Authorities, is made upon the pleadings and papers already on file, and any evidentiary hearing and oral argument of counsel deemed necessary by the Court. Petitioner, EDWARD ADAMS, alleges that he is being

RA051

1 held in custody in violation of the Fifth, Sixth, and Fourteenth Amendments of the Constitution
2 of the United States of America, as well as Articles I and IV of the Nevada Constitution.

3 DATED this 24th day of October, 2019.

4 /s/ James A. Oronoz
5 James A. Oronoz, Esq.
6 Nevada Bar No. 6769
7 Rachael E. Stewart, Esq.
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11 *Attorneys for Petitioner*

MEMORANDUM OF POINTS AND AUTHORITIES

I. Defense Counsel was ineffective for allowing Juror No. 7 to remain on the jury because she knew the trial judge and one of the State's witnesses. Juror No. 7 was not a fair and impartial juror.¹

The State argues that Mr. Adams has failed to demonstrate that Juror No. 7 (aka Prospective Juror No. 156) was not fair and impartial. In support of its argument, the State provides the trial transcript texts where Juror No. 7, Mrs. Clayton, explained that she would be fair and impartial. Tr. November 2, 2009, at 17; Tr. November 2, 2009, at 96-87; Tr. November 3, 2009, at 199-200, 212-214. The State further argues that nothing in the record shows that "the juror could not remain fair and impartial despite knowing Judge Barker and the State's witness." Response, at 12.

Contrary to the State's assertions, the record is clear that Mrs. Clayton, Juror No. 7, had a close social relationship with the trial judge and knew one of the State's witnesses. The record is also clear that Defense Counsel did not question Mrs. Clayton, Juror No. 7, about her relationship with the judge. Instead, Defense Counsel relied on her representations to the judge and the prosecutor that she could be fair and impartial. Consequently, the trial record only contains Mrs. Clayton's representations to the judge and prosecutor because Defense Counsel did not even attempt to explore her potential biases.

Counsel caused a structural error in this case by not questioning Mrs. Clayton, Juror No. 7, and determining whether she could honestly be fair and impartial to Mr. Adams. Counsel took no measures to discern whether she was actually suitable to sit on the jury. Mrs. Clayton, Juror No. 7, admitted that she had known the trial judge socially for twenty (20) years, which

¹ The State's Response does not track the claims as laid out in either Mr. Adams' Petition or the Supplemental Petition. For clarity's sake, this Reply will follow the order of the State's Response. The State did not respond to several of Mr. Adams' claims, so Mr. Adams hereby replies directly to the arguments set forth in the State's Response.

1 should have prompted Defense Counsel to explore the nature of that relationship. Tr. November
2 2, 2009, at 17, 93. Additionally, she explained that she had been a former prosecutor at the
3 Office of the Attorney General and had worked there with the judge's wife. Tr. November 2,
4 2009, at 18, 93. This should have raised red flags for Defense Counsel. Defense Counsel did
5 not explore whether Mrs. Clayton, Juror No. 7, could put aside her prosecutorial biases and
6 consider the case impartially.
7

8 When Defense Counsel questioned Mrs. Clayton, Juror No. 7, he asked her about her
9 experience at the Attorney General's office, asked about whether she would judge his
10 performance, and asked about whether she was going to "peek behind the curtains" to find out
11 more about the case than was presented at trial. Tr. November 2, 2009, at 133. Mrs. Clayton
12 told Defense Counsel that his appearance and performance would not affect her ability to judge
13 the case. *Id.* When she answered about whether she would want to "peek behind the curtains,"
14 and "think about what's going on at a bench conference," she answered: "Well, I think I would
15 be thinking about that, but I don't think it would be –it's not a distraction." *Id.* She also told
16 Defense Counsel that sitting on a jury would be "a good experience" for teaching and that she
17 hoped to be on a jury. *Id.*
18

19 As for the State's witness, Shayla Joseph, Defense Counsel asked the Juror if she would
20 give Ms. Joseph's testimony more weight than other witnesses. Tr. November 3, 2009, at 213-
21 214. This was the extent of his examination. He did not ask any other questions that may
22 uncover the nature of Mrs. Clayton's ability to be fair and impartial.
23

24 Defense Counsel did not explore Mrs. Clayton's relationship with the judge at all.
25 Essentially, Defense Counsel heard Mrs. Clayton, Juror No. 7, say that she could be fair and
26 impartial, without probing the issue. Simply saying the magic words does not make a juror fair
27
28

1 and impartial. Mrs. Clayton even admitted that she would be thinking about what was going on
2 at the bench conferences and wanting to “peek behind the curtains.”

