

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: 05C212968

Docket No: 85367

RECORD ON APPEAL VOLUME 6

ATTORNEY FOR APPELLANT
JOSEPH HENDERSON # 67224,
PROPER PERSON
P.O. BOX 650
INDIAN SPRINGS, NV 89070

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

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MINUTES,
NUMBERED PAGE(S)
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U.S. MAIL**

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****April 08, 2010**

05C212968

The State of Nevada vs Joseph A Henderson

April 08, 2010**9:00 AM****Motion**

**DEFT'S PRO PER
MTN TO
WITHDRAW
CNSL& REQREC
Court Clerk: Jennifer
Kimmel
Reporter/Recorder:
JoAnn Orduna
Heard By: Abbi
Silver**

HEARD BY:**COURTROOM:** No Location**COURT CLERK:****RECORDER:****REPORTER:****PARTIES****PRESENT:**

Nance, Aaron M.
Public Defender
Waters, William

Attorney
Attorney
Attorney

JOURNAL ENTRIES

- There being no opposition, COURT ORDERED, Deft's Motion is GRANTED and he is now in Proper Person. Mr. Waters advised he will have the file sent to the Deft. right away.
CUSTODY

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

June 03, 2010

05C212968

The State of Nevada vs Joseph A Henderson

June 03, 2010

9:00 AM

Motion

**DEFT'S PRO PER
MTN FOR
PRODUCTION OF
ADDITIONAL
RECORDS Court
Clerk: Jennifer
Kimmel
Reporter/Recorder:
JoAnn Melendez
Heard By: Abbi
Silver**

HEARD BY:**COURTROOM:** No Location**COURT CLERK:****RECORDER:****REPORTER:****PARTIES**

PRESENT: O'Callaghan, Michael N. Attorney

JOURNAL ENTRIES

- COURT FINDS, Defendant is requesting post-conviction discovery, such discovery is not available except on a showing of good cause after a writ has been granted. Additionally, after the writ has been granted and a date set for the hearing, a party may invoke any method of discovery available under the Nevada Rules of Civil Procedure if, and to the extent that, the judge for good cause shown grants leave to do so pursuant to NRS 34.780(2). In this case, no writ has been granted. Additionally, Defendant has failed to delineate any good cause for such discovery. Accordingly, COURT ORDERED, Deft's Motion is DENIED.

NDC

PRINT DATE: 11/15/2022

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Minutes Date: July 14, 2005

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****March 15, 2011**

05C212968

The State of Nevada vs Joseph A Henderson

March 15, 2011**9:00 AM****Motion for Appointment of
Attorney****HEARD BY:** Silver, Abbi**COURTROOM:** RJC Courtroom 11D**COURT CLERK:** Denise Trujillo**RECORDER:****REPORTER:** Renee Silvaggio**PARTIES****PRESENT:**Ponticello, Frank M.
State of NevadaAttorney
Plaintiff

JOURNAL ENTRIES

- DEFT'S PRO PER MOTION FOR APPOINTMENT OF COUNSEL; REQUEST FOR EVIDENTIARY HEARING

COURT advised of status of case and ORDERED, Motion for appointment of counsel is GRANTED, matter REFERRED to Drew Christiansen and matter CONTINUED for confirmation of counsel. COURT directed clerk to advised Mr. Christiansen that Deft. is facing multiple life sentences.

NDC

3/17/11 9:00 AM CONFIRMATION OF COUNSEL....REQUEST FOR EVIDENTIARY HEARING

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****March 17, 2011**

05C212968

The State of Nevada vs Joseph A Henderson

March 17, 2011**9:00 AM****Confirmation of Counsel****HEARD BY:** Silver, Abbi**COURTROOM:** RJC Courtroom 11D**COURT CLERK:** Susan Botzenhart**RECORDER:****REPORTER:** Renee Silvaggio**PARTIES****PRESENT:**

Henderson, Joseph A

Defendant

Iskan, Ercan E

Attorney

Kice, Stephanie B., ESQ

Attorney

State of Nevada

Plaintiff

JOURNAL ENTRIES

- Ms. Kice confirmed as counsel for Deft. COURT SO ORDERED; Public Defender's office to forward case file to Ms. Kice. COURT FURTHER ORDERED, matter SET for status check on trial setting.

NDC

3/31/11 9:00 AM STATUS CHECK: TRIAL SETTING / REQUEST FOR EVIDENTIARY HEARING...DEFT'S PRO PER PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

March 31, 2011

05C212968

The State of Nevada vs Joseph A Henderson

March 31, 2011

9:00 AM

Petition for Writ of Habeas
Corpus

HEARD BY: Silver, Abbi

COURTROOM: RJC Courtroom 11D

COURT CLERK: Denise Trujillo

RECORDER:

REPORTER: Renee Silvaggio

PARTIES

PRESENT:	McDonald, Patrick E.	Attorney
	Raman, Jay	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- DEFT'S PRO PER PETITION FOR WRIT OF HABEAS CORPUS

Mr. McDonald, present for Ms. Kice, advised she requested 90 days to file supplemental. COURT ORDERED, matter SET for hearing, briefing schedule as follows: Deft. to file supplemental opening brief within 90 days; State to file response within 30 days; and Deft. to file reply within 30 days.

NDC

9/29/11 9:00 AM HEARING: DEFT'S PRO PER PETITION FOR WRIT OF HABEAS CORPUS

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****August 11, 2011**

05C212968

The State of Nevada vs Joseph A Henderson

August 11, 2011**9:00 AM****Motion****HEARD BY:** Silver, Abbi**COURTROOM:** RJC Courtroom 11D**COURT CLERK:** Jennifer Kimmel**RECORDER:****REPORTER:** JoAnn Melendez**PARTIES****PRESENT:**Raman, Jay
State of NevadaAttorney
Plaintiff**JOURNAL ENTRIES**

- Ms. Rochelle Nguyen, Esq. present on behalf of the Deft. for Ms. Kice. COURT NOTED, counsel have filed a stipulation to extend the time to file Response to 10/28/11 and the Reply, if any, to 11/14/11. Accordingly, COURT ORDERED, the upcoming hearing set for 9/29/11 is VACATED and matter set for hearing.

NDC

12/1/11 9:00 A.M. DEFT'S PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****December 01, 2011**

05C212968

The State of Nevada vs Joseph A Henderson

December 01, 2011 9:00 AM**Petition for Writ of Habeas
Corpus****HEARD BY:** Bonaventure, Joseph T.**COURTROOM:** RJC Courtroom 11D**COURT CLERK:** Jennifer Kimmel
Jill Chambers**RECORDER:****REPORTER:** Michelle R. Ferreyra-Marez**PARTIES****PRESENT:** Kice, Stephanie B., ESQ Attorney

JOURNAL ENTRIES

- Ms. Agnes Botelho, Esq. present on behalf of the State of Nevada. COURT noted, the State of Nevada has filed an Opposition and this record will need to be expanded. Accordingly, COURT ORDERED, matter CONTINUED and set for a two hour Evidentiary Hearing.

NDC

CONTINUED TO: 1/9/12 1:00 P.M.//EVIDENTIARY HEARING

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****January 05, 2012**

05C212968

The State of Nevada vs Joseph A Henderson

January 05, 2012**10:45 AM****All Pending Motions****HEARD BY:** Silver, Abbi**COURTROOM:** RJC Courtroom 11D**COURT CLERK:** Jennifer Kimmel**RECORDER:****REPORTER:****PARTIES****PRESENT:**

JOURNAL ENTRIES

- EVIDENTIARY HEARING...DEFT'S PETITION FOR A WRIT OF HABEAS CORPUS

Pursuant to an e-mail received on 1/5/12, the Court has been notified that the Defendant's attorney's are not available for the Writ hearing, accordingly, COURT ORDERED, matters are CONTINUED.

NDC

CONTINUED TO: 1/12/12 9:00 A.M.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****January 12, 2012**

05C212968

The State of Nevada vs Joseph A Henderson

January 12, 2012**9:00 AM****All Pending Motions****HEARD BY:** Silver, Abbi**COURTROOM:** RJC Courtroom 11D**COURT CLERK:** Jennifer Kimmel**RECORDER:****REPORTER:** Robert Cangemi**PARTIES****PRESENT:** Kice, Stephanie B., ESQ Attorney**JOURNAL ENTRIES****- EVIDENTIARY HEARING...DEFT'S WRIT OF HABEAS CORPUS**

Ms. Maria Lavell, Esq. present on behalf of the State of Nevada. Discussion regarding getting all the appropriate Deputies together to coordinate re-setting this Evidentiary Hearing. COURT stated, it believed everyone would be present with their respective calendars. COURT additionally stated, the Deputies Public Defenders were Violet Radosta and Norm Reed and from the record, Stacy Kollins would be the Deputy D.A. Court directed Ms. Kice to contact these deputies and set this for an Evidentiary Hearing on a Monday at 1:00 P.M. Court and counsel discussed possible dates. COURT ORDERED, matters CONTINUED, Ms. Kice to update the Court next date.

NDC

CONTINUED TO: 1/19/12 9:00 A.M.

CLERK'S NOTE: Following the hearing Ms. Radosta arrived and the Court advised her of the ruling above. jk

PRINT DATE: 11/15/2022

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Minutes Date: July 14, 2005

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****January 19, 2012**

05C212968

The State of Nevada vs Joseph A Henderson

January 19, 2012**9:00 AM****All Pending Motions****HEARD BY:** Silver, Abbi**COURTROOM:** RJC Courtroom 11D**COURT CLERK:** Jennifer Kimmel**RECORDER:****REPORTER:** Renee Silvaggio**PARTIES****PRESENT:**

Henderson, Joseph A

Defendant

Kice, Stephanie B., ESQ

Attorney

JOURNAL ENTRIES**- EVIDENTIARY HEARING...DEFT'S PETITION FOR WRIT OF HABEAS CORPUS**

Ms. Kristen Kramer, Esq. present on behalf of the State of Nevada. Also present Ms. Violet Radosta. Discussion regarding rescheduling the Evidentiary Hearing. COURT ORDERED, matter CONTINUED and Deft. to be held at Clark County Detention Center pending the next hearing.

NDC

CONTINUED TO: 1/30/12 1:00 P.M.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****January 30, 2012**

05C212968

The State of Nevada vs Joseph A Henderson

January 30, 2012**1:00 PM****All Pending Motions****HEARD BY:** Silver, Abbi**COURTROOM:** RJC Courtroom 11D**COURT CLERK:** Jennifer Kimmel**RECORDER:****REPORTER:** JoAnn Melendez**PARTIES****PRESENT:** Henderson, Joseph A Defendant**JOURNAL ENTRIES****- EVIDENTIARY HEARING...DEFT'S PETITION FOR WRIT OF HABEAS CORPUS**

COURT explained to the Deft. that his counsel was ill and would not be present this date, therefore the Court advised the Deputy District Attorney their presence would not be necessary. COURT ORDERED, matter is CONTINUED and Deft. may be transported back to High Desert. COURT FURTHER ORDERED, Deft's counsel is to visit the Deft. at High Desert to review his issues prior to the next hearing.

State is directed to prepare an Order for Transport to the next hearing.

NDC

CONTINUED TO: 3/12/12 1:00 P.M.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****March 27, 2012**

05C212968

The State of Nevada vs Joseph A Henderson

March 27, 2012**9:00 AM****All Pending Motions****HEARD BY:** Silver, Abbi**COURTROOM:** RJC Courtroom 11D**COURT CLERK:** Jennifer Kimmel**RECORDER:****REPORTER:** JoAnn Melendez**PARTIES****PRESENT:**

Kice, Stephanie B., ESQ

Attorney

JOURNAL ENTRIES**- EVIDENTIARY HEARING..DEFT'S PETITION FOR WRIT OF HABEAS CORPUS**

Ms. Lisa Luzaich, Esq. and Mr. Brad Turner, Esq. present on behalf of the State of Nevada. Also present Mr. Norm Reed, Esq. and Ms. Violet Radosta, Esq. COURT noted the Nevada Department of Corrections did not transport the Deft. to this hearing. Accordingly, COURT ORDERED, matter is CONTINUED. Mr. Turner advised he will have another Transport Order prepared for the next hearing.

Ms. Kice requested several procedural matters be addressed. COURT ORDERED, request is GRANTED. Ms. Kice advised she has received the discovery from the Deputy District Attorney however there is a missing DNA report from California, which was not in the file. Mr. Reed indicated they had their expert look at that report so he believes it is in the file. COURT FURTHER ORDERED, State to produce a copy of the missing report for Ms. Kice. Additionally, Ms. Kice requested permission to supplement the Petition following her review of the report, if needed. COURT FURTHER ORDERED, request is GRANTED.

Ms. Kice advised she has been told in the past that the Deputy District Attorney does not allow counsel to view a file post conviction and requests clarification on that issue. Discussion ensued.

PRINT DATE: 11/15/2022

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Minutes Date: July 14, 2005

COURT FURTHER ORDERED, State to make their files available to Ms. Kice.

Ms. Kice requested Indigent Defense funds for independent expert. COURT FURTHER ORDERED, request is DENIED as there was already an independent expert, Nora Rudin therefore another one is not necessary as this is not another trial. COURT clarified the issue is Ineffective Assistance of Counsel and that would be a question of whether or not the Deft s attorneys fell below the standard of care pursuant to the Strickland factors.

Discussion ensued regarding resetting this matter, when all parties will be available. COURT noted Mr. Reed will be beginning a capitol murder case on 6/11/12. COURT further stated, the Court will accommodate Mr. Reed s schedule and, if helpful, we could begin at 8:00 A.M. with his testimony. COURT stated it will do the best it can to accommodate.

NDC

CONTINUED TO: 6/11/12 1:00 P.M.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****May 08, 2012**

05C212968

The State of Nevada vs Joseph A Henderson

May 08, 2012**9:00 AM****Status Check****HEARD BY:** Silver, Abbi**COURTROOM:** RJC Courtroom 11D**COURT CLERK:** Jennifer Kimmel**RECORDER:****REPORTER:** JoAnn Melendez**PARTIES****PRESENT:**

Kice, Stephanie B., ESQ

Attorney

Kramer, Kristen B.

Attorney

State of Nevada

Plaintiff

JOURNAL ENTRIES

- Ms. Kramer advised Mr. Turner was unable to be present this date. COURT noted, Deft. is also not present. COURT ORDERED, matter is CONTINUED and all counsel are directed to bring in their respective schedules. COURT NOTED, resetting this Evidentiary Hearing involves Norm Reed and Violet Radosta, who are also directed to be present next date.

NDC

CONTINUED TO: 5/22/12 9:00 A.M.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****May 22, 2012**

05C212968

The State of Nevada vs Joseph A Henderson

May 22, 2012**9:00 AM****Status Check****HEARD BY:** Silver, Abbi**COURTROOM:** RJC Courtroom 11D**COURT CLERK:** Jennifer Kimmel**RECORDER:****REPORTER:** JoAnn Melendez**PARTIES****PRESENT:**

Kice, Stephanie B., ESQ

Attorney

JOURNAL ENTRIES

- Mr. Jonathan Cooper, Esq. present on behalf of the State of Nevada and advised matter is assigned to Ms. Luzaich. COURT ORDERED, upcoming Petition is RESET. COURT directed the State to advise Ms. Luzaich of the hearing date wherein she will have time to request it be reset if needed.

NDC

8/27/12 1:00 P.M. PETITION FOR WRIT OF HABEAS CORPUS

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****August 27, 2012**

05C212968

The State of Nevada vs Joseph A Henderson

August 27, 2012**1:00 PM****All Pending Motions****HEARD BY:** Silver, Abbi**COURTROOM:** RJC Courtroom 11D**COURT CLERK:** Jennifer Kimmel**RECORDER:****REPORTER:** JoAnn Melendez**PARTIES****PRESENT:**

Gregory, Julian

Attorney

Kice, Stephanie B., ESQ

Attorney

State of Nevada

Plaintiff

Turner, Robert B.

Attorney

JOURNAL ENTRIES**- EVIDENTIARY HEARING...DEFT'S PETITION FOR WRIT OF HABEAS CORPUS**

Ms. Violet Radosta, Esq. also present under subpoena. Court Staff confirmed that High Desert has not transported the Deft. to this hearing. COURT ORDERED, matters CONTINUED. COURT FURTHER ORDERED, matter set for Status Check and the Court's Judicial Executive Assistant shall prepare an Order for Transport.

NDC

10/18/12 9:00 A.M. DEFT'S PRESENCE

CONTINUED TO: 10/22/12 1:00 P.M.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

October 18, 2012

05C212968

The State of Nevada vs Joseph A Henderson

October 18, 2012

9:00 AM

Status Check

HEARD BY: Silver, Abbi

COURTROOM: RJC Courtroom 11D

COURT CLERK: Jennifer Kimmel

RECORDER:

REPORTER: Renee Silvaggio

PARTIES

PRESENT:	Henderson, Joseph A	Defendant
	Kice, Stephanie B., ESQ	Attorney
	State of Nevada	Plaintiff
	Turner, Robert B.	Attorney

JOURNAL ENTRIES

- Ms. Lisa Luzaich, Esq. also present on behalf of the State of Nevada. Discussion regarding Mr. Turner's schedule next week. COURT ORDERED, Evidentiary Hearing date STANDS. COURT stated Mr. Norm Reed and Ms. Violet Radosta from the Special Public Defenders office are required to be present and the Evidentiary Hearing date has been pending for some time. COURT stated, Mr. Turner can get an associate to hear the Evidentiary Hearing next week if he is unable to be present. COURT FURTHER ORDERED, Deft. is REMANDED NO BAIL and is to stay at Clark County Detention Center (CCDC) until the Evidentiary Hearing.

NDC

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****October 22, 2012**

05C212968

The State of Nevada vs Joseph A Henderson

October 22, 2012**1:00 PM****All Pending Motions****HEARD BY:** Silver, Abbi**COURTROOM:** RJC Courtroom 11D**COURT CLERK:** Jennifer Kimmel**RECORDER:****REPORTER:** JoAnn Melendez**PARTIES****PRESENT:**

Henderson, Joseph A

Defendant

Kice, Stephanie B., ESQ

Attorney

JOURNAL ENTRIES**- EVIDENTIARY HEARING...DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS**

Ms. Shannon Clowers, Esq. present on behalf of the State of Nevada. Ms. Kice, Esq. indicated she is withdrawing the portion of the Petition related to the Affidavit of Search Warrant. COURT SO NOTED.

Testimony presented, (see worksheet). COURT stated its findings and ORDERED, Deft.'s Petition is DENIED. COURT will have the transcripts from today prepared and given to the Deputy District Attorney who will prepare the Order and matter is set for Status Check.

NDC

11/20/12 9:00 A.M. STATUS CHECK: WRITTEN ORDER

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****November 20, 2012**

05C212968

The State of Nevada vs Joseph A Henderson

November 20, 2012 9:00 AM**Status Check****HEARD BY:** Silver, Abbi**COURTROOM:** RJC Courtroom 11D**COURT CLERK:** Jennifer Kimmel**RECORDER:****REPORTER:** JoAnn Melendez**PARTIES****PRESENT:**

JOURNAL ENTRIES

- Ms. Hagar Trippiedi, Esq. present on behalf of the State of Nevada. COURT stated, it has received the written Findings of Fact, Conclusions of Law and Order and will sign same in chambers. COURT ORDERED, once Order is signed and filed, CASE is CLOSED.

NDC

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****March 14, 2013**

05C212968

The State of Nevada vs Joseph A Henderson

March 14, 2013**9:00 AM****Status Check****HEARD BY:** Silver, Abbi**COURTROOM:** RJC Courtroom 11D**COURT CLERK:** Jennifer Kimmel**RECORDER:****REPORTER:** JoAnn Melendez**PARTIES****PRESENT:**

Gregory, Julian

Attorney

Ponticello, Frank M.

Attorney

State of Nevada

Plaintiff

JOURNAL ENTRIES

- Mr. Julian Gregory, Esq. present and accepting appointment as Deft's counsel. COURT stated, this matter just had an Evidentiary Hearing on a Post Conviction Writ of Habeas Corpus for ineffective assistance of counsel, which was denied and that decision is now being appealed. Accordingly, COURT ORDERED, Mr. Gregory is APPOINTED.

NDC

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****December 02, 2014**

05C212968

The State of Nevada vs Joseph A Henderson

December 02, 2014 9:00 AM**All Pending Motions****HEARD BY:** Silver, Abbi**COURTROOM:** RJC Courtroom 11D**COURT CLERK:** Athena Trujillo**RECORDER:****REPORTER:** JoAnn Melendez**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Hagar Trippiedi, Deputy District Attorney, present for the State of Nevada.
Defendant Henderson not present.

DEFENDANT'S PRO SE PETITION FOR WRIT OF HABEAS CORPUS ... RESPONSE AND
COUNTERMOTION: STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S
SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

COURT ORDERED, Petition for Writ of Habeas Corpus DENIED via written order FILED IN OPEN
COURT.

NDC

CLERK'S NOTE: A copy of the order has been mailed to:

Joseph A. Henderson
Ely State Prison
PO Box 1989
Ely, NV 89301-1989

PRINT DATE: 11/15/2022

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Minutes Date: July 14, 2005

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****February 10, 2022**

05C212968

The State of Nevada vs Joseph A Henderson

February 10, 2022**3:00 AM****Minute Order****HEARD BY:** Kierny, Carli**COURTROOM:** RJC Courtroom 16B**COURT CLERK:** Jill Chambers**RECORDER:****REPORTER:****PARTIES****PRESENT:**

JOURNAL ENTRIES

- This matter is before the Court on Defendant's "Motion Contesting No Jurisdiction" and Defendant s "Motion for Notice of Corruption and Hindrance Procedure Violation." Both are hereby denied as moot. Defendant's contention in both motions is that his successive post-conviction petition was heard by the Justice Court, and he is demanding that the motions be heard by District Court. The motions are moot because his successive post-conviction petition was already heard by the duly-elected judge in District Court 2, and not a justice of the peace. Therefore, the motions are both denied, and the hearing date of 2/15/22 is hereby vacated.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

May 10, 2022

05C212968

The State of Nevada vs Joseph A Henderson

May 10, 2022

9:00 AM

Motion

Requesting the Facts,
Findings and
Conclusion of Law
from Feb 15th 2022

HEARD BY: Gibbons, Mark

COURTROOM: RJC Courtroom 11B

COURT CLERK: Kory Schlitz

RECORDER: Gina Villani

REPORTER:

PARTIES**PRESENT:**

Gregory, Julian
Judd, Joshua D
State of Nevada

Attorney
Attorney
Plaintiff

JOURNAL ENTRIES

- Defendant not present and in custody in the Nevada Department of Corrections.

Mr. Gregory stated he previously was the attorney of record on this case when he was a private attorney several years ago, and the Defendant is requesting documents, however it is his understand he provided the Defendant with the relevant documents. Mr. Judd indicated the State is not taking a position on this matter. COURT ORDERED, Requested the Facts, Findings and Conclusions of Law from February 15, 2022 DENIED.

NDC

CLERK'S NOTE: A copy of this Minute Order, and the Minute Order dated February 10, 2022 mailed to: Joseph Henderson #67224, PO BOX 1989, Ely, Nevada 89301. (5/11/2022 ks)

PRINT DATE: 11/15/2022

Page 56 of 58

Minutes Date: July 14, 2005

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

June 28, 2022

05C212968

The State of Nevada vs Joseph A Henderson

June 28, 2022

9:00 AM

Motion

Requesting Status of
Petition for Writ of
Habeas Corpus and
Responding to Why
Any Lawyer Such a
Julian Gregory
Would Stand in for
the Defendant when
he is Pro Se

HEARD BY: Gibbons, Mark

COURTROOM: RJC Courtroom 11B

COURT CLERK: Kory Schlitz

RECORDER: Gina Villani

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- APPEARANCES CONTINUED: Defendant not present and in custody in the Nevada Department of Corrections; Deputy District Attorney Haley Jarimillo present on behalf of the State; Julian Gregory Esq. not present.

Ms. Jarimillo indicated the State is not taking a position on this Motion. COURT ORDERED, Motion DENIED WITHOUT PREJUDICE as the Defendant has an attorney of record, and this is a rouge motion.

NDC

PRINT DATE: 11/15/2022

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Minutes Date: July 14, 2005

CLERK'S NOTE: A copy of this Minute Order has been mailed to: Joseph Henderson #67224, PO BOX 1989, Ely, Nevada 89301. (6-28-2022 ks)

Certification of Copy and Transmittal of Record

State of Nevada }
County of Clark } SS:

Pursuant to the Supreme Court order dated November 1, 2022, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises six volumes with pages numbered 1 through 1245.

STATE OF NEVADA,

Plaintiff(s),

vs.

JOSEPH ALEXANDER HENDERSON,

Defendant(s),

Case No: 05C212968

Dept. No: I

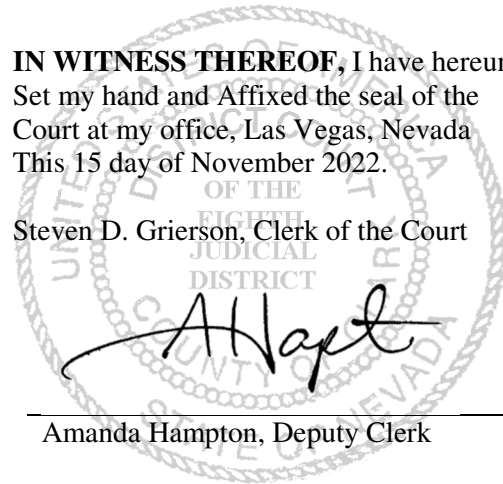
now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 15 day of November 2022.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk



IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: 05C212968

Docket No: 85367

RECORD ON APPEAL VOLUME 5

ATTORNEY FOR APPELLANT
JOSEPH HENDERSON # 67224,
PROPER PERSON
P.O. BOX 650
INDIAN SPRINGS, NV 89070

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

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5	6/3/2022	"The Defendant is Requesting the Status of the Successive Petition New Evidence Habus Corpus, and Responding to Why any Lawyer Such as Gregory Julian would Stand in for the Defendant when he's Pro Sa"...	1114 - 1116
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1 refused the plea offer. 10-22-2012 Evidentiary Hearing at 114-15. Because defense
2 counsel communicated the plea offer to Defendant, they were not ineffective for
3 failure to communicate a plea offer.

4 32. Defendant received effective assistance of counsel.

5 CONCLUSIONS OF LAW

6 1. "The law of a first appeal is law of the case on all subsequent appeals in which the
7 facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798
8 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The
9 doctrine of the law of the case cannot be avoided by a more detailed and precisely
10 focused argument subsequently made after reflection upon the previous proceedings."
11 Hall, 91 Nev. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues
12 previously decided on direct appeal may not be reargued in a habeas petition.
13 Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (citing McNelson v. State, 115
14 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)).

15 2. NRS 34.810 states in relevant part:

16 1. The court shall dismiss a petition if the court determines that:

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

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

21 3. In order to assert a claim for ineffective assistance of counsel a defendant must prove
22 that he was denied "reasonably effective assistance" of counsel by satisfying the two-
23 prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-
24 64 (1984):

25 First, the defendant must show that counsel's performance was
26 deficient. This requires showing that counsel made errors so serious
27 that counsel was not functioning as the 'counsel' guaranteed the
28 defendant by the Sixth Amendment. Second, the defendant must
show that the deficient performance prejudiced the defense. This
requires showing that counsel's errors were so serious as to deprive
the defendant of a fair trial, a trial whose result is reliable. Unless a

1 defendant makes both showings, it cannot be said that the conviction
2 or death sentence resulted from a breakdown in the adversary
process that renders the result unreliable.

3 Id. at 687, 2064; see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
4 (1993); Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505
5 (1984) (adopting Strickland two-part test in Nevada). “Effective counsel does not mean
6 errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
7 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, Nevada State
8 Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson,
9 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

10 4. In considering whether trial counsel has met this standard, the court should first
11 determine whether counsel made a “sufficient inquiry into the information that is
12 pertinent to his client's case.” Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280
13 (1996); citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once such a
14 reasonable inquiry has been made by counsel, the court should consider whether
15 counsel made “a reasonable strategy decision on how to proceed with his client's
16 case.” Doleman, 112 Nev. at 846, 921 P.2d at 280, citing Strickland, 466 U.S. at 690-
17 691, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a “tactical” decision and
18 will be “virtually unchallengeable absent extraordinary circumstances.” Doleman, 112
19 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180
20 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

21 5. Based on the above law, the court begins with the presumption of effectiveness and
22 then must determine whether or not the petitioner has proved disputed factual
23 allegations underlying his ineffective-assistance claim by a preponderance of the
24 evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). The role of a
25 court in considering allegations of ineffective assistance of counsel is “not to pass
26 upon the merits of the action not taken but to determine whether, under the particular
27 facts and circumstances of the case, trial counsel failed to render reasonably effective
28 assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), citing

1 Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977).

- 2 6. This analysis does not mean that the court “should second guess reasoned choices
3 between trial tactics nor does it mean that defense counsel, to protect himself against
4 allegations of inadequacy, must make every conceivable motion no matter how
5 remote the possibilities are of success.” Donovan, 94 Nev. at 675, 584 P.2d at 711. In
6 essence, the court must “judge the reasonableness of counsel's challenged conduct on
7 the facts of the particular case, viewed as of the time of counsel's conduct.”
8 Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.
- 9 7. “There are countless ways to provide effective assistance in any given case. Even the
10 best criminal defense attorneys would not defend a particular client in the same way.”
11 Strickland, 466 U.S. at 689, 104 S.Ct. at 689. “Strategic choices made by counsel
12 after thoroughly investigating the plausible options are almost unchallengeable.”
13 Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992), citing Strickland, 466
14 U.S. at 690, 104 S. Ct. at 2066; see also Ford v. State, 105 Nev. 850, 853, 784 P.2d
15 951, 953 (1989).
- 16 8. Even if a defendant can demonstrate that his counsel's representation fell below an
17 objective standard of reasonableness, he must still demonstrate prejudice and show a
18 reasonable probability that, but for counsel's errors, the result would have been
19 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), citing
20 Strickland, 466 U.S. at 687. “A reasonable probability is a probability sufficient to
21 undermine confidence in the outcome.” Id., citing Strickland, 466 U.S. at 687-89,
22 694. “Surmounting Strickland's high bar is never ... easy.” Harrington v. Richter, 562
23 U.S. ___, 131 S.Ct. 770, 788 (2011). “The question is whether an attorney's
24 representation amounted to incompetence under prevailing professional norms, not
25 whether it deviated from best practices or most common custom.” Id. Moreover,
26 “[r]are are the situations in which the latitude counsel enjoys will be limited to any
27 one technique or approach... Counsel is entitled to balance limited resources in accord
28 with effective trial tactics and strategies.” Id. at 789.

- 1 9. Occasionally, "Criminal cases will arise where the only reasonable and available
2 defense strategy requires consultation with experts or introduction of expert evidence,
3 whether pretrial, at trial, or both. There are, however, countless ways to provide
4 effective assistance in any given case. Even the best criminal defense attorneys would
5 not defend a particular client in the same way. Rare are the situations in which the
6 wide latitude counsel must have in making tactical decisions will be limited to any
7 one technique or approach." Harrington, 131 S.Ct. at 788-789 (internal citations and
8 quotations omitted).
- 9 10. Counsel cannot be deemed ineffective for failing to make futile objections or motions.
10 Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).
- 11 11. Trial counsel does not need to take every conceivable action in order to protect
12 himself against allegations of inadequacy. Donovan, 94 Nev. at 675, 584 P.2d at 711.
- 13 12. Claims asserted in a petition for post-conviction relief must be supported with specific
14 factual allegations, which if true, would entitle the petitioner to relief. Hargrove v.
15 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations
16 are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6)
17 states, in pertinent part:
- 18 [Petitioner] must allege specific facts supporting the claims in
19 the petition [he] file[s] seeking relief from any conviction or
20 sentence. Failure to raise specific facts rather than just
conclusions may cause [the] petition to be dismissed.
- 21 13. Due process does not require every sidebar conference to be recorded. See Daniel v.
22 State, 119 Nev. 498, 78 P.3d 890 (2003).
- 23 14. Missouri v. Frye, 132 S. Ct. 1399, 1408, 182 L. Ed. 2d 379 (2012), holds that defense
24 counsel has the duty to communicate formal offers from the prosecution that may be
25 favorable to the accused. It does not hold that defense attorneys are required to
26 discuss a plea offer with a defendant for any particular period of time.


27 //

28 //

1 **ORDER**

2 THEREFORE, **IT IS HEREBY ORDERED** that the Petition for Writ of Habeas
3 Corpus (Post Conviction) shall be, and it is, denied.

4 DATED this 20th day of November, 2012.

5
6 
7 Abbi Silver
8 DISTRICT JUDGE

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

12 BY  for
13 SHANON CLOWERS
14 Chief Deputy District Attorney
15 Nevada Bar #010008

16
17
18
19 **NOTICE OF SERVICE**

20 I, HOWARD CONRAD, hereby certify that the State forwarded a copy of these
21 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER on the 15th day of
22 NOVEMBER, 2012, to:

23 STEPHANIE KICE, ESQ.
24 skice@kicelaw.com

25 
26 Secretary for the District Attorney's Office
27

28 hjc/SVU

Conrad, Howard

From: Conrad, Howard
Sent: Thursday, November 15, 2012 1:56 PM
To: 'skice@kicelaw.com'
Attachments: 50514601.doc

THE STATE OF NEVADA,)	
)	
Plaintiff,	)	CASE NO: 05C212968
)	
-vs-)	
JOSEPH HENDERSON,	)	DEPT NO: XV
#1502730)	
)	
Defendant.)	
)	
)	
)	

FINDINGS OF FACT, CONCLUSIONS OF

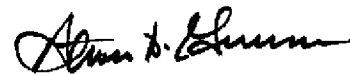
LAW AND ORDER

DATE OF HEARING: OCTOBER 22, 2012
TIME OF HEARING: 1:00 PM

Howard Conrad
Special Victims Unit
Clark County District Attorney
(702) 671-2790

"What I really need is a droid
who understands the binary
language of moisture evaporators."

NEO



CLERK OF THE COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JOSEPH A. HENDERSON,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: C212968

Dept No: XV

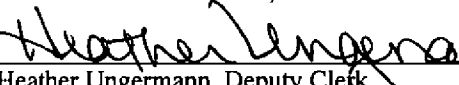
**NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
ORDER**

PLEASE TAKE NOTICE that on November 21, 2012, the court entered a decision or order in this matter,
a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
mailed to you. This notice was mailed on December 3, 2012.

STEVEN D. GRIERSON, CLERK OF THE COURT

By:


Heather Ungermann, Deputy Clerk

CERTIFICATE OF MAILING

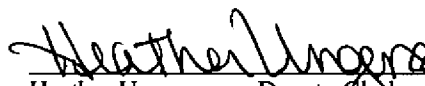
I hereby certify that on this 3 day of December 2012, I placed a copy of this Notice of Entry of Decision
and Order in:

The bin(s) located in the Office of the District Court Clerk of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division

☒ The United States mail addressed as follows:

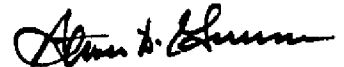
Joseph Henderson # 67224
P.O. Box 650
Indian Springs, NV 89070

Stephanie B. Kice, Esq.
616 S. Eighth St.
Las Vegas, NV 89101


Heather Ungermann, Deputy Clerk

ORIGINAL

Electronically Filed
11/21/2012 01:57:53 PM



CLERK OF THE COURT

1 **ORDR**
2 **STEVEN B. WOLFSON**
3 **Clark County District Attorney**
4 **Nevada Bar #001565**
5 **JAMES R. SWEETIN**
6 **Chief Deputy District Attorney**
7 **Nevada Bar #005144**
8 **200 Lewis Avenue**
9 **Las Vegas, Nevada 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

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

10 **THE STATE OF NEVADA,**

11 **Plaintiff,**

12 **-vs-**

13 **JOSEPH HENDERSON,**
14 **#1502730**

15 **Defendant.**

CASE NO: 05C212968

DEPT NO: XV

16
17 **FINDINGS OF FACT, CONCLUSIONS OF**

18 **LAW AND ORDER**

19 **DATE OF HEARING: OCTOBER 22, 2012**
20 **TIME OF HEARING: 1:00 PM**

21 **THIS CAUSE** having come on for hearing before the Honorable **ABBI SILVER**,
22 **District Judge**, on the 22nd day of October, 2012; the Petitioner being present, represented
23 **by STEPHANIE B. KICE, ESQ.**; Respondent being represented by **STEVEN B.**
24 **WOLFSON**, Clark County District Attorney, by and through **SHANON CLOWERS**, Chief
25 **Deputy District Attorney**, and the Court having considered the matter, including briefs,
26 **transcripts**, the testimony of Defendant's former attorneys, arguments of counsel, and
27 **documents on file herein**, now therefore, the Court makes the following findings of fact and
28 **conclusions of law:**

//

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NOV 19 2012

FINDINGS OF FACT

1. On July 11, 2005, Joseph Henderson, hereinafter "Defendant," was charged by way of Information with Count 1 - Conspiracy to Commit Burglary, Count 2- Burglary While in Possession of a Firearm, Count 3 - Conspiracy to Commit First Degree Kidnapping, Counts 4 and 5 - First Degree Kidnapping With Use of a Deadly Weapon, Count 6 - Conspiracy to Commit Sexual Assault, Counts 7, 8, and 9 - Sexual Assault With Use of a Deadly Weapon, Count 10 - Conspiracy to Commit Robbery, Counts 11 and 12 - Robbery With Use of a Deadly Weapon, Count 13 - Open or Gross Lewdness, and Count 14 - Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm.
2. On June 27, 2008, Defendant was found guilty by a jury of all counts.
3. On August 28, 2008, Defendant was sentenced as follows: As to Count 1 – to Twelve (12) Months in the Clark County Detention Center; As to Count 2 – to a Maximum of One Hundred Fifty-Six (156) Months with a Minimum Parole Eligibility of Sixty-Two (62) Months, to run Concurrent with Count 1; As to Count 3 – to a Maximum of Sixty (60) Months with a Minimum Parole Eligibility of Twenty-Four (24) Months, to run Consecutive to Count 2; As to Count 4 – to Life with a Minimum Parole Eligibility after Sixty (60) Months, plus an Equal and Consecutive term of Life with a Minimum Parole Eligibility after Sixty (60) Months for the Use of a Deadly Weapon, to run Consecutive to Count 3; As to Count 5 – to Life with a Minimum Parole Eligibility after Sixty (60) Months, plus an Equal and Consecutive term of Life with a Minimum Parole Eligibility after Sixty (60) Months for the Use of a Deadly Weapon, to run Consecutive to Count 4; As to Count 6 – to a Maximum of Sixty (60) Months with a Minimum Parole Eligibility of Twenty-Four (24) Months, to run Consecutive to Count 5; As to Count 7 - to Life with a Minimum Parole Eligibility of One Hundred Twenty (120) Months, plus an Equal and Consecutive term of Life with a Minimum Parole Eligibility of One Hundred Twenty (120) Months for the Use of a Deadly Weapon, to run Concurrent with Count 6; As to Count 8 - to Life with a

1 Minimum Parole Eligibility of One Hundred Twenty (120) Months, plus an Equal and
2 Consecutive term of Life with a Minimum Parole Eligibility of One Hundred Twenty
3 (120) Months for the Use of a Deadly Weapon, to run Consecutive to Count 7; As to
4 Count 9 – to Life with a Minimum Parole Eligibility of One Hundred Twenty (120)
5 Months, plus an Equal and Consecutive term of Life with a Minimum Parole
6 Eligibility of One Hundred Twenty (120) Months for the Use of a Deadly Weapon, to
7 run Consecutive to Count 8; As to Count 10 – to a Maximum of Sixty (60) Months
8 with a Minimum Parole Eligibility of Twenty-Four (24) Months, to run Consecutive
9 to Count 9; As to Count 11 – a Maximum of One Hundred Eighty (180) Months with
10 a Minimum Parole Eligibility of Seventy-Two (72) Months, plus an Equal and
11 Consecutive term of Maximum of One Hundred Eighty (180) Months with a
12 Minimum Parole Eligibility of Seventy-Two (72) Months for the Use of a Deadly
13 Weapon, to run Concurrent with Count 10; As to Count 12 – to a Maximum of One
14 Hundred Eighty (180) Months with a Minimum Parole Eligibility of Seventy-Two
15 (72) Months, plus an Equal and Consecutive term of Maximum of One Hundred
16 Eighty (180) Months with a Minimum Parole Eligibility of Seventy-Two (72) Months
17 for the Use of a Deadly Weapon, to run Consecutive to Count 11; As to Count 13 – to
18 Twelve (12) Months in the Clark County Detention Center, to run Concurrent with
19 Count 12; As to Count 14 – a Maximum of One Hundred Fifty-Six (156) Months with
20 a Minimum Parole Eligibility of Sixty-Two (62) Months, to run Consecutive to Count
21 13; with One Two Hundred Fifty-One (1,251) Days credit for time served. Further
22 Ordered, a Special Sentence of Lifetime Supervision is imposed to commence upon
23 release from any term of imprisonment, probation or parole.