3 Defense Counsel should have challenged her ability to be unbiased. He knew that she
4 wanted to be on the jury. Mrs. Clayton, Juror No. 7, was an attorney who knew what she would
5 have to say to remain on the jury. Given the nature of her long-term social relationship with the
6 judge and his wife, her former occupation as a Deputy Attorney General, and her having known
7 witness Shayla Joseph, Counsel should have challenged Mrs. Clayton’s, Juror No. 7’s, ability to
8 be fair and impartial and sought her removal from the jury.
9

10 Therefore, Defense Counsel was ineffective and caused a structural error by failing to
11 protect Mr. Adams’ right to a fair and impartial jury. Counsel’s failure caused Mr. Adams to
12 proceed to trial with a juror who could not have been impartial, and Counsel did not challenge
13 her presence on the jury. Therefore, a structural error exists because Counsel failed to protect Mr.
14 Adams’ constitutional right to have a fair and impartial jury. Thus, this Court should reverse Mr.
15 Adams’ conviction.
16

17 ***II. Defense Counsel failed to investigate the case and prepare for trial.***

18 In this subsection, the State conflates and confuses many of Mr. Adams’ arguments. The
19 State argues that Mr. Adams has not addressed his claim in the body of the Supplemental
20 Petition. The State’s position is inaccurate. On pages 27-28 of the Supplemental Petition, Mr.
21 Adams addressed his claim that Counsel failed to investigate the case and failed to prepare for
22 trial. In fact, the State even cited to the pages of Mr. Adams’ Supplemental Petition. Therefore,
23 the State’s contention lacks merit.
24

25 Next, the State argues that the record does not support Mr. Adams’ claim that Counsel
26 told him that he was not prepared for trial because he did not have a second chair and had to
27 juggle. Response, at 12. The State’s argument is misplaced. There would not be a record of a
28

1 private conversation between Mr. Adams and Counsel. For this reason, the Court should grant
2 Mr. Adams an evidentiary hearing so he can present evidence to support this claim.

3 The State also argues that Counsel prepared for trial by filing “many pre-trial motions.”
4 Response, at 12. This is inaccurate. Counsel filed the following motions prior to trial:

- 5 1. October 6, 2008: Motion to Continue Trial Date
- 6 2. October 21, 2009: Defendant’s Motion to Dismiss Based Upon the State’s Failure to
7 Preserve Exculpatory Evidence, and Motion to Dismiss Due to the State’s Failure to
8 Provide Brady Material

9 As the record shows, Defense Counsel only filed two motions prior to trial. First,
10 Counsel moved to continue the trial. Second, Counsel filed a Motion to Dismiss due to the
11 State’s failure to produce Andre Randle as a witness. During the motion hearing on October 27,
12 2009, Defense Counsel withdrew the Motion to Dismiss. Tr. October 27, 2009, at 3. Counsel
13 did not file any other pre-trial motions on Mr. Adams’ behalf. The State’s argument on this
14 issue is belied by the record.

15 The State then argues that Mr. Adams makes a “bare and naked allegation” that Counsel
16 did not adequately investigate the case because the District Attorney found Andre Randle as a
17 witness for trial. Response, at 13. The State argues that Randle testified at trial, and Counsel
18 “had the opportunity to meet with Randle the morning before his trial testimony.” Response, at
19 13. The State then argues that Counsel conducted a thorough cross-examination of Detective
20 Gabriel Lebario at trial and asked him about the missing witness. Response, at 13.

21 None of the State’s assertions shows that Defense Counsel took time to investigate the
22 case. The State simply shows that Counsel cross-examined both Detective Lebario and Andre
23 Randle at trial. This does not undermine Counsel’s duty to investigate and prepare for trial. As
24 explained fully in Mr. Adams’ Supplemental Petition, producing a trial witness on the day of
25 trial does not allow Counsel to prepare for the examination adequately. Therefore, Defense
26
27
28

1 Counsel should have requested a continuance of the trial to have time to interview Randle and
2 prepare for his testimony.