- 24 4. Defendant's Judgment of Conviction (Jury Trial) was filed on September 24, 2008.
25 5. Defendant filed a Notice of Appeal on October 9, 2008. The Nevada Supreme Court
26 affirmed Defendant's conviction on February 3, 2010 (case no. 52573). Remittitur
27 issued on March 2, 2010.

28 //

- 1 6. Defendant filed his pro per Petition for Writ of Habeas Corpus (Post-Conviction) on
2 January 11, 2011. The State's response was filed on March 29, 2011.
- 3 7. On March 15, 2011, the court granted Defendant's Motion for the Appointment of
4 Counsel. Stephanie B. Kice confirmed as counsel on March 17, 2022.
- 5 8. On August 26, 2011, through counsel, Defendant filed a Supplemental Petition for
6 Writ of Habeas Corpus (Post-Conviction) (hereinafter "Supp. Pet." or "Supplemental
7 Petition"). The State responded to the Supplement on September 30, 2011.
- 8 9. On December 1, 2011, the matter was set for an evidentiary hearing to expand the
9 record. Following continuances, the court held an evidentiary hearing on October 22,
10 2012, during which Norm Reed and Violet Radosta, Esqs., were sworn and testified
11 regarding Defendant's claims of ineffective assistance of counsel. Defendant was
12 present with counsel.
- 13 10. In Grounds 1, 5, and 6 of the Petition, Defendant claims (1) the State deprived him of
14 his confrontation rights when it "failed to provide [him] the evidence submitted to the
15 [DNA lab], (2) the State consumed all available material for DNA testing, and (3) the
16 district court erred in failing to dismiss the information due to the State's alleged
17 consumption of all available DNA material. Pet. at 5g-i, 5s-t. Defendant raised claims
18 regarding the State's handling of the DNA evidence and the district court's denial of
19 his motion to dismiss on direct appeal. The Nevada Supreme Court held, "Because
20 [Defendant's] claim that the State did not preserve DNA material from each sample
21 for defense retesting is belied by the record, we conclude that the district court did not
22 abuse its discretion." 02-03-2010 Order Affirming at 1. Grounds 1, 5, and 6 are
23 therefore barred by the doctrine of law of the case.
- 24 11. In Ground 7 of the Petition, Defendant argues that the State should have been
25 prevented from identifying him as the perpetrator through the use of the DNA
26 evidence. Pet. at 5t-x. Defendant claimed on direct appeal that the district court had
27 erred by denying a pretrial motion to preclude the improper use of DNA evidence.
28 The Nevada Supreme Court found this claim to be without merit. 02-03-2010 Order

1 Affirming at 2. Ground 7 of the Petition is therefore barred by the doctrine of law of
2 the case.

3 12. In Ground 8 of the Petition, Defendant claims the district court erred in denying his
4 motion for a mistrial. Pet. at 5x-y. Defendant also raised this same claim in his direct
5 appeal. The Nevada Supreme Court found that "the district court did not clearly abuse
6 its discretion when it denied the motion...." 02-03-2010 Order Affirming at 2. As
7 such, Ground 8 claim is barred as the law of the case.

8 13. In Grounds 2 and 3 of the Petition, Defendant claims that the State elicited perjured
9 testimony and that it did not prove each element of the crime beyond a reasonable
10 doubt. Pet. at 5j-p. In Ground 2 of the Supplemental Petition, Defendant alleges that
11 the State committed a violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194
12 (1963). Defendant did not raise these claims on direct appeal and, as such, they are
13 waived per NRS 34.810.

14 14. Defendant alleges that the victim pressed herself onto her injured fiancé's bloody
15 body and knelt in a pool of his blood, and this may have contaminated the DNA
16 evidence. Pet. at 5r. Defendant fails to support this assertion with specific factual
17 allegations and the claim is therefore dismissed. Moreover, there is no evidence in the
18 record that supports Defendant's contention that the victim "pressed herself" on to
19 Mr. Bernzweig's body or "kneeled" in the pool of blood. See 6/24/08 TT p. 149-150;
20 6/25/08 TT p. 35. Defendant fails to explain how coming into contact with Mr.
21 Bernzweig's blood in any way makes the DNA test results identifying him as the
22 perpetrator unreliable. Defendant's DNA was not rendered undetectable, and DNA
23 profiles of individuals can be discerned from mixed profiles. As such, Defendant fails
24 to demonstrate that counsel was deficient or that he was prejudiced.

25 15. Defendant claims his attorney was ineffective for failing to "call into question and
26 have tested the evidence of California authorities' lab work matching petitioner to
27 Nevada's profile." Pet. at 5q. Defendant was identified as a suspect by witness Kathy
28 Gunther, who matched the unknown DNA profile to Defendant with the assistance of

1 outside agencies. 6/26/08 TT p.109. Defendant claims that his attorney should have
2 challenged the DNA profile generated by the outside agency which identified him as
3 the unknown perpetrator. However, such an action by trial counsel would have been
4 useless since Ms. Gunther matched the DNA profile of the unknown perpetrator to a
5 buccal swab obtained from Defendant in a confirmatory match. Id. As such,
6 Defendant does not demonstrate that counsel was ineffective or that he was
7 prejudiced, since counsel cannot be deemed ineffective for failing to make futile
8 objections or motions.

9 16. Defendant argues that his counsel was ineffective for failing to challenge Ms.
10 Gunther's testimony that she detected spermatozoa sufficient to obtain a genetic
11 profile. Pet. at 5r. Defendant failed to demonstrate that such an attempt by counsel
12 would have achieved favorable testimony. Moreover, Defendant's DNA was also
13 detected on the breast swab taken from the victim. 6/26/08 TT 115. As such,
14 Defendant fails to demonstrate prejudice.

15 17. In the Supplemental Petition, Defendant claims his attorney was ineffective for failing
16 to retain his own DNA expert to either retest or make an independent evaluation of
17 the DNA report. Supp. Pet. at 8-9. The mere failure to retain an expert does not render
18 counsel per se ineffective. Further, Defendant's bare allegations that mistakes "may
19 have been made" during testing are insufficient to demonstrate prejudice under
20 Strickland.

21 18. Mr. Norm Reed's and Ms. Violet Radosta's testimony at the evidentiary hearing was
22 credible.

23 19. Defendant waived his attorney client privilege at the evidentiary hearing. 10-22-2012
24 Evidentiary Hearing at 12.

25 20. At the evidentiary hearing, Ms. Violet Radosta testified that she brought Mr. Norm
26 Reed in because the DNA evidence in the case had been questioned. 10-22-2012
27 Evidentiary Hearing at 82. Mr. Reed was second chair on the case, and his job was to
28 examine, interpret, and attack the DNA evidence. 10-22-2012 Evidentiary Hearing at

1 10. Defendant's allegation that defense counsel failed to consult with a DNA expert is
2 belied by the record. Mr. Reed and Ms. Radosta consulted with a DNA expert, Norah
3 Rudin, one of the nation's renowned DNA experts. 10-22-2012 Evidentiary Hearing
4 at 26-27, 53, 128. Ms. Rudin reviewed the DNA evidence – the entire forensic file –
5 including the bed sheet, the vaginal swabs, the breast swabs, and the California DNA
6 results. Id. Reviewing the entire file allows her to make her own interpretation of it.
7 Id. at 29. Mr. Reed consulted with Ms. Rudin regarding her findings. Id. at 27. Ms.
8 Rudin concluded, first, that the testing procedures were done correctly. Id. at 29. Ms.
9 Rudin further concluded that, although there were some differences in how she would
10 arrive at the result, at the end of the day, Defendant was the source of the DNA. Id. at
11 29-30, 53. Defendant was the single-source contributor of the DNA on the sheets. Id.
12 at 55. Defendant was the single-source contributor of the DNA on the vaginal swab of
13 the victim taken pursuant to the sexual assault kit. Id. at 55-56, 107. Defendant was
14 the single-source contributor of the DNA on the victim's breast area. Id. at 57, 107.

15 21. Defense counsel made the strategic decision not to put Ms. Rudin on the stand
16 because, although she disagreed with some points of interpretation, she agreed with
17 the overall results reached by Metro, which were that Defendant's DNA was present
18 at the scene. 10-22-2012 Evidentiary Hearing at 30-31.

19 22. There was enough DNA to retest, but defense counsel made the strategic choice not to
20 do so because they would have been obligated to turn the results over to the State. 10-
21 22-2012 Evidentiary Hearing at 40, 101-104, 106, 108. Ms. Rudin advised against
22 having the DNA retested. Id. at 39-40. Retesting would in effect turn the defense
23 expert into a witness for the State. Id. at 108. Had counsel brought in the California or
24 CODIS match, it would have simply illuminated that yet another independent lab
25 found that Defendant's DNA was on the victim. In total, three different DNA experts
26 found that the DNA was Defendant's: (1) the California lab, (2) the buccal swab done
27 based on the probable cause of the CODIS match, and (3) Metro's DNA testing. 10-
28 22-2012 Evidentiary Hearing at 36, 52. Bringing in the CODIS or California match

1 would also raise questions about why Defendant's DNA was on file with California
2 and lead to the inference that he was a felon. 10-22-2012 Evidentiary Hearing at 52.

3 23. Based on the number of independent labs confirming Defendant's DNA at the scene,
4 Mr. Reed and Ms. Radosta made the reasonable strategic decision to proceed only
5 with Metro's lab results, so they could try to cross-examine the DNA expert regarding
6 testing procedures such that it may raise doubt to the jury that this Defendant was the
7 source of the DNA. 10-22-2012 Evidentiary Hearing at 88-89. To advance this trial
8 tactic, Mr. Reed and Ms. Radosta held mock trials and practiced their cross-
9 examination with the help of Norah Rudin. Ms. Rudin prepared a list of potential
10 cross-examination questions for counsels. 10-22-2012 Evidentiary Hearing at 31.

11 24. On the eve of trial, Defendant sought to change his defense to an argument that his
12 DNA was present on the victim because the sex with the victim was consensual. 10-
13 22-2012 Evidentiary Hearing at 119-20, 124-27. Ms. Radosta explained to Defendant
14 that although this would be a defense to sexual assault, it was not a defense to the
15 other charges. Id. at 125. Given this, defense counsel chose to continue with their
16 strategy of attacking the DNA results.

17 25. It is irrelevant that the Nevada database did not have a match for Defendant. 10-22-
18 2012 Evidentiary Hearing at 60. Mr. Reed testified that it was unusual that the CODIS
19 hit did not come from Nevada because Defendant had a previous conviction in
20 Nevada, but the CODIS hit only provides a probable cause determination. 10-22-2012
21 Evidentiary Hearing at 34. Following the hit, the State performs an independent exam
22 of the evidence and a manual comparison. Id. at 34-35, 51-52. Because both
23 California got the match right and Metro's manual comparison was right according to
24 the defense expert, defense counsel could only have emphasized that Defendant
25 should have been in the Nevada system because of his prior conviction by
26 investigating why the CODIS hit did not come from Nevada. Id. at 59-61.

27 //

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1 26. As to Defendant's allegations that defense counsel failed to investigate a potential
2 alibi, raised for the first time at the evidentiary hearing, his arguments lack merit. It is
3 of no consequence that a co-defendant admitted he was at the scene. 10-22-2012
4 Evidentiary Hearing at 45-48. Further, Ms. Radosta testified that Defendant could not
5 explain where he was at the time of the crime based on lack of memory. Id. at 85-88,
6 90-91. Defense counsel did not fall below the standard of investigation for an alibi
7 defense.

8 27. In the Supplemental Petition, Defendant argues his counsel should have challenged
9 the validity of the search warrant. Supp. Pet. at 9-10. Defendant's bare allegation that
10 the search warrant "may" have been based upon false statements is insufficient to
11 demonstrate ineffective assistance. Further, simply stating the evidence "may very
12 well have been suppressed" does not show a reasonable probability the outcome
13 would have been different, so Defendant fails to demonstrate prejudice. Defense
14 counsel testified that he saw no issue with the search warrant in this case. 10-22-2012
15 Evidentiary Hearing at 70-71, 73-74. In any case, appellate counsel withdrew the
16 issue of the search warrant affidavit at the October 22, 2012 evidentiary hearing. 10-
17 22-2012 Transcript at 132, 159.

18 28. In the Supplemental Petition, Defendant claims that he was not allowed to review his
19 presentence investigation report ("PSI"), and his counsel was ineffective for failing to
20 allow him to do so. Supp. Pet. at 10-11. However, Defendant fails to specifically state
21 what errors his PSI allegedly contains and thus fails to demonstrate any prejudice
22 under Strickland. Further, defense counsels testified at the evidentiary hearing that it
23 is their habit, routine, and practice to over the PSI and that they believed they had
24 gone over Defendant's PSI with him. 10-22-2012 Evidentiary Hearing at 68-69, 129.
25 Had there been substantive errors in the PSI, defense counsel would have raised the
26 issue with the sentencing judge. Id. at 131.

27 //

28 //

1 29. In the Supplemental Petition, Defendant claims that trial counsel failed to make an
2 adequate record by recording bench conferences. Supp. Pet. at 11. Defendant's
3 general allegations of unrecorded bench conferences fail to explain which judicial
4 actions should have been preserved, how such actions did or did not have merit, or a
5 reasonable probability that their preservation would have alter the outcome of his trial
6 or appeal. Defendant's allegations are too vague to warrant relief per Hargrove and
7 NRS 34.735(6). Further, Mr. Reed testified at the evidentiary hearing that he was not
8 prevented in any way from making a record on anything that was said at a bench
9 conference. 10-22-2012 Evidentiary Hearing at 66. The trial judge always gave
10 defense counsel the opportunity to put material off-record discussions on the record at
11 a later time. Id. Mr. Reed testified that nothing in the unrecorded bench conferences
12 would have changed the outcome of the trial. Id. at 72.

13 30. In the Supplemental Petition, Defendant alleges trial counsel was ineffective for
14 failure to keep necessary notes, conduct research, or properly document the file. Supp.
15 Pet. at 11-12. Defendant does not cite, nor has this Court been able to locate, any case
16 holding an attorney ineffective for such reasons. Post-conviction counsel's opinion
17 that trial counsel's note taking abilities are inadequate does not render him
18 incompetent or ineffective. Trial counsel does not need to take every conceivable
19 action in order to protect himself against allegations of inadequacy. Counsel is not
20 required to document every step during litigation in his personal file for the purpose
21 of making post-conviction counsel's attempt at alleging him ineffective easier.
22 Defendant's bare allegation is insufficient for relief, and Defendant fails to
23 demonstrate how the outcome of his trial would have been different had counsel done
24 a better job at taking notes. He is not entitled to relief under Strickland.

25 31. Although appellate counsel raised for the first time at the evidentiary hearing the late
26 timing of the State's plea offer, Ms. Radosta testified that defense counsel was able to
27 discuss the offer with him for about forty-five minutes to an hour. 10-22-2012
28 Evidentiary Hearing at 110-11. Over counsels' advice to the contrary, Defendant

1 refused the plea offer. 10-22-2012 Evidentiary Hearing at 114-15. Because defense
2 counsel communicated the plea offer to Defendant, they were not ineffective for
3 failure to communicate a plea offer.

4 32. Defendant received effective assistance of counsel.

5 **CONCLUSIONS OF LAW**

6 1. "The law of a first appeal is law of the case on all subsequent appeals in which the
7 facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798
8 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The
9 doctrine of the law of the case cannot be avoided by a more detailed and precisely
10 focused argument subsequently made after reflection upon the previous proceedings."
11 Hall, 91 Nev. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues
12 previously decided on direct appeal may not be reargued in a habeas petition.
13 Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (citing McNelson v. State, 115
14 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)).

15 2. NRS 34.810 states in relevant part:

16 1. The court shall dismiss a petition if the court determines that:

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

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

21 3. In order to assert a claim for ineffective assistance of counsel a defendant must prove
22 that he was denied "reasonably effective assistance" of counsel by satisfying the two-
23 prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-
24 64 (1984):

25 First, the defendant must show that counsel's performance was
26 deficient. This requires showing that counsel made errors so serious
27 that counsel was not functioning as the 'counsel' guaranteed the
28 defendant by the Sixth Amendment. Second, the defendant must
show that the deficient performance prejudiced the defense. This
requires showing that counsel's errors were so serious as to deprive
the defendant of a fair trial, a trial whose result is reliable. Unless a

1 defendant makes both showings, it cannot be said that the conviction
2 or death sentence resulted from a breakdown in the adversary
process that renders the result unreliable.

3 Id. at 687, 2064; see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
4 (1993); Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505
5 (1984) (adopting Strickland two-part test in Nevada). "Effective counsel does not mean
6 errorless counsel, but rather counsel whose assistance is '[w]ithin the range of
7 competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State
8 Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson,
9 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

10 4. In considering whether trial counsel has met this standard, the court should first
11 determine whether counsel made a "sufficient inquiry into the information that is
12 pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280
13 (1996); citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once such a
14 reasonable inquiry has been made by counsel, the court should consider whether
15 counsel made "a reasonable strategy decision on how to proceed with his client's
16 case." Doleman, 112 Nev. at 846, 921 P.2d at 280, citing Strickland, 466 U.S. at 690-
17 691, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision and
18 will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112
19 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180
20 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

21 5. Based on the above law, the court begins with the presumption of effectiveness and
22 then must determine whether or not the petitioner has proved disputed factual
23 allegations underlying his ineffective-assistance claim by a preponderance of the
24 evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). The role of a
25 court in considering allegations of ineffective assistance of counsel is "not to pass
26 upon the merits of the action not taken but to determine whether, under the particular
27 facts and circumstances of the case, trial counsel failed to render reasonably effective
28 assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), citing

1 Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977).

- 2 6. This analysis does not mean that the court “should second guess reasoned choices
3 between trial tactics nor does it mean that defense counsel, to protect himself against
4 allegations of inadequacy, must make every conceivable motion no matter how
5 remote the possibilities are of success.” Donovan, 94 Nev. at 675, 584 P.2d at 711. In
6 essence, the court must “judge the reasonableness of counsel's challenged conduct on
7 the facts of the particular case, viewed as of the time of counsel's conduct.”
8 Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.
- 9 7. “There are countless ways to provide effective assistance in any given case. Even the
10 best criminal defense attorneys would not defend a particular client in the same way.”
11 Strickland, 466 U.S. at 689, 104 S.Ct. at 689. “Strategic choices made by counsel
12 after thoroughly investigating the plausible options are almost unchallengeable.”
13 Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992), citing Strickland, 466
14 U.S. at 690, 104 S. Ct. at 2066; see also Ford v. State, 105 Nev. 850, 853, 784 P.2d
15 951, 953 (1989).
- 16 8. Even if a defendant can demonstrate that his counsel's representation fell below an
17 objective standard of reasonableness, he must still demonstrate prejudice and show a
18 reasonable probability that, but for counsel's errors, the result would have been
19 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), citing
20 Strickland, 466 U.S. at 687. “A reasonable probability is a probability sufficient to
21 undermine confidence in the outcome.” Id., citing Strickland, 466 U.S. at 687-89,
22 694. “Surmounting Strickland's high bar is never ... easy.” Harrington v. Richter, 562
23 U.S. ___, 131 S.Ct. 770, 788 (2011). “The question is whether an attorney's
24 representation amounted to incompetence under prevailing professional norms, not
25 whether it deviated from best practices or most common custom.” Id. Moreover,
26 “[r]are are the situations in which the latitude counsel enjoys will be limited to any
27 one technique or approach... Counsel is entitled to balance limited resources in accord
28 with effective trial tactics and strategies.” Id. at 789.


- 1 9. Occasionally, "Criminal cases will arise where the only reasonable and available
2 defense strategy requires consultation with experts or introduction of expert evidence,
3 whether pretrial, at trial, or both. There are, however, countless ways to provide
4 effective assistance in any given case. Even the best criminal defense attorneys would
5 not defend a particular client in the same way. Rare are the situations in which the
6 wide latitude counsel must have in making tactical decisions will be limited to any
7 one technique or approach." Harrington, 131 S.Ct. at 788-789 (internal citations and
8 quotations omitted).
- 9 10. Counsel cannot be deemed ineffective for failing to make futile objections or motions.
10 Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).
- 11 11. Trial counsel does not need to take every conceivable action in order to protect
12 himself against allegations of inadequacy. Donovan, 94 Nev. at 675, 584 P.2d at 711.
- 13 12. Claims asserted in a petition for post-conviction relief must be supported with specific
14 factual allegations, which if true, would entitle the petitioner to relief. Hargrove v.
15 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations
16 are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6)
17 states, in pertinent part:
- 18 [Petitioner] must allege specific facts supporting the claims in
19 the petition [he] file[s] seeking relief from any conviction or
20 sentence. Failure to raise specific facts rather than just
conclusions may cause [the] petition to be dismissed.
- 21 13. Due process does not require every sidebar conference to be recorded. See Daniel v.
22 State, 119 Nev. 498, 78 P.3d 890 (2003).
- 23 14. Missouri v. Frye, 132 S. Ct. 1399, 1408, 182 L. Ed. 2d 379 (2012), holds that defense
24 counsel has the duty to communicate formal offers from the prosecution that may be
25 favorable to the accused. It does not hold that defense attorneys are required to
26 discuss a plea offer with a defendant for any particular period of time.

27 //
28 //

1 **ORDER**

2 THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas
3 Corpus (Post Conviction) shall be, and it is, denied.

4 DATED this 20th day of November, 2012.

5
6 
7 Abbi Silver
8 DISTRICT JUDGE **Abbi Silver**

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

10
11 BY  for
12 SHANON CLOWERS
13 Chief Deputy District Attorney
Nevada Bar #010008

14
15
16
17
18
19 **NOTICE OF SERVICE**

20 I, HOWARD CONRAD, hereby certify that the State forwarded a copy of these
21 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER on the 15th day of
22 NOVEMBER, 2012, to:

23 STEPHANIE KICE, ESQ.
24 skice@kicelaw.com

25 
26 Secretary for the District Attorney's Office
27

28 hjc/SVU

Conrad, Howard

From: Conrad, Howard
Sent: Thursday, November 15, 2012 1:56 PM
To: 'skice@kicelaw.com'
Attachments: 50514601.doc

THE STATE OF NEVADA,)	
)	
Plaintiff,	)	CASE NO: 05C212968
)	
-vs-)	
JOSEPH HENDERSON,	)	DEPT NO: XV
#1502730)	
)	
Defendant,)	
)	
)	
)	

FINDINGS OF FACT, CONCLUSIONS OF

LAW AND ORDER

DATE OF HEARING: OCTOBER 22, 2012
TIME OF HEARING: 1:00 PM

Howard Conrad
Special Victims Unit
Clark County District Attorney
(702) 671-2790

"What I really need is a droid
who understands the binary
language of moisture evaporators."

48

Joseph A. Henderson #167224
P.O. Box 650 HDSP
Indian Springs, Nevada 89018
In Proper Person

FILED

FEB 12 2013

Ch. 111
CLERK OF COURT

District Court
Clark County, Nevada

05C212968
NOASC
Notice of Appeal (criminal)
2220973



Joseph A. Henderson,
Petitioner,

05C212968
Case No. C212968
Dept. No. XV

-VS-

The State of Nevada,
Respondent.

Second Notice of Appeal

Petitioner, Joseph A. Henderson, with the assistance of another prisoner, in proper person, does now serve this, his Second (2nd) Notice of appeal regarding the denial of a post-conviction writ of habeas corpus by this Court, Judge A. Silver, Department 15, of the Eighth Judicial District Court of the State of Nevada, as petitioner's First (1st) informal notice of appeal has gone unfiled and constituted contrary to the legal precedent of this State, as well as the United States of America.

Appeal is a matter of right under Nevada law and refusal to file is a denial of due process. Petitioner's informal notice of appeal is and was timely.

Dated this date, 29 January 2013.

Submitted,

Joseph A. Henderson
Joseph A. Henderson
Petitioner/Appellant
In Proper Person

RECEIVED
CLERK OF COURT
FEB 12 2013

Petitioner/Appellant would remind this Court that pro se litigants' pleadings are to be construed liberally and held to less stringent standards than formal pleadings drafted by lawyers; If Court can reasonably read pleadings to state a valid claim on which litigant could prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant's unfamiliarity with pleading requirements. See; Borg v. MacDougall, 102 S.Ct. 700; Green v. Brawson, 108 F.3d 1296; Spencer v. Doe, 139 F.3d 107; Huskey v. Owens, 63 F.3d 354; Baker v. Cuomo, 68 F.3d 814.

In addition, Nevada case law is rather dear as to the timely and effective filing of a notice of appeal in relation to writs of habeas corpus. "Where the trial court had orally denied the prisoner's petition for habeas corpus and the petitioner filed his notice of appeal before the entry of written order, the notice of appeal was not premature... the appellate court treated it as filed after entry of the order and on the day thereof." See, Hill v. Warden, 96 Nev. 38, cited, State v. Convery, 99 Nev. 342, at 343, Jordan v. Hausenright, 101 Nev. 146, at 148, Washington v. State, 104 Nev. 309, at 311, MAZZAN v. State, 109 Nev. 1067, at 1071, Beets v. State, 110 Nev. 339, at 341, Klein v. Warden, El. State Prison, 118 Nev. 325, at 310; see also, Dotson v. State, 114 Nev. 582, at 584.

In the instant matter, petitioner attempted first to file his notice of appeal directly with the Nevada Supreme Court due to some lack of communication issues with counsel. In petitioner's own layman words: "Also would you please except this missive as a 'Notice of Appeal' to the habeas corpus hearing..." (emphasis in the original, see attached exhibit "A" incorporated by reference and fact). The Deputy Clerk at the Nevada Supreme Court returned petitioner's documents unfiled (see attached exhibit "B" incorporated by reference and fact).

In turn, petitioner then mailed these documents to the Clark County Clerk's Office, Mr. Steven Grierson for filing. With no response, petitioner wrote again: "In the memo I requested that you please acknowledge my request to the notice of appeal on my habeas corpus hearing." (see attached exhibit "C" incorporated by reference and fact).

Of import is the fact that not one (1), but two (2), attempts were made by the petitioner to have his notice of appeal filed by the Clerk of the Court for Clark County well before the expiration of the thirty-three (33) days as provided by the "Notice of entry of Findings of fact, conclusions of law and order" (see attached exhibit "D" incorporated by reference and fact). As of 16 January 2013, no reference to these attempts is noted in the "Case Summary" (see attached exhibit "E" incorporated by reference and fact), nor has any notice of appeal been filed. That marks a total of three (3) proper persons, informal, layman attempts by the petitioner to have a timely notice of appeal filed: Once with the Nevada Supreme Court, and twice with the Clark County District Court.

It is therefore respectfully requested that this Court order this notice of appeal filed and noted as timely in accordance with the cases cited herein.

Dated this date, 29 January 2013.

Respectfully Submitted,

Joseph Henderson
Joseph A. Henderson

Certificate of Service

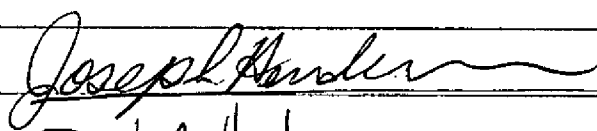
I do hereby certify that I placed a true and correct copy of the foregoing "Second Notice of Appeal", postage pre-paid, in the hands of a prison guard at High Desert State Prison for the express purpose of placing into the United States mail, addressed as follows:

Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155

and

Catherine Carter-Mastro
Attorney General for the State of Nevada
Capitol Complex
Carson City, Nevada 89710

Dated this date, January 2013.


Joseph A. Henderson
P.O. Box 650 HDSP
Indian Springs, Nevada 89308

JOSEPH HENDERSON B1224
PO BOX 650 INDIAN SPRING NV

11-17-12

CASE - C212968

MEMO to Court clerk.

① Please stamp file copy
one of these letters, and please
send the one with Ms Kice
counsel to her, as you see
I've also attached an envelope
already addressed to her.

② Also would you please
except this missive as
a "notice of appeal" to
the Heab corps hearing I
just had in district court
on 9-22-12. disregard if my
lawyer has already done
so.

Thank U.



SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
TRACIE K. LINDEMAN, CLERK
201 SOUTH CARSON STREET, SUITE 201
CARSON CITY, NEVADA 89701-4702

Telephone
(775) 684-1600

December 6, 2012

Joseph A. Henderson
Inmate ID: 67224
HDSP
P.O. Box 650
Indian Springs, NV 89070

Dear Mr. Henderson,

We are returning unfiled the enclosed documents received in this office on December 5, 2012. The remittitur, in case no. 52573 issued on March 2, 2010, closing this case.

Per our records you have no other appeals or petitions currently pending in this court.

All Notice of Appeals are filed directly with the District Court. Please refer to Nevada Rules of Appellate Procedure (NRAP), Rule (3).

Sincerely,

A handwritten signature in cursive script, appearing to read "L. Hamilton".

L. Hamilton
Deputy Clerk

Enclosure

att: Mr Steven Grierson

12-27-12

case no C 212968

I is on 12-10-12 I sent you documents to be stamp filed copied, one for the record, one for my lawyer.

In the memo I ~~to~~ requested that you please acknowledge my request to the notice of appeal in my next Corpus hearing I had in 9-22-12

Every other time I requested your help you would always send me something in 2 weeks at most. This is very important to me, I haven't been able to talk to my lawyer lately. So I don't know if she has filed the notice of appeal, but I'm sure she did, but I have to be for sure, my lawyer will tell me one thing and do another, so I have to make sure,

Thank u Steven.

JOSEPH HENDERSON 67224
PO BOX 650 INDIAN SPRING

Exhibit "C"

1 NEO


CLERK OF THE COURT

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4
5 JOSEPH A. HENDERSON,

6 Petitioner,

7 vs.

8 THE STATE OF NEVADA,

9 Respondent,

Case No: C212968
Dept No: XV

10 **NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
ORDER**

11 **PLEASE TAKE NOTICE** that on November 21, 2012, the court entered a decision or order in this matter,
12 a true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
15 mailed to you. This notice was mailed on December 3, 2012.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

17 By: 
18 Heather Ungermann, Deputy Clerk

19 **CERTIFICATE OF MAILING**

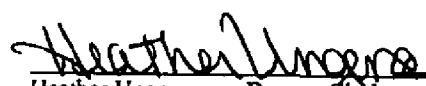
20 I hereby certify that on this 3 day of December 2012, I placed a copy of this Notice of Entry of Decision
21 and Order in:

22 The bin(s) located in the Office of the District Court Clerk of:
23 Clark County District Attorney's Office
Attorney General's Office – Appellate Division

24 ☒ The United States mail addressed as follows:


25 Joseph Henderson # 67224
26 P.O. Box 650
Indian Springs, NV 89070


Stephanie B. Kice, Esq.
616 S. Eighth St.
Las Vegas, NV 89101

27 
28 Heather Ungermann, Deputy Clerk


DEPARTMENT 15
CASE SUMMARY
CASE No. 05C212968


Conviction)


12/01/2011  **Petition for Writ of Habeas Corpus (9:00 AM)** (Judicial Officer: Silver, Abbi)
12/01/2011, 01/05/2012, 01/12/2012, 01/19/2012, 01/30/2012, 03/27/2012, 08/27/2012, 10/22/2012
Events: 08/26/2011 Petition for Writ of Habeas Corpus


12/08/2011  **Order for Production of Inmate**


01/05/2012 **Evidentiary Hearing (10:45 AM)** (Judicial Officer: Silver, Abbi)
01/05/2012, 01/12/2012, 01/19/2012, 01/30/2012, 03/27/2012, 08/27/2012, 10/22/2012


01/05/2012  **All Pending Motions (10:45 AM)** (Judicial Officer: Silver, Abbi)
Evidentiary Hearing and Def't's Writ of Habeas Corpus - Rescheduled


01/12/2012  **All Pending Motions (9:00 AM)** (Judicial Officer: Silver, Abbi)
Evidentiary Hearing and Def't's Writ of Habeas Corpus


01/19/2012  **All Pending Motions (9:00 AM)** (Judicial Officer: Silver, Abbi)
Evidentiary Hearing and Def't's Writ of Habeas Corpus


01/30/2012  **All Pending Motions (1:00 PM)** (Judicial Officer: Silver, Abbi)
Evidentiary Hearing and Def't's Writ of Habeas Corpus


02/03/2012  **Order for Production of Inmate**
Order for Production of Inmate Joseph Alexander Henderson BAC #67224


03/27/2012  **All Pending Motions (9:00 AM)** (Judicial Officer: Silver, Abbi)
Evidentiary Hearing and Def't's Petition for Writ of Habeas Corpus


05/08/2012  **Status Check (9:00 AM)** (Judicial Officer: Silver, Abbi)
05/08/2012, 05/22/2012
Status Check: Reset Evidentiary Hearing


08/27/2012  **All Pending Motions (1:00 PM)** (Judicial Officer: Silver, Abbi)
Evidentiary Hearing and Def't's Petition for Writ of Habeas Corpus

08/28/2012  **Order for Production of Inmate**

09/21/2012  **PSI - Misc**

10/18/2012  **Status Check (9:00 AM)** (Judicial Officer: Silver, Abbi)
Status Check: Def't's Presence

10/22/2012  **All Pending Motions (1:00 PM)** (Judicial Officer: Silver, Abbi)
Evidentiary Hearing and Def't's Writ of Habeas Corpus

10/25/2012  **Order**
Filed By: Plaintiff State of Nevada
Order For Transcript





11/13/2012  **Reporters Transcript**
Filed By: Plaintiff State of Nevada

Exhibit "E"

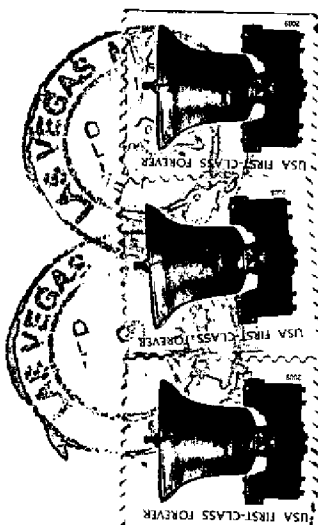
DEPARTMENT 15
CASE SUMMARY
CASE NO. 05C212968

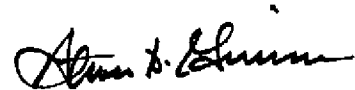
	<i>Reporter's Transcript of Evidentiary Hearing</i>	
11/20/2012	 Status Check (9:00 AM) (Judicial Officer: Silver, Abbi) <i>Status Check: Written Order</i>	
11/21/2012	 Finding of Fact and Conclusions of Law Filed By: Plaintiff State of Nevada <i>Findings of Fact, Conclusions of Law and Order</i>	
12/03/2012	 Notice of Entry Filed By: Plaintiff State of Nevada <i>Notice of Entry of Findings of Fact, Conclusions of Law and Order</i>	
DATE	FINANCIAL INFORMATION	

Defendant Henderson, Joseph A	
Total Charges	179.00
Total Payments and Credits	4.00
Balance Due as of 01/16/2013	175.00

STEVENSON 67224
b5D
EVAN SPRINGS N.Y.
89070

STEVEN GRIERSON CLERK OF THE COURT
200 LEWIS AVE 3RD FLR
LV. N.V. 89155-1160





CLERK OF THE COURT

ASTA

**DISTRICT COURT
CLARK COUNTY, NEVADA**

STATE OF NEVADA,

Plaintiff(s),

vs.

JOSEPH A. HENDERSON,

Defendant(s).

Case No: 05C212968
Dept No: XV

CASE APPEAL STATEMENT

1. Appellant(s): Joseph A. Henderson

2. Judge: Abbi Silver

3. Appellant(s): Joseph A. Henderson

Counsel:

Joseph A. Henderson #67224
P.O. Box 650
Indian Springs, NV 89070

4. Respondent: The State of Nevada

Counsel:

Steven B. Wolfson, District Attorney
200 Lewis Ave.
Las Vegas, NV 89101
(702) 671-2700

5. Respondent's Attorney Licensed in Nevada: Yes

6. Appellant Represented by Appointed Counsel In District Court: Yes

1 7. Appellant Represented by Appointed Counsel On Appeal: N/A

2 8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A

3 9. Date Commenced in District Court: June 29, 2005

4 10. Brief Description of the Nature of the Action: Criminal

5 Type of Judgment or Order Being Appealed: Writ of Habeas Corpus

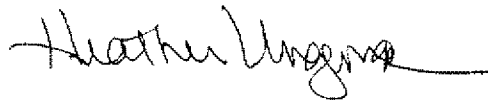
6 11. Previous Appeal: Yes

7 Supreme Court Docket Number(s): 52573

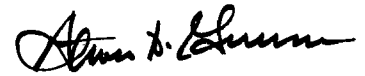
8 12. Child Custody or Visitation: N/A

9
10 Dated This 15 day of February 2013.

11 Steven D. Grierson, Clerk of the Court

12
13 

14 Heather Ungermann, Deputy Clerk
15 200 Lewis Ave
16 PO Box 551601
17 Las Vegas, Nevada 89155-1601
18 (702) 671-0512
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28



CLERK OF THE COURT

ORDER

JULIAN GREGORY, ESQ.
Nevada Bar No. 11978
LAW OFFICE OF GABRIEL L. GRASSO, P.C.
231 South Third Street, Suite #100
Las Vegas, NV 89101
Tel. (702) 868-8866
Fax. (702) 868-5778

Attorneys for Joseph Henderson

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

Case No. 05C212968
Dep't No. XV

vs.

JOSEPH HENDERSON, #1502730,

Defendant.

ORDER APPOINTING COUNSEL

Following an order of limited remand from the Nevada Supreme Court, and based upon a referral from the Clark County Office of Appointed Counsel, it is hereby ordered that Julian Gregory is appointed to represent the defendant, Joseph Henderson, in the above-entitled case for the purposes of appeal.

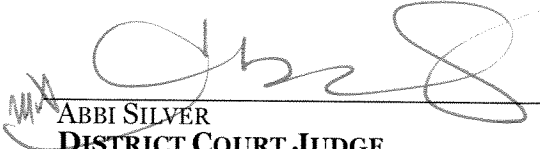
///

///

///

1 It is further ordered that this order will be applied *nunc pro tunc* to the date counsel
2 first appeared in this case; specifically, March 14, 2013.

3
4 DATED this 27 of March, 2013.

5
6 
7 **ABBI SILVER**
8 **DISTRICT COURT JUDGE**

9
10 SUBMITTED this 17 of March, 2013.

11
12 /s/ Julian Gregory
13 **JULIAN GREGORY, ESQ.**
14 **LAW OFFICE OF GABRIEL L. GRASSO, P.C.**
15 Attorneys for Joseph Henderson
16
17
18
19
20
21
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23
24

25 **AFFIRMATION**

26 Pursuant to NRS 239B.030

27 The undersigned does hereby affirm that the preceding document does not
28 contain the social security number of any person.

/s/ Julian Gregory
Julian Gregory, Esq.

03-17-13
Date

Case No. C212968

Dept. No. _____

FILED

JUN 12 3 01 PM '14

IN THE EIGHT JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

05C212968
PWHC
Petition for Writ of Habeas Corpus
3904091



JOSEPH A HENDERSON
Petitioner,

v.

STATE OF NEVADA
Respondent.

"SUCCESSIVE"
PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

RECEIVED

JUN 12 2014

CLERK OF THE COURT

44

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: ELY STATE PRISON WHITEPINE NEVADA

2. Name and location of court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT

3. Date of judgment of conviction: SEPTEMBER 24th 2008

4. Case number: C212968

5. (a) Length of sentence: 10 LIFE SENTENCES PLUS 40 years to 90 years

(b) If sentence is death, state any date upon which execution is scheduled: _____

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes _____ No X
If "yes", list crime, case number and sentence being served at this time: _____

7. Nature of offense involved in conviction being challenged: ROBBERY, KIDNAP, ASSULT SEXUAL ASSULT, BURGLARY, CONSPIRACY:

8. What was your plea? (check one):
(a) Not guilty X (b) Guilty _____ (c) Nolo contendere _____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details: _____

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)
(a) Jury X (b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No X

12. Did you appeal from the judgment of conviction? Yes X No _____

13. If you did appeal, answer the following:
(a) Name of Court: EIGHTH JUDICIAL DISTRICT COURT #16
(b) Case number or citation: C212968
(c) Result: FOUND GUILTY BY JURY

(d) Date of result: JUNE 26th 2008

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: _____

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?