3 For these reasons, Mr. Adams asks that the Court find Defense Counsel ineffective and
4 reverse his conviction.

5 ***III. Defense Counsel was ineffective for both failing to investigate and failing to***
6 ***challenge the State's late disclosure of witness Andre Randle.***

7 It is indisputable that “[c]ounsel has a duty to make reasonable investigations or to make
8 a reasonable decision that makes particular investigations unnecessary.” Strickland v.
9 Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel is not
10 required to be “errorless,” but Counsel must conduct “careful factual and legal investigations”
11 to make “informed decisions on his client’s behalf both at the pleading stage and at trial.”
12 Rusling v. State, 96 Nev. 755, 758, 616 P.2d 1108 (1980).

13 The State argues that Counsel filed a Motion to Dismiss on October 20, 2009, arguing
14 that the State should produce the “mystery witness.” Response, at 15. The State then argues,
15 “By counsel filing this motion prior to trial, he was objecting and challenging the fact that the
16 State had not produced Mr. Randle.” Response, at 15.

17 The State’s argument is incorrect. Defense Counsel filed the Motion to Dismiss on
18 October 21, 2009. *See*, Supplemental Petition, Exhibit D.

19 By October 22, 2009, Counsel had received the name of the witness from the State. *See*,
20 Supplemental Petition, Exhibit B. Counsel had ample time to investigate or request a
21 continuance of the trial at that point. However, Counsel neither located Randle nor requested a
22 continuance.

23 Then, on October 27, 2009, Defense Counsel withdrew the Motion to Dismiss. *See*,
24 Supplemental Petition, Exhibit C. Contrary to the State’s assertion, Defense Counsel did not
25 preserve the issue. Instead, he withdrew it. In fact, Counsel only effectively preserved one issue
26
27
28

1 by way of motion in this case, which was the Motion to Continue Trial Date filed on October 6,
2 2008. There were no other motions filed in this case.

3 Next, the State argues that Counsel was not ineffective because the prosecutor “allowed
4 counsel to not only cross-examine Mr. Randle, but also speak with him beforehand...”
5 Response, at 15. The State has missed the point of the issue at hand.
6

7 Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) requires the
8 prosecution to provide the defense with material evidence that is favorable to the accused upon
9 request. This requirement is clear. As explained in the Supplemental Petition, the Ninth Circuit
10 has held that a Brady violation may be cured by disclosing the evidence “at a time when
11 disclosure would be of value to the accused.” United States v. Gamez-Orduno, 235 F.3d 453,
12 461 (9th Cir. 2000); Tennison v. City and County of San Francisco, 570 F.3d 1078, 1093 (9th
13 Cir. 2009).
14

15 It is irrelevant to this case that Counsel spoke with Andre Randle briefly before his
16 testimony. The issue at hand is that the State disclosed a material witness and provided him for
17 trial at a time where he would not be of value to Mr. Adams.

18 Mr. Adams does not dispute that Counsel agreed to Andre Randle testifying at trial. The
19 issue is that Counsel should have objected to the late disclosure and asked for the available
20 remedy of a continuance. A continuance at that point would have allowed Counsel and the
21 investigator to interview Randle to determine the value of his testimony and determine whether
22 Randle could lead to any additional exculpatory defense evidence. Because Counsel did not
23 request a continuance when the State brought Randle to trial, Counsel failed to protect Mr.
24 Adams’ rights to due process and a fair trial.
25

26 Next, the State argues that Mr. Adams asserts that Counsel should have “expended all
27 resources to find this unidentified witness.” Response, at 16. The State further argues that:
28

1 “Moreover, it is utter speculation that Randle’s testimony would have somehow been different
2 at trial had counsel conducted a more in-depth pre-trial interview of the witness, when
3 Petitioner admits that Randle’s testimony was favorable to the defense. Trial counsel had time
4 before Randle’s testimony to discuss his testimony with him and essentially have a pre-trial
5 interview.” Response, at 16.
6

7 The State has completely misrepresented Mr. Adams’ claim. It is indisputable that
8 Counsel had a duty to investigate and prepare for trial. Part of preparing for trial is locating
9 material witnesses. The record and case file are devoid of evidence that Counsel made any
10 effort to locate Mr. Randle after checking into the address provided by the State on October 22,
11 2009. This does not mean that Counsel was required to expend “all resources.” This means that
12 Counsel was required to do his job diligently and make efforts to track down and interview a
13 material witness.
14

15 To put the claim more simply, Counsel did not investigate and interview Andre Randle
16 before trial. On October 21, 2009, eleven days before trial, Counsel filed a Motion to Dismiss
17 the case because the State did not provide material evidence—the identity of Andre Randle. On
18 October 22, 2009, Counsel learned Andre Randle’s name. On October 27, 2009, without having
19 located Randle, Counsel withdrew the Motion to Dismiss and made an agreement for “leeway”
20 while questioning Detective Gabriel Lebario. On November 2, 2009, the parties proceeded to
21 trial. On November 3, 2009, the State informed Defense Counsel that they located Andre
22 Randle and planned to produce him as a witness on November 4, 2009. Tr. November 3, 2009,
23 at 276-277. Counsel agreed to speak with Andre Randle before his testimony on November 4,
24 2009. Id. at 277. Counsel had no other contact with Andre Randle before he testified. Andre
25 Randle testified favorably for Mr. Adams.
26
27
28

1 Had Defense Counsel objected to the late disclosure and requested a continuance, he
2 could have interviewed Andre Randle and investigated any additional leads that may have
3 arisen. To be clear, the issue is not that Defense Counsel should have objected to Andre Randle
4 as a witness. The issue is that Defense Counsel should have objected to the late disclosure and
5 sought a remedy to protect Mr. Adams' rights.

6
7 The State's assertion that Defense Counsel had time to speak with Randle before he
8 testified is irrelevant. By the last day of trial, the jury had already heard the majority of the
9 evidence against Mr. Adams. Had Counsel located and interviewed Randle before trial, he
10 could have cross-examined the other witnesses more effectively and used Randle's testimony to
11 corroborate the cross-examinations.

12 At a very minimum, Counsel should have sought his one available remedy and
13 requested a continuance of the trial so he could interview Randle in depth and determine
14 whether Randle could lead him to any other exculpatory defense evidence. There is no way that
15 Counsel could have effectively prepared to examine Randle having just met him on the day of
16 his testimony.

17
18 Finally, the State argues that there was no prejudice to Mr. Adams because Randle's
19 testimony was favorable to Mr. Adams. Again, the State misses the point of the claim.

20 There is a reasonable probability that the result of the trial would have been different
21 had Counsel used Randle's testimony to build the entire defense theory. Had Counsel known
22 the content of Randle's testimony, it is reasonably probable that Counsel could have used
23 Randle's testimony to discredit the other State's witnesses. Of course, Randle testified at trial.
24 The issue here is not whether Randle testified. The issue is that Defense Counsel did not
25 request a continuance after the late disclosure to investigate and prepare for Randle's testimony.
26
27
28

1 Had Defense Counsel located and interviewed Randle before trial, he could have
2 subpoenaed him as a defense witness and prepared the theory of defense around Randle's
3 testimony. Even after not doing this, Counsel should have objected to the late disclosure and
4 requested a continuance so he could properly interview Randle and determine how to handle his
5 testimony most effectively.

6
7 In sum, there is a reasonable probability that the result of the trial would have been
8 different had Counsel located Randle before trial. At a minimum, Counsel should have
9 requested a continuance to determine the value of Randle's testimony. Counsel's brief
10 discussion with Randle before his testimony was not sufficient to protect Mr. Adams' rights to
11 due process and a fair trial. Therefore, Counsel was ineffective, and this Court should reverse
12 Mr. Adams' conviction.

13 ***IV. Claims Two and Four through Twelve are not waived.***

14
15 The State argues that Mr. Adams' claims were not properly raised in his petition for writ
16 of habeas corpus because they should have been raised on direct appeal. The State's argument
17 is mistaken. The State incorrectly alleges that the only claims that can be raised in post-
18 conviction habeas proceedings are "challenges to the validity of a guilty plea" and "claims of
19 ineffective assistance of trial and appellate counsel." Response, at 18.

20 NRS 34.724 provides:

- 21
22 **(1) Any person convicted of a crime and under sentence of death or imprisonment**
23 **who claims that the conviction was obtained, or that the sentence was imposed, in**
24 **violation of the Constitution of the United States or the Constitution or laws of this**
25 **State, or who claims that the time the person has served pursuant to the judgment of**
26 **conviction has been improperly computed, may, without paying the filing fee, file a**
27 **postconviction petition for writ of habeas corpus to obtain relief from the**
28 **conviction or sentence or to challenge the computation of time that the person has**
served.

29 The statutory language is clear. A petitioner may challenge an unconstitutional
30 conviction. The statute does not limit post-conviction claims to "claims or ineffective assistance

1 of counsel.” Ineffective assistance of counsel is merely one constitutional collateral challenge to
2 a conviction. NRS 34.724 does not limit post-conviction claims to include only claims for
3 ineffective assistance of counsel.