Yes X No _____

16. If your answer to No. 15 was "yes", give the following information:

(a)(1) Name of court: EIGHTH JUDICIAL DISTRICT COURT #16

(2) Nature of proceeding: MOTION TO DISMISS COUNSEL; MOTION FOR DISCOVERY;

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes _____ No X

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes _____ No _____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such a result: _____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes _____ No _____

Citation or date of decision: _____

(2) Second petition, application or motion? Yes _____ No _____

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes _____ No _____

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) _____

(a) Ground One: The State deprived Petitioner of his right to be confronted with the evidence and witnesses against him in violation of the 6th and 14th Amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(b) Ground Two: The State elicited perjured testimony from its expert witness Guenther and failed to correct the known perjury in violation of Petitioner's 6th and 14th amendment rights to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(c) Ground Three: The State failed to meet its burden of proving Petitioner guilty of each element of each offense beyond a reasonable doubt in violation of Petitioner's rights under the 6th and 14th amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(d) Ground Four: Petitioner suffered ineffective assistance of counsel at trial in violation of the 6th and 14th Amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(a) Ground Five: PETITIONER WAS DEPRIVED OF HIS RIGHT TO CONFRONTATION AND COMPULSORY PROCESS IN VIOLATION OF THE 6TH AND 14TH AMENDMENT RIGHT UNDER THE U.S. CONST.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(b) Ground Six: THE TRIAL COURT'S FAILURE TO DISMISS THE CHARGES AGAINST THE PETITIONER AND FAILURE TO PRECLUDE EVIDENCE AGAINST THE PETITIONER VIOLATED PETITIONER'S 6TH AND 14TH AMENDMENT RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER U.S. CONST.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(c) Ground Seven: THE TRIAL COURT ERRED WHEN IT DENIED PETITIONER MOTION IN LIMINE TO PRECLUDE THE STATE FROM PRESENTING EVIDENCE OR ARGUING PETITIONER'S ID WAS ASSUMED AS A RESULT OF DNA TESTING IN VIOLATION OF THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONST.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(d) Ground Eight: PETITIONER RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE COURT DENIED DEFENSE MOTION FOR A MISTRAIL AFTER THE TESTIMONY OF KIM MURGA IN VIOLATION OF THE 6TH AND 14TH AMENDMENT TO THE U.S. CONST.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(a) Ground Nine: THE STATE DEPRIVED THE PETITIONER OF HIS 14TH AMENDMENT AND DUE PROCESS RIGHT VIOLATION OF THE U.S. CONST.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(b) Ground Ten: THE STATE DEPRIVED THE PETITIONER OF HIS 14TH AMENDMENT AND DUE PROCESS RIGHT VIOLATION OF THE U.S. CONST.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(c) Ground Eleven: THE STATE DEPRIVED THE PETITIONER OF HIS DUE PROCESS RIGHT AND THE 14TH AMENDMENT OF THE U.S. CONST.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(d) Ground Twelve: PROSECUTION MISCONDUCT, DUE PROCESS VIOLATION OF THE 14TH AMENDMENT OF THE U.S. CONST.

Supporting FACTS (Tell your story briefly without citing cases or law.):

GROUND 13TH - PETITIONER SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL DEPRIVING THE PETITIONER OF HIS 6TH AND 14TH AMENDMENT OF THE U.S. CONST.

GROUND 14TH - THE PETITIONER WAS DEPRIVED OF HIS DUE PROCESS RIGHT AND MISCONDUCT BY THE STATE. A 14TH AMENDMENT VIOLATION OF THE U.S. CONST.

GROUND 15TH - PETITIONER SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION TO THE 6TH AND 14TH AMENDMENT OF THE U.S. CONST.

GROUND 16TH - THE PETITIONER SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 14TH AMENDMENT AND DUE PROCESS OF THE U.S. CONST.

GROUND 17TH - THE PETITIONER SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 14TH AMENDMENT AND DUE PROCESS RIGHT OF THE U.S. CONST.

GROUND 18TH - THE PETITIONER SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 14TH AND 6TH AMENDMENT OF THE U.S. CONST.

GROUND 19TH - THE PETITIONER SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AND 14TH AMENDMENT OF THE U.S. CONST.

GROUND 20TH - THE PETITIONER SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AND 14TH AMENDMENT OF THE U.S. CONST.

GROUND 21TH - THE PETITIONER SUFFERED A FOURTEENTH VIOLATION OF THE U.S. CONST. AND ABUSIVE OF DISCRETION BY THE COURT.

Background

On September 03, 2004, approximately thirty minutes past midnight, Eric Bernweig and his girlfriend Julie Kim were victims of a home invasion robbery. Three men, one white and two black, gained entry into the home ostensibly in search of money. During the course of the robbery one of the black males subjected Ms. Kim to multiple acts of sexual assault in various areas throughout the home. At some point Ms. Kim was taken upstairs and while tied up she was raped a second time. In her bedroom, on her bed, she was subjected to further restraints as her assailant then tied her legs.

While Ms. Kim was being raped, the other two men were beating Mr. Bernweig up and ransacking the home in search of a safe and more money. Mr. Bernweig gave the men approximately one thousand dollars in hundred dollar bills and asserted it was all he had. Mr. Bernweig was also restrained but managed to slip his restraints and was pistol whipped about the head and face when he was discovered.

Shortly thereafter, the assailants fled. Ms. Kim managed to free herself and went to the aid of her boyfriend who was lying in a pool of blood. The couple called 911 and police arrived but the assailants were gone. Mr. Bernweig drove to Summerlin for hospital attention from a colleague while Ms. Kim was transported to UMC where she is seen by Linda Ebbert, RN and Sexual Assault Nurse Examiner (SANE). Ebbert completes a rape kit, having interviewed, photographed and swabbed Julie Kim. Ms. Kim informed Ebbert that her assailant licked her nipples at one point. As a result of that information, swabs were taken of the nipples of Ms. Kim. In addition to blood being drawn and taking oral, vaginal, rectal and buccal swabs, Ebbert took swabs of blood from Ms. Kim's left forearm, left hand, and left knee. It was noted that there was also blood on the bridge of her nose. Ms. Kim asserted the blood was not her own but that of her boyfriend.

Nurse Ebbert conducted a pelvic examination with the use of toluidine blue dye and

reported that there was no adherence made with the blue dye and stated "Light Staining microscope was negative for any Sperm on Slides prepared by this nurse."

The rape kit was eventually turned over to LVMPD. Detective Michael Jeffries was assigned to the case which was assigned Event number 040903-0152. Jeffries requested the rape kit be examined by the LVMPD's DNA Lab. The examination was conducted by Criminalist David P. Welch of the LVMPD. Welch concluded his exam and findings on November 16, 2004. Welch reported that DNA was detected on the breast swabs of victim Julie Kim, DNA from an unknown male. The DNA profile from the unknown male was searched against the local DNA Index System. No matches were found. Petitioner's DNA was on file in both Nevada and California and the profile did not come back as a match to him. Further, Welch reported that Semen was detected on the

Vaginal Swabs of the Victim, "however, no Spermatozoa were observed. Therefore, no significant DNA-STR typing results were obtained."

Once detective Jeffries learns that no suspect can be identified from the analysis, he submits the profile to Kathy M. Guenther, another Criminalist with the LVMPD, who submitted the profile to her contacts in the California Department of Justice on January 7, 2005 requesting that they "Please start the match confirmation procedure." According to Guenther's preliminary testimony, officials in California "...went ahead and pulled their sample [DNA] and tested it again..." (prelim. Transcr. of 6/9/05 at p. 118 ln. 19-23). This was the "CODIS" hit purportedly by federal authorities (4/28/05 prelim. Tr. at pp. 138-139).

So, the profile generated from the breast swabs of Ms. Kim ~~was~~ sent to a comparison lab in California in hopes of discovering a match. On February 13, 2005, Guenther is allegedly notified by CDOJ that the profile submitted matched their known DNA for Petitioner, Joseph Henderson.

(Note: Skipped 5e)

Guenther informed Jeffries of this information and with it, Detective Jeffries obtains a Search Warrant to take buccal Swabs of Petitioner's mouth. The Swabs were given to Guenther for analysis and she generate a profile that was a match for Petitioner's DNA from the obtained buccal Swabs and the DNA obtained from the breast Swabs of the victim, Ms. Kim.

Petitioner at this point was effectively locked in as the prime suspect of the charged crimes.

THE STATE DEPRIVED PETITIONER
OF HIS RIGHT TO BE CONFRONTED WITH
THE EVIDENCE AND WITNESSES AGAINST HIM

This violation occurred when the State failed to provide Petitioner the evidence Guenther submitted to the Comparison lab. Petitioner required that evidence for testing to insure that it was not unfairly and unreliably manufactured. It is apparent that

the DNA "profiles" are indeed manufactured as evinced by Guenther's trial testimony stating "The DNA goes through a lot of steps. I won't go through all the boring steps of the DNA process, but at the end we end up with a numeric profile generated from our genetic analyzer." (Trial Tr. of 6/27/08 at p. 11).

Petitioner was not afforded any discovery concerning this "genetic analyzer." Does this machine inject biological specimens? Is it sterilized before and after each use? By whom? Who can verify that? Does it merely do math and scan markers? What software does it use? What hardware? How reliable is this soft or hardware?

Petitioner was never given opportunity to confront his actual accuser, the genetic analyzer.

Further, if the profile Guenther sent to federal authorities in California was indeed flawed, how reliable is the Codis match? What steps did CDOJ

take to match Petitioner to the profile
Gwenther provided them? She asked them
to make a match and "confirm" it and they
did. But, did they do so fairly? Was
Petitioner's Profile in California merely
Similar, Strikingly Similar, or Spot-on-Exact?
Did the federal authorities alter their
Calibrations to bring about the match or
increase the probability of a match? Could
their Conclusions be a matter of interpretation?
These are all questions Petitioner should have
been able to explore but he was deprive
of that right. Petitioner could not Confront
his accusers, Cross-examine them and Compel
Expert Testimony to Contradict them. This
was a violation of Petitioner's 6th & 14th
Amendment rights to the U.S. Constitution

THE STATE ELICITED PERJURED TESTIMONY
FROM ITS EXPERT WITNESS - GUENTHER AND
FAILED TO CORRECT WHAT THEY KNEW TO BE
FALSE.

Guenther testified as follows:

A. ... I detected the presence of Semen on
two stains on ^{the} top bed sheet. I tested
those and obtained DNA profiles from those.

Q. From two independent stains?

A. YES.

Q. Sufficient Spermatozoa for you to get a
profile?

A. YES, Certainly.

Q. Did you document those findings as well?

A. YES, I did.

Q. And again this was in July of 2005 when
you were looking at two more loci; is that
correct?

A. That's correct.

Q. Prior to the -- to Dave Welch's initial Crime Scene Screening and your initial Comparison of the known DNA of Joseph Henderson?

A. That's correct.

Here, the jury hears testimony from this expert that she detected semen, tested stains, obtained DNA profiles from them because there was sufficient spermatozoa to get a profile and she had all of this from the very outset, having obtained it prior to Dave Welch's initial Crime Scene Screening and her initial Comparison of the known DNA of Petitioner. It's a regular "gotcha" moment. The jury could reasonably infer that the State had Petitioner's sperm from the beginning and obtain a profile with it first.

We know this is completely untrue as Welch conducted his analysis in November of 2004. The perjury went uncorrected and

prejudiced Petitioner & that his Conviction was wrongfully obtained with this perjured testimony.

THE STATE FAILED TO MEET ITS BURDEN OF PROVING PETITIONER GUILTY OF EACH ELEMENT OF EACH OFFENSE BEYOND A REASONABLE DOUBT.

Petitioner is alleged to have committed the crimes in this case with two co-conspirators, however there was no evidence presented by way of testimony of a co-conspirator or perpetrator that Petitioner was in any way party to these crimes. There was no testimony from the victims that Petitioner was one of their assailants; no eye witness identification testimony presented; no fingerprints nor confession that puts Petitioner at the scene of these crimes.

In this case, the State was in a position where they merely had to prove the crimes took place in general. Then, the

State asserts that Petitioner's DNA was found at the scene and it is automatically presumed in the minds of the jury that the State has proven its case and the defendant is guilty. This is because of the almost mythic infallibility jurors routinely afford confident scientific experts as they attempt to explain their cutting-edge technology. Because the average person can hardly understand the scientific mumbo-jumbo, we bow to the assertion that it's correct and concede that we are not qualified to question it.

For this reason, it is imperative that the State not abuse its authority when using this science. When the State points its finger and asserts that it is the defendant's DNA that is found in a case such as this, that defendant will surely be convicted. Consequently, the process to get to that point,

must be pristine, virtually error free, before it can be presumed that the information is correct and the State has met its burden of proof. Otherwise the process would be fundamentally unfair. In this case, the victim, Ms. Kim knelt in a pool of her husband's blood (DNA) at the scene of the crime. When she arrived at UMC and was seen by SANE Nurse Ebbert, Ebbert noted that there was blood on Ms. Kim's face, hand, arm and knee. There can be no question that blood splatter, contaminate DNA, has come into contact with the victim before any swabs were taken. Ms. Kim went to check on her boyfriend and concerned for him she

5.n

Pressed her body to his and picked up foreign DNA all over her person, from head to knee. The State of the evidence is that at that point, Ms. Kim was nearly nude, without panties or brassiere. It could reasonably be assumed that the contaminate DNA came into contact with Ms. Kim's breast and pelvis either directly or through contact soaked through her night gown. In any case, if Ms. Kim's person was contaminated by Eric Bernweig's DNA, how reliable is the profile generated from the swabs taken subsequent to the contamination? Not very!

In the instant case, Criminalists Welch and Guenther assert that the analysis they performed on the DNA was through PCR amplification. PCR is an acronym for "polymerase chain reaction." PCR tests are

Extremely sensitive to contaminating DNA at the crime scene and within the test laboratory. During PCR, contaminants may be amplified up to a billion times their original concentration. Contamination can influence PCR results, particularly in the absence of proper handling techniques and proper controls for contamination. Sensitivity is the main advantage of PCR tests. However, the increased sensitivity also makes PCR tests more vulnerable to trace contaminants, i.e., DNA from unexpected sources.

The State was careful to avoid presenting evidence of Julie Kim's contamination as their case hinged upon the interpretation of these tests. The evidence of the contamination is irrefutable, see Exhibit "A" attached hereto. In light of this evidence, the profile generated from the swabs of Julie Kim were presumptively unreliable and the State failed to meet its burden of proof.

PETITIONER SUFFERED THE
INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In this case, the State sought to prove Petitioner's guilt by showing his DNA was left on the person of the victim, Ms. Kim.

The only plausible defense available to Petitioner was to challenge the reliability of the Experts findings. There was no "strategic" reasoning that could remotely justify abandoning this course of action.

Petitioner contends that Counsel was ineffective when:

A. Counsel failed to call into question and have tested the evidence of California authorities' lab work matching Petitioner to Nevada's profile.

B. Counsel failed to move for the suppression of the State's profiles generated with or

"possibly" generated with Contaminated DNA.

C. Counsel failed to make the jury aware that the State failed to maintain the integrity of its evidence, conducting analysis with potentially contaminated DNA.

D. Counsel failed to make the jury aware that Julie Kiri's actions in pressing herself to Eric Bernweig's bloody body and kneeling in a pool of his blood may have effectively contaminated herself so as to make all subsequent testing presumptively unreliable thus giving rise to reasonable doubt.

E. Counsel failed to impeach the credibility of Expert Guenther who claimed to have located sufficient spermatozoa to obtain a genetic profile when Expert Welch and SANE Nurse Ekbert asserted there was virtually no spermatozoa at all.

F. Counsel failed to make the jury aware that witness Linda Ebbert performed a blue dye test that revealed no spermatazoa.

G. Counsel failed to make the jury aware that Expert Witness Guenther committed perjury.

PETITIONER WAS DEPRIVED OF HIS
RIGHT TO CONFRONTATION AND COMPULSORY
PROCESS

State's Witness, Criminalist Welch consumed all of the evidence of the breast swabs of Julie Kim. Consequently, Petitioner was deprived the opportunity to test the swabs himself and compel expert testimony to refute the State's experts on the outcome of the breast swabs. Petitioner could not confront this evidence against him.

THE TRIAL COURT'S FAILURE TO
DISMISS THE CASE FOR FAILURE TO
PRESERVE EVIDENCE VIOLATED PETITIONER'S
RIGHT TO DUE PROCESS AND A FAIR
TRIAL

Trial Counsel filed a motion to dismiss due to Welch's failure to preserve some portion of the breast swab so the defense could test it. The Trial Court refused to dismiss and refused to provide an instruction that the mishandled DNA evidence prejudiced Petitioner. This action was violative of the 6th & 14th Amendments to the U.S. Constitution.

THE TRIAL COURT REFUSED TO
PRECLUDE THE STATE FROM ARGUING AND
PRESENTING EVIDENCE THAT PETITIONER'S
IDENTITY IS ASSUMED AS A RESULT OF
THE DNA TESTING

Petitioner's motion in Limine Challenged the nature and extent by which the State's expert's could testify and the prosecutor could argue regarding conclusions of the DNA testing. The motion in limine asked the Court not to allow inaccurate and unreliable testimony concerning DNA evidence. The government should not have been able to present nor argue statistical evidence to suggest that the DNA evidence indicates the likelihood of the defendant's guilt rather than the odds of the evidence having him found in a randomly selective sample. The prosecution could elicit that the DNA match is one in whatever number of people randomly selected from the population would also match the DNA found. That is random match probability. However, giving a percentage that the DNA was found to be Petitioner was impermissible. That was/is Source Probability.

Additionally, an expert should be precluded from stating, and the prosecutor precluded from arguing identity is assumed.

In trial, the prosecutor asked its expert, Guenther, the following:

Q. To a reasonable degree of scientific certainty, what is your conclusion regarding the vaginal swab vis-a-vis the known profile of Joseph Henderson re-profiled in July 2005?

A. That the sperm DNA profile from the vaginal swab, male portion, matches the DNA profile from Joseph Henderson and Joseph Henderson is the source of that DNA. (6/26/08 TTr. at pg. 131)

This was impermissible source probability testimony asserting invariably (100%) that it was Petitioner. This violated Petitioner's right to a fair trial under the 6th Amendment, U.S. Constitution.

The violation occurred again when the State asked:

Q. Ma'am, in your professional opinion,

to a reasonable degree of scientific certainty, who was the contributor?

A. The male contributor is Joseph Henderson.

(6/27/08 TTr. at pg. 21).

Again, this was not random match probability testimony but rather source probability and leaves the impression that it is 100% invariable.

The State elicited this same prejudicial testimony from its witness, Kim Murga, who also was presented as an expert.

A. The individual who left the DNA on the breast swab of -- on the breast sample of Julie Kim is Joseph Henderson. (6/27/08 TTr. at p. 34).

A. The individual who contributed to the DNA mixture, the male profile in the vaginal swab is Joseph Henderson. (6/27/08 TTr. at pg. 34).

5. W

These actions violated Petitioner's 6th and 14th amendment rights under the U.S. Constitution to a fair trial.

PETITIONER'S RIGHT TO DUE PROCESS
WAS VIOLATED WHEN THE COURT DENIED
DEFENSE MOTION FOR MISTRIAL AFTER
THE TESTIMONY OF KIM MURGA

The State's key witness or expert witness, Kim Murga, was used to bolster the State's case as she testified to the veracity of and credibility of witnesses Welch and Guenther. Using this expert to vouch for the credibility of the State's other experts was improper. Murga's testimony was cumulative and highly prejudicial. Additionally, she referenced material evidence not timely disclosed to the defense. These actions

WERE VIOLATION OF PETITIONERS' 6TH AND 14TH AMENDMENT RIGHTS
UNDER THE U.S. CONSTITUTION.

GROUND 9

THE STATE DEPRIVED THE PETITIONER OF HIS 14TH AMENDMENT
AND DUE PROCESS RIGHT.

SUPPORTING FACT²: CRIME LAB SPECIALIST DAVID WEICH MIXED CRIME SCENES EVIDENCES FROM TWO SEPARATE CRIME SCENE EVENT NUMBERS-152/158, WHICH CONTAMINATED THE ENTIRE EVIDENCE.

REASONABLE DOUBT: IT WOULD OF BEEN A DIFFERENT OUT COME IF THE JURY HAD KNOWN THE EVIDENCE FROM THE HOME WAS MIXED WITH THE EVIDENCE FROM THE JOB SITE, WHICH IS TWO TOTELY DIFFERENTLY CRIME SCENES.

GROUND 10

THE STATE DEPRIVED THE PETITIONER OF HIS 14TH AMENDMENT
AND DUE PROCESS RIGHT.

SUPPORTING FACT²: CRIME LAB TECH DAVID WEICH USED ALL OF THE ORIGINAL DNA EVIDENCE DURING HIS TESTINGS, THE LAW STATES NO FORENSIC TECH SHOULD USE ALL ORIGINAL EVIDENCE FOR ANY KIND OF TESTING WITH OUT PERMISSION FROM THE COURT² FIRST...

REASONABLE DOUBT: CRIME LAB TECH DAVID WEICH HINDERED THE PETITIONERS DUE-PROCESS RIGHT TO BE ABLE TO RE-TEST AND CHALLENGE THE STATES FINDINGS.

HAD THE JURY KNOWN THE PETITIONER WAS'NT ALLOWED TO RE-TEST THE EVIDENCE AGAINST HIM, THE OUT COME WOULD OF BEEN DIFFERENT.

GROUND 11

THE STATE DEPRIVED THE PETITIONER OF HIS DUE PROCESS RIGHT
AND HIS 14TH AMENDMENT..

SUPPORTING FACT²: CRIME LAB TECH DAVID WEICH COMPLETED HIS FINDINGS OF THE CRIME SCENE EVIDENCE, BUT FOR SOME REASON HE DIDNT TEST THE ENTIRE EVIDENCE, THERE WAS HAIR AND A CIGARTIP LEFT AT THE CRIME SCENE, THAT SHOULD OF BEEN TESTED....

REASONABLE DOUBT: IF THE VICTIM WOULD'NT CLEARLY SAID IN TRAIL THE ASSAILANT SMOKED A CIGAR TYPE SOMETHING AFTER THE ASSAULT, THEN TESTING THAT CIGAR WOULD'NT OF BEEN SO VERY IMPORTANT. IF THE JURY WOULD OF KNOWN THERE WAS CRUCIAL EVIDENCE THAT COULD OF CLEARED THE PETITIONER AND IT WAS'NT TESTED.

GROUND-12TH

PROSECUTION MISCONDUCT, DUE PROCESS VIOLATION 14TH AMENDMENT OF THE U.S. CONSTITUTION.

SUPPORTING FACT: CRIME LAB TECH KATHY GUTHER TOLD THE DETECTIVES SHE HAD CONFIRMATION FROM SOME ONE IN CALIFORNIA WHO SUPPOSINGLY CONFIRMED A MATCH TO THE PETITIONER TO THIS CRIME.

THE DETECTIVE WENT TO THE JUDGE REQUESTING A SEARCH WARRANT / ARREST WARRANT AND A BUCAL SWAB OF THE PETITIONERS MOUTH FOR DNA. BUT THE STATE WITHHELD THE CRUCIAL FACT OF THE PETITIONERS DNA PROFILE WAS ALREADY IN THE STATES CRIMINAL DATABASE INDEX. THE JUDGE WOULD OF NOT GIVEN THE STATE A WARRANT OR ALLOWED THE STATE TO SWAB THE PETITIONERS MOUTH FOR DNA IF THE JUDGE KNEW THE CRIME SCENE EVIDENCE (DNA) WAS PROFILED AND RAN AGAINST THE STATES CRIMINAL INDEX DATABASE AND "NO MATCHES WERE FOUND". THE PETITIONERS DNA HAS BEEN IN THE STATES CRIMINAL INDEX DATABASE SINCE EARLY 2001. THIS CASE TOOK PLACE IN LATE 2004. AND AS OF YET, HAS ANY CONFIRMATION FROM ANY AGENCY FROM CALIFORNIA OR COD IS EVER BEEN PRODUCED OR PART OF THE DISCOVERY.

REASONABLE DOUBT: IF THE JURY WOULD OF KNOWN THE STATE WITHHELD CRUCIAL INFORMATION CONCERNING THE ENTIRE CASE. THE FACT IS THE DNA OF THE ASSAILANT WAS RAN AGAINST THE LOCAL AND STATES CRIMINAL DATABASE INDEX AND NO MATCHES WERE FOUND - (THIS PETITIONERS DNA IS IN BOTH DATABASES) AND IF THE JUDGE WOULD OF KNOWN JUST THIS FACT HE/SHE WOULD OF NOT GRANTED A WARRANT, AND FOR SURE NOT GRANTED A BUCAL SWAB WHEN 1. THE LAB SHOULD OF ALREADY HAD ENOUGH OF THE ASSAILANT'S DNA TO CHECK - WHATEVER THEY NEEDED TO CHECK. 2. WHY WOULD THE CRIME LAB NEED PURE DNA FROM THE PETITIONER? PETITIONERS DNA IS ON FILE IN THE LVPD CRIME LABS DATABASE AND A PURE BUCAL SWAB SHOULD NOT BE NEEDED. THE CRIME LAB TECH WHO REQUESTED THE BUCAL SWAB SAID SHE HAD CONFIRMATION FROM SOME ONE IN CALIFORNIA MATCHING THE PETITIONER TO THIS CRIME. 3. WHAT DID THE SO CALLED LAB IN CAL ACTUALLY MATCH THE PETITIONER TO? NO CONFIRMATION OR ANY DOCUMENTS WERE EVER PRODUCED. REQUESTING AND GETTING THE PETITIONER DNA THROUGH A WARRANT FOR THE BUCAL SWAB WAS MALICIOUS INTENT. WHY WOULD THE CRIME LAB NEED PURE DNA FROM THE PETITIONER? AND WHY WOULDNT THE STATE INFORM THE JUDGE OF ALL THE PROBLEMS WITH THE DNA IN THIS CASE.

GROUND-13TH

PETITIONER SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL AND DEPRIVED THE PETITIONER OF HIS 6TH, 14TH AMENDMENTS, OF THE U.S. CON.

SUPPORTING FACT: TRAIL COUNSELS / APPELLANT COUNSEL / HABEAS COUNSEL WERE ALL INEFFECTIVE FOR NOT PROPERLY INVESTIGATING THIS CASE. MORE DID THIS PETITIONER EVER HAVE A INVESTIGATOR TO PROPERLY THOROUGHLY INVESTIGATE THE CRUCIAL MISTAKES WITH THE DNA EVIDENCE. THE VICTIM KNEALED IN A POOL OF BLOOD (THE VICTIM SAID IT WAS HER HUSBAND'S BLOOD) WHICH IS FOREIGN DNA. PRIOR TO ANY SWABS BEING TAKEN OFF THE VICTIM. THE VICTIM KNEALING IN HER HUSBANDS BLOOD CAUSED A MAJOR CONTAMINATION ISSUE WITH THE ONLY EVIDENCE IN THIS CASE. COUNSELS NEVER MENTIONED THIS TO THE COURT, JURY, IN ANY OF THEIR BRIEFS OR MOTIONS. NO INVESTIGATION WAS DONE.

REASONABLE DOUBT: IF COUNSELS WOULD OF PROPERLY INVESTIGATED THE ENTIRE CASE, ITS CHAIN OF CUSTODY, CONTAMINATION ISSUES, AND THE FACT THAT THE (FBI) CAME AND TOOK THE ENTIRE DNA EVIDENCE WHILE THIS CASE WAS IN JUSTICE COURT FOR THEIR OWN INDEPENDENT TESTING. NO WARRANT WAS ISSUED BY THE (FBI) TO TAKE THE DNA EVIDENCE. THE STATE SAID THE EVIDENCE

WAS TAKEN BY THE (FBI), BUT SOMEHOW THE 2ND CRIME LAB TECH WHO TOUCHED THE EVIDENCE IN THIS CASE (KATHY GUNTHER) SAID IN HER FINDINGS AND RECORDS SHE WAS ABLE TO MATCH THE PETITIONER TO THE EVIDENCE. THAT THE (FBI) HAD ALREADY TAKEN PRIOR TO ANY OF HER TESTINGS. THE OUTCOME OF THE JURY DECISION WOULD OF BEEN DIFFERENT IF COUNSEL WOULD OF PROPERLY INVESTIGATED THE ENTIRE DNA EVIDENCE AND HOW (CRIME LAB SPECIALIST KATHY GUNTHER) WAS ABLE TO MATCH THE PETITIONER TO EVIDENCE THAT SHE COULDNT OF BEEN ABLE TO RE-TEST, BECAUSE THE (FBI) TOOK THE EVIDENCE PRIOR TO HER TESTINGS, AND THE EMAIL FROM LAB TECH KATHY GUNTHER TO THE DISTRICT ATTORNEY ON THIS CASE: K. GUNTHER SAYS TO DA SHE CHECKED THE PROFILE OF THE PETITIONER AGAINST THE KNOWN PROFILE OF THE ASSAILANT IN THIS CASE BUT ONLY SEEN MINOR PEAKS!!! AND SHE ASK THE STATE IF THEY WANTED HER TO RE-TEST?. BUT WHAT DID SHE RE-TEST? THE TOOK ALL THE ORIGINAL EVIDENCE. COUNSEL SHOULD OF INVESTIGATED THE ENTIRE DNA EVIDENCE AND THAT DIDNT HAPPEN.

GROUND 14TH

THE PETITIONER WAS DEPRIVED OF HIS DUE PROCESS RIGHT AND MISCONDUCT BY THE STATE. A 14TH AMENDMENT VIOLATION OF THE U.S. CONSTITUTION.

SUPPORTING FACT: THE (FBI) CAME AND RETRIEVED THE ENTIRE DNA EVIDENCE FROM THIS CASE FOR THEIR OWN INDEPENDENT TESTINGS. ALL WHILE THE PETITIONER HAD COUNSEL, BUT COUNSEL NOR PETITIONER WERE NOTIFIED PRIOR TO THE STATE RELEASE OF THE EVIDENCE, TO ANY OUTSIDE AGENCY. THE (FBI) CONSUMED THE ENTIRE ORIGINAL EVIDENCE DURING THEIR TESTINGS. WHICH DEPRIVED THE PETITIONER OF HIS DUE PROCESS RIGHT TO CONFRONT ALL EVIDENCE AGAINST THE PETITIONER AT TRIAL. THE PETITIONER WAS DEPRIVED OF THE RIGHT TO BE ABLE TO RE-TEST, AND CHALLENGE THE STATES FINDINGS. NO DOCUMENTS OR FINDINGS WERE EVER PRODUCED OF THE (FBI) FINDINGS, AND THE STATE DENIED THE MOTION FOR DISMISSAL. YET THE STATE LOST OR GAVE AWAY THE EVIDENCE.

REASONABLE DOUBT: IF THE JURY HAD KNOWN THE STATE CARELESSLY GAVE AWAY THE EVIDENCE TO SOME OUTSIDE AGENCY, LEAVING THE PETITIONER WITHOUT ANY WAY OF RE-TESTING THE DNA OR CHALLENGING THE STATES FINDINGS OR TESTIMONY AT TRIAL.

GROUND 15TH

PETITIONER SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION TO THE 6TH AND 14TH AMENDMENT OF THE U.S. CONSTITUTION.

SUPPORTING FACT: THE STATE ALLOWED PERJURED TESTIMONY FROM ITS STAR WITNESS CRIME LAB TECH KATHY GUNTHER WHEN SHE SAID UNDER OAT: SHE ALREADY HAD THE PETITIONERS SPERM ON FILE PRIOR TO ANY TESTING DONE BY CRIME LAB TECH DAVID WEICHERL OR HERSELF. LAB TECH DAVID WEICHERL IS THE FIRST AND ONLY CRIME LAB TECH TO TEST ANY ORIGINAL EVIDENCE IN THIS CASE.

REASONABLE DOUBT: IF THE JURY HAD KNOWN OF THE MISCONDUCT BY THE STATES STAR WITNESS CRIME LAB KATHY GUNTHER IN WHICH SHE LIED UNDER OAT, AND BY HER BEING THE ONLY CRIME LAB TECH WHO SUPPOSINGLY MATCHED THE PETITIONER TO THIS CASE, HER DISHONESTY WOULD OF CALLED INTO QUESTION HER CREDITIBILITY TO HER FINDINGS AT TRIAL.

GROUND 16TH

THE PETITIONER SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL
IN VIOLATION OF THE 14TH AMENDMENT AND DUE PROCESS OF THE U.S. CON.

SUPPORTING FACTS: AT CALLENDER CALL ON JUNE 17, 2008, COUNSEL FILED A MERITORIOUS MOTION TO DISMISS DUE TO LACK OF EVIDENCE, BUT WHEN IT CAME TIME TO PROPERLY ARGUE THE FACTS AND ISSUES COUNSEL FAILED TO PROPERLY DEFEND THE MOTION...

REASONABLE DOUBT: IF THE JURY WOULD BE KNOWN, WHEN THE COURT ASKED COUNSEL IF THEY FELT THERE WAS ANY PROBLEMS WITH THE DNA OR HOW THE TESTING WAS CONDUCTED, PROCESSES, OR PROCEDURES, OR ANY MISCONDUCT BY THE STATE OR CRIME LAB COUNSEL SAID NO. THE ENTIRE EVIDENCE HAD BEEN COMPROMISED, THAT WAS THE REASON FOR COUNSEL FILING THE MOTION.

GROUND 17TH

INEFFECTIVE ASSISTANCE OF COUNSEL 14TH AMENDMENT AND
DUE PROCESS VIOLATION OF THE U.S. CONSTITUTIONS.

SUPPORTING FACTS: COUNSEL WAS INEFFECTIVE FOR NOT CALLING CRIME LAB SUPERVISOR BURCH HENRY TO TRAIL TO TESTIFY TO HIS FINDINGS, AFTER HE REVIEWED BOTH CRIME LAB TECHS RESULTS OF THE DNA EVIDENCE IN THIS CASE, BUT BOTH LAB TECHS RESULTS WERE TOTALLY OPPOSITE.

REASONABLE DOUBTS: CRIME LAB TECH SUPERVISOR BURCH HENRY SIGNED CORRECTLY AND PROPERLY DONE ON BOTH LAB TECHS (KATHY GUNTHER AND DAVID WELCH) DNA ANALYSIS AND FINDINGS OF THE SAME EVIDENCE. BUT HOW IS THAT POSSIBLE WHEN BOTH LAB TECHS RESULTS WERE TOTALLY OPPOSITE. YET BOTH LAB TECHS USED THE SAME METHOD OF ANALYSIS (PCR TESTING). THE FIRST LAB TECH TO TEST AND PROFILE THE ORIGINAL EVIDENCE FROM THE CRIME. (DAVID WELCH) WAS ABLE TO PROFILE MALE DNA OF THE ASSAILANT FROM THE BREAST SWAB, BUT USED ALL OF THE SWAB TO GET A PROFILE. WELCH RAN THE ASSAILANT'S DNA PROFILE THROUGH THE LOCAL AND STATE CRIME LAB DATABASE, BUT CAME BACK NEGATIVE FOR ANY HIT. AND THE ANALYSIS WELCH DID ON THE VAGINAL SWAB CAME BACK NEGATIVE FOR SPERM BUT HE DID SEE SEMEN BUT COULDN'T PROFILE. NOW LAB TECH KATHY GUNTHER THE 2ND SPECIALIST COMES ALONG MONTHS LATER AND SAYS SHE WAS NOTIFIED BY SOME ONE IN CALIFORNIA WHO GIVES HER THE PETITIONER'S NAME. NOW LAB TECH KATHY GUNTHER SAYS SHE NOW ABLE TO GO BACK USE THE SAME METHOD PCR TESTING, RETEST THE EVIDENCE, AND NOW SHE'S ABLE TO MATCH THAT DNA EVIDENCE TO THE PETITIONER. PLEASE KNOW THE PETITIONER DNA PROFILE WAS IN THE LOCAL AND STATE CRIMINAL DATABASE INDEX AND NO MATCH WAS FOUND TO THE PETITIONER... LAB TECH KATHY GUNTHER REQUESTED A BUCCAL SWAB THROUGH A WARRANT. COUNSEL SHOULD OF CALLED INTO QUESTION WHY WOULD LAB TECH NEED A BUCCAL SWAB OF THE PETITIONER DNA IF PETITIONER'S DNA IS IN THE CRIMINAL DATABASE OF NEVADA? COUNSEL SHOWED NO INTEREST IN CALLING BURCH HENRY TO TESTIFY TO HOW TWO LAB TECHS TESTED THE SAME EVIDENCE WITH THE SAME METHOD PCR BUT BOTH HAD OPPOSITE FINDINGS. AND HOW DID SUPERVISOR BURCH HENRY COME TO THE CONCLUSION BOTH FINDINGS WERE ACCURATE.

PETITIONER SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 14TH AND 6TH AMENDMENTS OF THE U.S. CONSTITUTION.

SUPPORTIVE FACTS: COUNSELS WERE INEFFECTIVE FOR NOT CALLING INTO QUESTIONS CONCERNING THE ENTIRE STATES EVIDENCE. IN THIS CASE, COUNSELS NEVER REQUESTED A INVESTIGATOR TO PROPERLY INVESTIGATE THE CRUCIAL ISSUES AND PROBLEMS THE DNA HAD. COUNSELS SHOULD OF CALLED INTO SERIOUS QUESTION HOW THE FIRST CRIME LAB TECH (DAVID WEICH) NOT ONLY USED THE ENTIRE EVIDENCE TO PROFILE LEAVING THE PETITIONER TO BE FORCED TO SUFFER DUE PROCESS BECAUSE THE PETITIONER WAS DENIED THE OPPORTUNITY TO RETEST AND CHALLENGE THE STATES TESTIMONY OR FINDINGS. ALSO WHILE THIS CASE WAS IN JUSTICE COURT, SOME HOW THE STATE RELEASED THE ENTIRE EVIDENCE TO THE (FBI) FOR THERE OWN INDEPENDENT TESTINGS, WITH NO COURT ORDER SIGNED BY THE JUSTICE COURT JUDGE. THEN SOME HOW THE 2ND CRIME LAB TECH KATHY GUNTHER COME ALONG SOME MONTHS LATER AND NOW SAYS SHE RECEIVED A CONFIRMATION FROM SOME ONE IN CALIFORNIA, SAYING THEY MATCHED THE PETITIONER TO THIS CASE. CRIME LAB K GUNTHER REQUESTS A DNA BUCCAL SWAB OF THE PETITIONER MOUTH. LAB TECH ALSO COMES ALONG AND NOW SHE SAYS SHE HAS SHEETS FROM THE CRIME SCENE WITH THE PETITIONERS SPERM ON THEM. YET TRAIL COUNSELS NEVER INVESTIGATED ANY OF THESE ISSUES.

REASONABLE DOUBT: IF THE JURY WOULD OF KNOWN, (1) THE FIRST CRIME LAB TECH TO TEST THE EVIDENCE IN THIS CASE, WAS ABLE TO GET A PROFILE OF THE ASSAILANT FROM THE BREAST SWAB, (DAVID WEICH) RAN THAT PROFILE THROUGH THE LOCAL AND NEVADA CRIMINAL DATABASE INDEX AND NO MATCHS WERE FOUND. (THE FBI) CAME AND RETRIEVED THE ENTIRE DNA EVIDENCE PRIOR TO ANY OF THE 2ND LAB TECHS TESTING, (2) WITH NO EVIDENCE FOR THE 2ND CRIME LAB TECH TO TEST SHE SENDS A EMAIL TO THE DISTRICT ATTORNEY ON THE CASE AND SAYS TO THE DISTRICT ATTORNEY: SHE CHECKED THE PROFILE OF JOSEPH HENDERSON AGAINST THE PROFILE OF THE ASSAILANT IN IN THIS CASE BUT ONLY SEEN (MINOR PEAKS) OF HENDERSON IN THE PROFILE. CRIME LAB TECH ASKED THE DISTRICT ATTORNEY WOULD SHE LIKE HER TO RETEST THE EVIDENCE AGAIN 30 DAYS LATER CRIME LAB TECH COMES ALONG WITH HER FINAL FINDINGS AND NOW SAYS SHE'S ABLE TO MATCH THE PETITIONER TO ALL OF THE DNA EVIDENCE. PLUS NOW SHE SAYS SHE ABLE TO FIND THE PETITIONERS DNA ON SOME SHEETS, BUT THE FIRST LAB TECH (DAVID WEICH) DIDNT MENTION ANY SHEETS IN HIS TABLE OF CONTENTS OF THE EVIDENCE HE REVIEWED AND TESTED. AND THE VICTIM SAID IN HER FIRST TWO INTERVIEWS THE ASSAILANT DIDNT EJACULATE. BUT SINCE THE 2ND LAB TECH COMES ALONG AND SAYS SHE MATCHED THE EVIDENCE TO THE PETITIONER, NOW IN TRAIL THE VICTIM COMES ALONG AND SAYS THE ASSAILANT DID EJACULATE.