4 In the Response, the State cites Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058,
5 1059 (1994), to propose that claims that do not involve either a challenge to the validity of a
6 guilty plea or ineffective assistance of counsel must be filed on direct appeal. In Franklin, the
7 Nevada Supreme Court dealt with a case wherein the petitioner filed a post-conviction petition
8 for habeas corpus because his plea counsel did not inform him of his ability to file a direct
9 appeal. The Court also provided examples of situations where a defendant who pleaded guilty
10 would need to appeal from his judgment of conviction and would be able to do so under
11 Nevada law. The Franklin case *does not* provide that ineffective assistance of counsel is the
12 *only* constitutional challenge to a conviction as the State suggests. NRS 34.724 expressly
13 permits a petitioner to challenge a conviction that violates the Constitution of the United States
14 or the Constitution of Nevada.

15 Here, Mr. Adams has raised several claims that challenge the constitutionality of his
16 conviction under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States
17 Constitution. For this reason, all of Mr. Adams’ claims have all been properly raised in his
18 post-conviction proceedings.

19 Accordingly, the Court should note that the State failed to respond to the merits of
20 several of Mr. Adams’ claims. Mr. Adams requests that the Court find that his claims have
21 properly been raised in these proceedings. Mr. Adams also requests that the Court treat the
22 State’s failure to respond to the claims as a confession of error and grant Mr. Adams’ claims.
23 *See generally, Polk v. State*, 126 Nev. 180, 233 P.3d 357 (2010); *see also*, EDCR 2.20(e).

1 In sum, Mr. Adams requests that the Court grant the claims raised in his Petition and
2 Supplement and reverse Mr. Adams' conviction.

3 ***V. Mr. Adams' pro per claims do not fail because they were not raised on direct appeal.***

4 Here, the State argues that Mr. Adams' pro per claims fail because they should have been
5 raised on appeal. This is the same argument that the State raised in its previous section. Here, the
6 State has not identified which claims should have been raised on appeal and simply designates
7 "Petitioner's Pro Per claims." For this reason, Mr. Adams requests that the Court disregard the
8 State's argument, consider the merits of each of Mr. Adams' claims, and grant Mr. Adams'
9 claims.
10

11 ***VI. Cumulative Error***

12 The State argues that cumulative error analysis does not apply to ineffective assistance
13 of counsel claims. Response, at 18. The State provides no legal authority to support this
14 position.
15

16 Additionally, Mr. Adams has claimed cumulative error based on the numerous errors in
17 this case—not just ineffective assistance of counsel. The State has not addressed any other error
18 at all.

19 In Nevada, cumulative error analysis turns on the following factors: (1) whether the
20 issue of guilt or innocence is close; (2) the quantity and character of the error; and (3) the
21 gravity of the crime charged. Dechant v. State, 116 Nev. 918, 927, 10 P.3d 108 (2000).
22

23 As Mr. Adams has demonstrated in his Petition and Supplement, the issue of guilt or
24 innocence was close, the errors were numerous, and the crimes charged were severe. Thus, Mr.
25 Adams requests that this Court find cumulative error in this case and reverse Mr. Adams'
26 conviction.
27
28

1 **VII. *Mr. Adams is entitled to an evidentiary hearing.***

2 The State argues that there is no reason to expand the record because Mr. Adams’
3 claims “are not cognizable in a post-conviction petition and Defendant fails to present specific
4 factual allegations that would entitle him to relief.” Response, at 19.

5 The State’s argument is incorrect. Mr. Adams has, in fact, raised claims that would
6 entitle him to relief in both his Petition and Supplemental Petition. Therefore, Mr. Adams
7 requests that this Court grant him an evidentiary hearing to allow him to present evidence to
8 support his claims.
9

10 **CONCLUSION**

11 Mr. Adams received ineffective assistance of counsel. Mr. Adams requests this Court
12 grant his claims and vacate his conviction and sentence. In the alternative, Mr. Adams requests
13 that this Court grant an evidentiary hearing to allow him to present evidence and expand the
14 record in support of his claims.
15

16 DATED this 24th day of October, 2019.

17 /s/ James A. Oronoz
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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Eighth Judicial District Court in Clark County, Nevada on October 24, 2019. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

STEVEN WOLFSON,
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101
PDMotions@clarkcountyda.com
Respondent

I hereby certify and affirm that I mailed a copy of the foregoing document on October 24, 2019, postage prepaid and addressed to the following:

AARON FORD
Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4714

By: /s/ Rachael Stewart
An employee of Ornoz & Ericsson, LLC

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