COUNSEL SHOULD OF CALLED INTO ALL THESE ISSUES AND MORE, LIKE HOW DID (KATHY GUNTHER) MATCH THE PETITIONER TO EVIDENCE THE (FBI) CAME AND TOOK PRIOR TO HER VIEW OF THE EVIDENCE. CSI DAHN SAID SHE ONLY TOOK THE SHEETS AS PROCEDURE, SHE SAID AT TRAIL SHE DIDNT SEE ANY LIQUID SUBSTANCE ON THE SHEETS, THATS WHY SHE DIDNT PACKAGE THE SHEETS DUE TO FORENSIC - PROTOCOL (ALL POSSIBLE DNA EVIDENCE MUST BE IN PAPER AND IMMEDIATELY REFRIGERATED. THOSE SHEETS WASNT PROPERLY STORED BECAUSE CSI DAHN DID SEE ANYTHING ON THEM. COUNSEL SHOULD OF PROPERLY INVESTIGATED THE ENTIRE EVIDENCE.

GROUND 19TH

PETITIONER SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL
IN VIOLATION OF THE 6TH AND 14TH AMENDMENT OF THE U.S. CON.

SUPPORTING FACTS: HABEAS CORPUS COUNSEL WAS INEFFECTIVE FOR CHANGING THE PETITIONER'S HABEAS CORPUS ISSUES. ON THE 31ST OF MARCH 2011, THE DISTRICT COURT ORDERED THE PETITIONER A HABEAS CORPUS HEARING BASED ON THE ISSUES PETITIONER RAISED IN THE HABEAS CORPUS WRIT. THE PETITIONER WAS GRANTED COUNSEL, BUT COUNSEL AMENDED THE WRIT AND TOOK ALL OF THE CRUCIAL ISSUES OUT. THE PETITIONER ASKED THE COUNSEL ON MANY OCCASIONS WAS THE ORIGINAL - ISSUES STILL GOING TO BE HEARD? COUNSEL SAID YES. BUT AT THE HABEAS CORPUS HEARING, COUNSEL TOLD THE PETITIONER TO BE QUITE WHILE SHE FOCUSE ON THE ISSUES AT HAND. THE PETITIONER SENT THE COUNSEL EVIDENCE TO SHOW THE COURT THE EMAIL FROM CRIME LAB KATHY BUNTER TO THE DISTRICT ATTORNEY WHICH WOULD OF SHOWED THE CRIME LAB SPECIALIST HAD BOTCHED HER FINDINGS. BUT COUNSEL DIDNT BRING THE EMAIL TO THE HEARING, BUT BEFORE THE HEARING COUNSEL HAD BEEN TELLING THE PETITIONER THE EMAIL WAS THE PROOF SHE NEEDED TO SHOW THE COURT THE LAB HAD EITHER MADE A MISTAKE OR JUST SET UP BY THE CRIME LAB. COUNSEL TOLD THE PETITIONER SHE WAS GOING TO FILE THE APPEAL TO THE HEARING, SEND THE EMAIL BACK TO THE PETITIONER BUT DID NEITHER...

REASONABLE DOUBT: THE COURT GRANTED THE PETITIONER'S WRIT OF HABEAS CORPUS TO HEAR THE ISSUES OF THE WRIT. BUT COUNSEL FOR SOME REASON TOOK OUT 95% OF THE ISSUES THE COURT GRANTED FOR REVIEW. COUNSEL USED THE PETITIONER'S LACK OF UNDERSTANDING TO THE LAW TO DEPRIVE THE PETITIONER OF HIS DUE PROCESS RIGHT AND RIGHT TO HABEAS CORPUS RELIEF.

GROUND 20TH

PETITIONER SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL
VIOLATION OF THE 14TH, 6TH AMENDMENT OF THE U.S. CON.

SUPPORTING FACTS: HABEAS CORPUS COUNSEL TOLD THE PETITIONER TO INVOLK HIS RIGHT TO CLIENT / ATTORNEY PRIVILEGE DURING THE POST CONVICTION HEARINGS, WHICH ALLOWED TRAIL COUNSELS TO LIE TO THE COURT, LIE UNDER OATH ON THEIR INEFFECTIVENESS THROUGH THE ENTIRE CASE AND MOST OF ALL AT TRIAL WHERE THE PETITIONER SINCE DAY ONE HAS MAINTAINED HIS INNOCENCE. YET TRAIL COUNSELS COME IN AND SAYS UNDER OATH THE PETITIONER TOLD TRAIL COUNSEL HE COMMITTED THIS CRIME, CAUSING COURT TO OVER LOOK THE CRUCIAL ISSUES AND DENIE THE PETITIONER WRIT.

REASONABLE DOUBT: IF THE COURT WOULD OF KNOWN COUNSEL CAME TO VISIT THE PETITIONER 2 DAYS PRIOR TO THE HEARING OF THE WRIT AND COUNSEL'S WORDS WERE: 'I JUST TALK TO YOUR TRAIL COUNSEL!' YOUR DONE!!! I ASKED COUNSEL WHAT WAS SHE TALKING ABOUT? HER WORDS WERE: 'YOUR DONE!!! TELL THE BAR THAT!!!' AND STORMED OUT OF THE ROOM... THE PETITIONER TRIED TO TALK TO COUNSEL AT THE HEARING BUT COUNSEL JUST TOLD THE PETITIONER RELAX!!! PETITIONER WAS TO TESTIFY AT THE POST CONVICTION HEARING BUT COUNSEL CHANGED HER WHILE THE HEARING WAS GOING ON. BUT THE PETITIONER REQUESTED TO ADDRESS THE COURT, TO ADDRESS TRAIL COUNSEL LIES ON THE STAND AND THE ISSUES COUNSEL AND PETITIONER PREPARED TO ADDRESS IN THE HABEAS CORPUS HEARING, THE PETITIONER NOTICED THE HEARING WAS ALMOST OVER BUT COUNSEL DIDNT ADDRESS ANY OF THE ISSUES PREPARED IN THE ORIGINAL WRIT. COUNSEL TOLD PETITIONER NOT TO ADDRESS THE COURT, BUT PETITIONER WENT FORWARD AND ADDRESS THE COURT ANYWAY. WHILE THE PETITIONER WAS MAKING A RECORD COUNSEL PUSHED HER CHAIR OVER TO THE DISTRICT ATTORNEY'S SIDE OF THE COURT AND SAID WHAT EVER. COUNSEL DIDNT OBJECT TO NONE OF THE KNOWN HEARSAY WE DISCUSSED PRIOR TO THE HEARING. SHE ALLOWED THE HEARSAY OF TRAIL COUNSEL ON LAB TECH NDRA RUDIN WHO TRAIL COUNSEL -

SAID THEY AND NORA RUBIN VIEWED AND DISCUSSED DOCUMENTS FROM SOME CALIFORNIA LAB WHO SUPPOSIBLY WAS ABLE TO MATCH PETITIONER TO THIS CRIME, HABEAS CORPUS COUNSEL - ASK PRIOR COUNSEL DID YOU REVIEW DOCUMENTS FROM CALIFORNIA? PRIOR TO THE HEARING - TRAIL COUNSEL SAID YES HE AND LAB TECH NORA RUBIN REVIEWED THOSE DOCUMENTS, BUT COUNSEL ASK TO SEE THOSE DOCUMENTS BECAUSE THEY WERE NOT A PART OF THE RECORDS SHE HAD. TRAIL COUNSEL CAME BACK AND SAID IT WAS A MISTAKE THEY (TRAIL COUNSEL) NEVER REVIEWED ANY DOCUMENTS FROM CALIFORNIA. BY HABEAS CORPUS COUNSEL NOT - OBJECTING TO TRAIL COUNSEL'S STATEMENTS SHE ALLOWED THE DISTRICT ATTORNEY TO SWINDLE IN UNTRUE STATEMENTS ABOUT NORA RUBIN'S FINDINGS, SHE OR HER LAB. NEVER TESTED ANY DNA IN THIS. HER LABORATORY OR HER DIDNT TEST ANY EVIDENCE IN THIS CASE. TRAIL COUNSEL TOLD PETITIONER, AND BOTH TRAIL COUNSELS FILED MOTIONS - BECAUSE THE OUTSIDE LAB COULDN'T TEST THE EVIDENCE BECAUSE THERE WAS NO - ORIGINAL EVIDENCE TO TEST AND TESTING THE STATES EXTRACTIONS WOULD BE UNFAIR. AND A DUE PROCESS VIOLATION.

GROUND 2/TH

THE PETITIONER SUFFERED A FOURTEENTH VIOLATION:
ABUSIVE OF DISCRETION BY THE COURT.

SUPPORTING FACTS: THE JUDGE ABUSED THE DISCRETION OF THE COURT'S JURISPRUDENCE WHEN A EMAIL FROM LVMPD CRIME LAB SPECIALIST (KATHY GUNTHER) TO LEAD DISTRICT ATTORNEY OVER THIS CASE STACY COMINS WHERE LAB TECH KATHY GUNTHERS WORDS ARE: "I RAN THE - PROFILE OF JOSEPH HENDERSON AGAINST THE KNOWN PROFILE OF THE ASSAULT IN THIS CRIME, AND ONLY SEEN MINOR PECKS OF HENDERSON BUT IF YOU WOULD LIKE I WILL RETEST IT."

THE COURT WOULDN'T ALLOW THE PETITIONER TO ENTER THE EMAIL AS EVIDENCE. WHEN THE EMAILS CONVERSATION IS ALL ABOUT THIS CASE. THE PROFILE OF THE PETITIONER WAS ALSO IN THE NEVADA DNA DATABASE, THE FIRST LAB TECH TO WORK ON THE ENTIRE - EVIDENCE, PROFILED THE ASSAULT, RAN THAT PROFILE AGAINST THE NEV DATA BASE INDEX AND NO MATCH WAS FOUND THE DNA EVIDENCE IS THE ONLY EVIDENCE AGAINST THE PETITIONER.

REASONABLE DOUBT: IF THE JURY WOULD OF KNOWN THAT CRIME LAB TECH - KATHY GUNTHER LIED UNDER OAT-0 THE (FBI) HAD RETRIEVED THE ENTIRE DNA EVIDENCE PRIOR TO HER EMAIL SO WHAT EVIDENCE DID SHE REALLY RETEST? SHE COMES BACK 30 DAYS AFTER THE EMAIL WAS SENT WITH HER FINAL FINDINGS - AND IS NOW ABLE TO MATCH THE PETITIONER TO THE BREAST SWAB, VAGINAL SWAB, AND SHEETS LAB TECH KATHY GUNTHER SAID SHE FOUND DNA ON. THE MAJOR PROBLEM IS THE FIRST LAB TECH TO ANALYSIS THE EVIDENCE IN THIS CASE (DAVID WEICH) SAID HE RAN THE EVIDENCE AGAINST THE NEV DATA BASE INDEX AND NO MATCH WAS FOUND, HE COULDN'T PROFILE THE VAGINAL SWAB BECAUSE THERE WAS NO SPERMATOZOA, SO HE COULDN'T PROFILE, AND IN THE PROCESS OF HIS ANALYSIS HE HAD TO USE THE ENTIRE DNA EVIDENCE. IN CRIME LAB TECH DAVID WEICH'S FINDINGS HE -

NEVER NOT ONE TIME MENTIONED ANYTHING ABOUT NO SHEETS IN HIS FINDINGS OR TABLE OF CONTENTS. THE VICTIM SAID IN HER FIRST TWO INTERVIEWS, THE ASSAILANT DIDNT EJACULATE. BUT CHANGES HER STORY IN TRAIL TO ACCOMMODATE THE DISTRICT ATTORNEY. 3 SOME HOW CRIME LAB TECH KATHY GUNTHER SAYS SHE USED THE SAME METHOD TO RETEST THE EVIDENCE AS DAVID WEICH USED PCR TESTING. BUT SHE GOES FROM MINOR PEAKS TO MATCHING THE PETITIONER 1 AND 500 BILLION!!! HOW DO YOU GO FROM MINOR PEAKS TO 1 AND 500 BILLION? 4 THE FBI CAME AND RETRIEVED THE ENTIRE EVIDENCE AND NEVER RETURNED THE EVIDENCE OR A FINDING. 5 SAME NURSE LINDA EBBERT SAID IN HER REPORT: (TO LINDINE BLUE DYE, MICROSCOPIC TEST, SLIDES, ALL NEGATIVE FOR SPERM) SEE EXHIBIT A. LUMPED CRIME LAB SPECIALIST KATHY GUNTHER SAID SOMEONE IN CALIFORNIA GAVE HER THE PETITIONER'S NAME, KATHY GUNTHER TOLD THE STATE SHE HAD CONFORMATION FROM CALIFORNIA LAB/CODIS MATCHING THE PETITIONER TO THIS CRIME, LAB TECH SENT THE STATE TO THE JUDGE TO RETRIEVE A BUCAL SWAB OF THE PETITIONER'S DNA, BUT IF A LAB IN CALIFORNIA HAS PETITIONER DNA, AND PETITIONER'S DNA IS ON FILE IN NEV SINCE EARLY 2001 AND YOU HAVE THE ASSAILANT'S DNA PROFILE, WHY WOULD YOU NEED THE PETITIONER'S DNA AGAIN? NO CONFORMATION HAS YET TO BE TURNED OVER FROM NO ONE IN CAL, THE STATE TOLD THE COURT THEY HAD THAT CONFORMATION, BUT MISLEAD THE COURT. THERES NOT ONE DOCUMENT FROM ANY OUTSIDE AGENCY IN THE DISCOVERY MATCHING THE PETITIONER TO ANY CRIME. AND WITH CALIFORNIA BEING THE AGENCY THE STATE SAID SUPPOSINGLY, MATCHED THE PETITIONER TO THIS CRIME WHY WOULDN'T THE STATE CALL WHO EVER IN CALIFORNIA TO TESTIFY AT TRIAL TO THERE FINDINGS, NO CALIFORNIA/CODIS LAB WERE EVEN EVER ON THE STATES WITNESS LIST FOR TRIAL.

ALSO: CRIME LAB (KATHY GUNTHER) WAS JUST IN THE NEWS PAPER FOR BLOTCHED FINDINGS FALSIFICATION OF DOCUMENTS (DNA) TESTINGS.

CONCLUSION

FOR THE REASONS SET FORTH IN THIS PETITION, PETITIONER PRAYS THIS COURT WILL REVERSE THIS CONVICTION AND REMAND THIS MATTER BACK TO THE PROSECUTOR'S OFFICE FOR FURTHER DISPOSITION.

RESPECTFULLY,

Joseph Henderson
JOSEPH A HENDERSON

DATED: THIS 2ND DAY OF JUNE 2014

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 2nd day of the month of June of the year 2011 ,

Joseph Anderson
Signature of petitioner

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

none
Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Joseph Anderson
Petitioner

none
Attorney for petitioner

UNIVERSITY MEDICAL CENTER
1800 West Charleston Boulevard
Las Vegas, Nevada 89102

Las Vegas Metro Event Number - 040903-0158

MODE OF ARRIVAL: Las Vegas Metro Police Department

TIME OF SERVICE: 3:28 on 09/03/2004

CHIEF COMPLAINT: Sexual assault.

- HISTORY OF PRESENT ILLNESS: The patient states that there was a knock at her door at about 11:30 last evening and that there was an Hispanic male who came to the door and he said that someone had thrown his keys into the backyard. The patient states that her boyfriend went into the garage to find a flashlight to assist him and then suddenly there were 2 black males that came into the home. The patient states she and her boyfriend were both tied with plastic bands and that she was sexually assaulted on the couch, pn missionary position by a black male and then she was sexually assaulted on the bed with her in missionary position. She states that the male who sexually assaulted her also tied her ankles. She states that after the assailants were gone, she was able to get loose from the restrains and that is when law enforcement became involved with the case. The patient does state that there was penetration of the vagina with the penis of the assailant 2-times. There was also finger penetration. She denies any anal or oral penetration. The patient does state the suspect did masturbate her, she is unsure if he did ejaculate. She does say that he sucked on her nipples, areas of the nipples are swabbed and placed in the sexual assault kit for saliva. She states there was a black gun used and that she has not had consensual intercourse in the last 5 days. The patient is very upset and nervous but cooperative and very straight forward with her answers during her examination.

PHYSICAL EXAMINATION:

GENERAL: This is an alert, oriented 29-year-old Oriental female who is here for a sexual assault examination.

HEENT: There is blood noted over the bridge of the nose. The patient states this is from her boyfriend, who had a cut to his head and injury to his mouth. She had no complaints of injury in this area.

HEART: Regular rate and rhythm.

LUNGS: Respirations are even and unlabored.

ABDOMEN: Soft and nontender.

EXTREMITIES: The patient is able to move all extremities without difficulty. She does have blood on her left forearm, on her left hand and on her left knee. These areas are also swabbed. She does state that this is from her boyfriend, however.

PELVIC: Pelvic examination is done with the use of toluidine blue dye. There is a increased redness at the introitus of the patient's vagina. Please see anatomical drawing sheet for this. No adherence was made with the toluidine blue dye. The increased redness is at 6 o'clock on the introitus. Light staining microscope was negative for any sperm on slides prepared by this nurse. The slide is enclosed in the sexual assault kit for further review by the Las Vegas Metro Crime Lab.

Sexual assault panel is done on the patient. Pregnancy test is reported as negative. Urine toxicology screen is negative. ETOH is less than 10. Zithromax 1 gram is given p.o. prophylactically, Tequin 400 mg, p.o., Ovral 2 tablets during her visit and 2 to take in 12-hours. The patient is also given Flagyl 2 grams p.o. She is given crackers to eat at this time and is encouraged to have breakfast as soon as she leaves. The patient is given instructions on sexually transmitted diseases, sexual assault instructions and sitz baths. She is to follow with the Rape Crisis Center. In 7 days

PATIENT: KIM, JULIE S

ACCOUNT#: 00075882522

MR#: 000-625-003

JOB #: 327018

ADM. DATE: 09/03/2004

Dictated by: Linda Ebbert, RN

Attending:

EMERGENCY ROOM NOTE

EXHIBIT-A

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Petition

For Writ of Habeas Corpus (Past-Conviction) SUCCESSIVE
(Title of Document)

filed in District Court Case No. C212968

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-OR-

B. For the administration of a public program or
for an application for a federal or state grant.

Joseph Henderson
(Signature)

6/2/14
(Date)

Certificate of Service by Mail

I, Joseph A. Henderson, hereby certify that
on this June day of ~~January~~, 2014, I
mailed a true and correct copy of the
foregoing Petition For Writ OF HABEAS CORPUS,
addressed to:

Eldon K. McDaniel
Warden, ESP
P.O. Box 1989
Ely, NV. 89301

David Roger
Clark County District Attorney
200 Lewis Avenue, 3rd Floor
Las Vegas, NV. 89155

Catherine Cortez Masto
Attorney General
100 North Carson Street
Carson City, NV. 89701-4717

Mr Joseph Henderson

MR HENDERSON JOSEPH 67224
PO BOX 1989
ELY NEVADA
89301

ELY STATE PRISON
JUN 09 2014
U8

U.S. GRIERSON, CLERK OF THE COURT
200 LEWIS AVE 3RD FLOOR
LY, N.Y. 89155-1160

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Motion From Clerk

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CONFIDENTIAL

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1 PPOW

FILED

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

2014 AUG 27 A 9:33

5 Joseph A. Henderson,
6 Petitioner,

7 vs.

8 DWIGHT NEVEN, WARDEN
9 STATE OF NEVADA,
Respondent,

John J. Quinn
CLERK OF THE COURT

Case No: 05C212968
Dept No: 15

ORDER FOR PETITION FOR
WRIT OF HABEAS CORPUS

11 Petitioner filed a petition for writ of habeas corpus (Post-Conviction Relief) on
12 June 12, 2014. The Court has reviewed the petition and has determined that a response would assist the
13 Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good
14 cause appearing therefore,

15 IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order,
16 answer or otherwise respond to the petition and file a return in accordance with the provisions of NRS
17 34.360 to 34.830, inclusive.

18 IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's

19
20 Calendar on the 2nd day of December, 2014, at the hour of

21
22 9AM o'clock for further proceedings.

23
24
25
26 *Abbi Silver*
District Court Judge

05C212968
OPWH
Order for Petition for Writ of Habeas Corpus
4180707



CLERK OF THE COURT
AUG 27 2014

RECEIVED


CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAMES R. SWEETIN
Deputy District Attorney
Nevada Bar #005144
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-

JOSEPH HENDERSON,
#1502730

Defendant.

CASE NO: **05C212968**

DEPT NO: **XV**

**STATE'S RESPONSE AND MOTION TO DISMISS DEFENDANT'S
SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)**

DATE OF HEARING: DECEMBER 2, 2014
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JAMES R. SWEETIN, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response and Motion to Dismiss Defendant's Successive Petition for Writ of Habeas Corpus (Post-Conviction).

This response and motion 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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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On July 11, 2005, Defendant Joseph Henderson was charged by way of Information as
4 follows: Count 1 - Conspiracy to Commit Burglary; Count 2- Burglary While in Possession of
5 a Firearm; Count 3 - Conspiracy to Commit First Degree Kidnapping; Counts 4 and 5 - First
6 Degree Kidnapping With Use of a Deadly Weapon; Count 6 - Conspiracy to Commit Sexual
7 Assault; Counts 7 through 9 - Sexual Assault With Use of a Deadly Weapon; Count 10 -
8 Conspiracy to Commit Robbery; Counts 11 and 12 - Robbery With Use of a Deadly Weapon;
9 Count 13 - Open or Gross Lewdness; and Count 14 - Battery With Use of a Deadly Weapon
10 Resulting in Substantial Bodily Harm.

11 On June 27, 2008, Defendant was found guilty by a jury of all counts. On August 28,
12 2008, Defendant was sentenced as follows: As to Count 1 – to Twelve (12) Months in the
13 Clark County Detention Center; As to Count 2 – to a Maximum of One Hundred Fifty-Six
14 (156) Months with a Minimum Parole Eligibility of Sixty-Two (62) Months, to run Concurrent
15 with Count 1; As to Count 3 – to a Maximum of Sixty (60) Months with a Minimum Parole
16 Eligibility of Twenty-Four (24) Months, to run Consecutive to Count 2; As to Count 4 – to
17 Life with a Minimum Parole Eligibility after Sixty (60) Months, plus an Equal and Consecutive
18 term of Life with a Minimum Parole Eligibility after Sixty (60) Months for the Use of a Deadly
19 Weapon, to run Consecutive to Count 3; As to Count 5 – to Life with a Minimum Parole
20 Eligibility after Sixty (60) Months, plus an Equal and Consecutive term of Life with a
21 Minimum Parole Eligibility after Sixty (60) Months for the Use of a Deadly Weapon, to run
22 Consecutive to Count 4; As to Count 6 – to a Maximum of Sixty (60) Months with a Minimum
23 Parole Eligibility of Twenty-Four (24) Months, to run Consecutive to Count 5; As to Count 7
24 - to Life with a Minimum Parole Eligibility of One Hundred Twenty (120) Months, plus an
25 Equal and Consecutive term of Life with a Minimum Parole Eligibility of One Hundred
26 Twenty (120) Months for the Use of a Deadly Weapon, to run Concurrent with Count 6; As to
27 Count 8 - to Life with a Minimum Parole Eligibility of One Hundred Twenty (120) Months,
28 plus an Equal and Consecutive term of Life with a Minimum Parole Eligibility of One Hundred

1 Twenty (120) Months for the Use of a Deadly Weapon, to run Consecutive to Count 7; As to
2 Count 9 – to Life with a Minimum Parole Eligibility of One Hundred Twenty (120) Months,
3 plus an Equal and Consecutive term of Life with a Minimum Parole Eligibility of One Hundred
4 Twenty (120) Months for the Use of a Deadly Weapon, to run Consecutive to Count 8; As to
5 Count 10 – to a Maximum of Sixty (60) Months with a Minimum Parole Eligibility of Twenty-
6 Four (24) Months, to run Consecutive to Count 9; As to Count 11 – a Maximum of One
7 Hundred Eighty (180) Months with a Minimum Parole Eligibility of Seventy-Two (72)
8 Months, plus an Equal and Consecutive term of Maximum of One Hundred Eighty (180)
9 Months with a Minimum Parole Eligibility of Seventy-Two (72) Months for the Use of a
10 Deadly Weapon, to run Concurrent with Count 10; As to Count 12 – to a Maximum of One
11 Hundred Eighty (180) Months with a Minimum Parole Eligibility of Seventy-Two (72)
12 Months, plus an Equal and Consecutive term of Maximum of One Hundred Eighty (180)
13 Months with a Minimum Parole Eligibility of Seventy-Two (72) Months for the Use of a
14 Deadly Weapon, to run Consecutive to Count 11; As to Count 13 – to Twelve (12) Months in
15 the Clark County Detention Center, to run Concurrent with Count 12; And as to Count 14 – a
16 Maximum of One Hundred Fifty-Six (156) Months with a Minimum Parole Eligibility of
17 Sixty-Two (62) Months, to run Consecutive to Count 13.

18 A Judgment of Conviction was filed on September 24, 2008. Defendant filed a Notice
19 of Appeal on October 9, 2008. The Nevada Supreme Court affirmed Defendant's conviction
20 on February 3, 2010. Remittitur issued on March 2, 2010.

21 On January 11, 2011, Defendant filed a Petition for Writ of Habeas Corpus. Counsel
22 was appointed for Defendant on March 17, 2011. The State filed its Response on March 29,
23 2011. On August 26, 2011, Defendant filed a Supplemental Petition for Writ of Habeas
24 Corpus (Post-Conviction). The State filed its Response on September 30, 2011.

25 On October 22, 2012, an evidentiary hearing was held. That same day, the district court
26 denied Defendant's Petition. Notice of Entry of Decision and Order was filed and served on
27 December 3, 2012. Defendant filed a Notice of Appeal on February 12, 2013. On September
28 18, 2014, the Nevada Supreme Court affirmed the judgment of the district court. Remittitur

1 issued on October 20, 2014.

2 On June 12, 2014, Defendant filed a Successive Petition for Writ of Habeas Corpus
3 (Post-Conviction). The State hereby responds as follows, and respectfully asks this Court to
4 dismiss Defendant's Petition.

5 **ARGUMENT**

6 **I. DEFENDANT'S PETITION IS PROCEDURALLY BARRED**

7 Defendant filed the instant Petition almost six years after entry of his Judgment of
8 Conviction and four years after the Nevada Supreme Court issued remittitur on his direct
9 appeal. Thus, Defendant's petition is barred pursuant to NRS 34.726. Additionally, the instant
10 Petition is Defendant's second attempt at post-conviction relief, and thus, it is barred as a
11 successive petition pursuant to NRS 34.810. Without a showing of good cause and actual
12 prejudice to overcome each of these bars, Nevada law requires the dismissal of Defendant's
13 petition.

14 **a. Application of Procedural Bars is Mandatory**

15 The Nevada Supreme Court has specifically found that the district court has a duty to
16 consider whether the procedural bars apply to a post-conviction petition and not arbitrarily
17 disregard them. In State v. Dist. Ct. (Riker), 121 Nev. 225, 112 P.3d 1070 (2005), the Court
18 held that "[a]pplication of the statutory procedural default rules to post-conviction habeas
19 petitions is mandatory," and "cannot be ignored when properly raised by the State." Id. at 231,
20 233, 112 P.3d at 1074, 1075. There, the Court reversed the district court's decision not to bar
21 the defendant's untimely and successive petition:

22 Given the untimely and successive nature of [defendant's]
23 petition, the district court had a duty imposed by law to consider
24 whether any or all of [defendant's] claims were barred under NRS
25 34.726, NRS 34.810, NRS 34.800, or by the law of the case . . .
[and] the court's failure to make this determination here
constituted an arbitrary and unreasonable exercise of discretion.

26 Id. at 234, 112 P.3d at 1076 (emphasis added).

27 //

28 //

1 The Court justified this holding by noting that “[t]he necessity for a workable system
2 dictates that there must exist a time when a criminal conviction is final.” Id. at 231, 112 P.3d
3 1074 (citation omitted); see also State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-
4 82 (2003) (wherein the Nevada Supreme Court held that parties cannot stipulate to waive,
5 ignore or disregard the mandatory procedural default rules nor can they empower a court to
6 disregard them). Defendant is required to show good cause to overcome the procedural bars
7 before his petition may be considered on the merits. Thus, Defendant’s petition will not be
8 considered on the merits if it is subject to the procedural bars and no good cause is shown.

9 **b. Defendant’s Petition is Time Barred**

10 The mandatory provisions of NRS 34.726(1) states:

11 Unless there is good cause shown for delay, a petition that
12 challenges the validity of a judgment or sentence must be filed
13 within 1 year after entry of the judgment of conviction or, if an
14 appeal has been taken from the judgment, within 1 year after the
Supreme Court issues its remittitur. For the purposes of this
subsection, good cause for delay exists if the petitioner
demonstrates to the satisfaction of the court:

15 (a) That the delay is not the fault of the petitioner; and

16 (b) That dismissal of the petition as untimely will
17 unduly prejudice the petitioner. . .

18 NRS 34.726(1) (emphasis added).

19 “[T]he statutory rules regarding procedural default are mandatory and cannot be
20 ignored when properly raised by the State.” Riker, 121 Nev. at 233, 112 P.3d at 1075. Per the
21 language, the one-year time bar prescribed by NRS 34.726 begins to run from the date the
22 judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson
23 v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998); see Pellegrini v. State, 117
24 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be construed by its
25 plain meaning).

26 In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme
27 Court rejected a habeas petition that was filed two (2) days late, pursuant to the “clear and
28 unambiguous” mandatory provisions of NRS 34.726(1). Gonzales reiterated the importance

1 of filing the petition with the District Court within the one-year mandate, absent a showing of
2 “good cause” for the delay in filing. Gonzales, 590 P.3d at 902. The one-year time bar is
3 therefore strictly construed. In contrast with the short amount of time to file a notice of appeal,
4 a prisoner has an ample full year to file a post-conviction habeas petition, so there is no
5 injustice in a strict application of NRS 34.726(1), despite any alleged difficulties with the
6 postal system. Gonzales, 118 Nev. at 595, 53 P.3d at 903.

7 In the instant case, Defendant filed a direct appeal. Thus, the one-year time bar began
8 to run from the date the Supreme Court issued Remittitur – March 2, 2010. Defendant’s second
9 Petition was not filed until June 12, 2014. This is over the one year time frame. Thus, absent
10 a showing of good cause for delay, Defendant’s Petition is procedurally barred under NRS
11 34.726.

12 **c. Defendant’s Petition is Successive**

13 Defendant’s instant petition should also be procedurally dismissed pursuant to NRS
14 34.810 as it is successive. Pertinent portions of NRS 34.810 state:

15 2. A second or successive petition must be dismissed if the judge
16 or justice determines that it fails to allege new or different grounds
17 for relief and that the prior determination was on the merits or, if
18 new and different grounds are alleged, the judge or justice finds
that the failure of the Defendant to assert those grounds in a prior
petition constituted an abuse of the writ.

19 3. Pursuant to subsections 1 and 2, the petitioner has the burden
of pleading and proving specific facts that demonstrate:

20 (a) Good cause for the petitioner’s failure to present the
21 claim or for presenting the claim again; and

22 (b) Actual prejudice to the petitioner.

23 NRS 34.810(2), (3).

24 In Lozada v. State, the Nevada Supreme Court stated: “Without such limitations on the
25 availability of post-conviction remedies, prisoners could petition for relief in perpetuity and
26 thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions
27 clog the court system and undermine the finality of convictions.” 110 Nev. 349, 358, 871 P.2d
28 944, 950 (1994). The Nevada Supreme Court recognizes that “[u]nlike initial petitions which

1 certainly require a careful review of the record, successive petitions may be dismissed based
2 solely on the face of the petition.” Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129
3 (1995).

4 Defendant filed his first Petition on January 11, 2011 and a Supplemental Petition on
5 August 26, 2011. The district court ultimately denied Defendant’s first habeas petition on the
6 merits after holding an evidentiary hearing on October 22, 2012. Notably, the Nevada
7 Supreme Court subsequently affirmed the district court’s denial of Defendant’s Petition on
8 September 18, 2014. Henderson v. State, Docket No. 62629 (Order of Affirmance, Sept. 18,
9 2014). Defendant filed this, his second, successive petition on June 12, 2014.

10 Because Defendant’s first petition was filed and decided on the merits, the instant
11 petition is successive pursuant to NRS 34.810(2). To avoid procedural default under NRS
12 34.810, Defendant has the burden of pleading and proving specific facts that demonstrate both
13 good cause for his failure to present his claims in earlier proceedings and actual prejudice.
14 NRS 34.810(3); Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993); Phelps
15 v. Director, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). As noted infra, Defendant has
16 not demonstrated any such good cause or prejudice, and consequently Defendant has not met
17 that burden. Absent a showing of good cause and prejudice, Defendant’s petition must be
18 dismissed pursuant to NRS 34.810

19 **II. DEFENDANT HAS NOT SHOWN GOOD CAUSE.**

20 To avoid procedural default under NRS 34.726 and 34.810, a defendant has the burden
21 of pleading and proving specific facts that demonstrate good cause for his failure to present
22 his claim in earlier proceedings or comply with the statutory requirements. See Hogan, 109
23 Nev. at 959-60, 860 P.2d at 715-16; Phelps, 104 Nev. at 659, 764 P.2d at 1305.

24 “To establish good cause, appellants must show that an impediment external to the
25 defense prevented their compliance with the applicable procedural rule.” Clem v. State, 119
26 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev.
27 248, 251, 71 P.3d 503, 506 (2003); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537
28 (2001). Such an external impediment could be “that the factual or legal basis for a claim was

1 not reasonably available to counsel, or that ‘some interference by officials’ made compliance
2 impracticable.” Hathaway, 74 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106
3 S.Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904, citing Harris v.
4 Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998). Any delay in filing of the petition
5 must not be the fault of the petitioner. NRS 34.726(1)(a).

6 The Nevada Supreme Court has clarified that, “appellants cannot attempt to
7 manufacture good cause[.]” Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there
8 must be a “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at 251,
9 71 P.3d at 506; (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)).
10 Excuses such as the lack of assistance of counsel when preparing a petition, as well as the
11 failure of trial counsel to forward a copy of the file to a petitioner have been found not to
12 constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by statute
13 on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004);
14 Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

15 In this case, Defendant alleges ineffective assistance of counsel, various nonsensical
16 constitutional challenges, and prosecutorial misconduct. Defendant does not address good
17 cause and therefore does not demonstrate good cause.

18 Accordingly, Defendant has failed to make a showing of good cause or actual innocence
19 sufficient to overcome the procedural bars and warrant consideration of his late, successive
20 petition on the merits. To the extent Defendant alleges constitutional issues, prosecutorial
21 misconduct, and ineffective assistance of counsel, the claims are without merit, nonsensical,
22 and do not demonstrate good cause sufficient enough to overcome the procedural bars. If this
23 Court finds good cause, the State reserves the right to respond on the question of prejudice.

24 //

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1 **CONCLUSION**

2 Based on the aforementioned, Defendant's Petition should be dismissed.

3 DATED this 24th day of October, 2014.

4 Respectfully submitted,

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

7
8 BY /s/ JAMES R. SWEETIN
9 JAMES R. SWEETIN
Deputy District Attorney
Nevada Bar #005144

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18 **CERTIFICATE OF SERVICE**

19 I hereby certify that service of the above and foregoing was made this 24TH day of
20 OCTOBER 2014, to:

21 JOSEPH HENDERSON, BAC#67224
22 ELY STATE PRISON
23 P.O. BOX 1989
ELY, NV 89301

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

27
28 hjc/SVU

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 62629
District Court Case No. C212968

FILED

OCT 24 2014

Tracie Lindeman
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 18th day of September, 2014.

06C212968
CCJA
NV Supreme Court Clerks Certificate/Judgm
4390662



IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
October 20, 2014.

Tracie Lindeman, Supreme Court Clerk

By: Sally Williams
Deputy Clerk



IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62629

FILED

SEP 18 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY K. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Abbi Silver, Judge.

On appeal from the denial of his petition filed on January 11, 2011, and his supplemental petition, appellant argues that the district court erred in denying two claims of ineffective assistance of counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's

application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant argues that his trial counsel were ineffective for failing to hire an expert to review the DNA evidence and for failing to have the DNA evidence retested.¹ We conclude that substantial evidence supports the district court's decision to deny this claim. At the evidentiary hearing, trial counsel testified that they had consulted with a forensic DNA expert before trial and had her review all of the DNA reports and evidence. Thus, appellant's claim that trial counsel failed to obtain an expert is belied by the record. Further, trial counsel testified that, based on the DNA expert's advice and determination that the testing procedures were done correctly and that appellant was the source of the three separate DNA samples, trial counsel decided not to retest the DNA. The district court determined that the decision not to retest the DNA was a reasonable trial strategy in light of the expert's opinion and the fact that the results of the retest could have been used against appellant at trial. The district court's factual findings are supported by substantial evidence, and appellant fails to address those factual findings or present any

¹Appellant also asserts in a footnote that trial counsel should have "obtained reports that verified the chain of custody from California when [appellant's] DNA was taken and the reports from the lab that developed the DNA profile [and] submitted that profile to CODIS." He fails to support this claim with cogent argument or relevant legal authority, and thus we decline to consider it. *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

argument on appeal demonstrating that the district court erred in denying this claim.²

Second, appellant argues that trial counsel was ineffective for failing to ensure that bench conferences were recorded. Appellant has failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified that the trial court always allowed him to make a record of any material issues discussed at unrecorded bench conferences. Appellant does not make any specific argument about any of the unrecorded bench conferences in this case but rather contends that the failure to record the bench conferences is prejudicial per se. Contrary to appellant's assertion, prejudice is not presumed when the district court fails to make a record of unrecorded conferences. Rather, appellant must demonstrate that "the record's missing portions are so significant that their absence precludes this court from conducting a meaningful review of the alleged errors that the appellant identified and the prejudicial effect of any error." *Preciado v. State*, 130 Nev. ___, ___, 318 P.3d 176, 178 (2014). Because appellant has

²In his reply brief, appellant argues that the district court erred by failing to find that trial counsel was ineffective for not hiring a second DNA expert to "vet" the first expert's opinion. His claim in his post-conviction petition was that counsel failed to consult a DNA expert; he never presented to the district court the issue of whether trial counsel should have consulted two experts. Thus, we decline to consider this claim on appeal. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004); *see also Ford v. Warden*, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995) (stating that an appellant "cannot change [his] theory underlying an assignment of error on appeal").

failed to make such a showing, we conclude that the district court did not err in denying this claim.

Next, appellant challenges the district court's denial of his *Brady*³ claim as procedurally barred under NRS 34.810(1)(b)(2). Appellant argues that the district court erred in finding that he did not raise this claim on direct appeal. We disagree. On direct appeal, appellant's claim was that the district court abused its discretion in denying a motion for mistrial because the State failed to disclose an expert's notes that were used in her testimony in violation of *Brady*. See *Henderson v. State*, Docket No. 52573 (Order of Affirmance, February 3, 2010). In his post-conviction petition, appellant claimed that the State violated *Brady* by failing to turn over information regarding the procedures used by the California lab in obtaining and placing appellant's DNA into the CODIS federal database. These are not the same claims. Moreover, appellant has failed to demonstrate good cause or prejudice for his failure to raise the *Brady* claim regarding the CODIS information on direct appeal. See NRS 34.810(1)(b); NRS 34.810(3); *State v. Huebler*, 128 Nev. ___, ___, 275 P.3d 91, 95 (2012). Thus, we conclude that the district court did not err in denying the *Brady* claim as procedurally barred.

Next, appellant claims that the district court abused its discretion by denying his motion for additional funds to secure a forensic DNA expert during the post-conviction proceedings. Appellant failed to provide this court with a copy of his motion or the transcript of the hearing on the motion. Therefore, he has failed to demonstrate that the district

³*Brady v. Maryland*, 373 U.S. 83 (1963).

court abused its discretion in denying the motion. *See State v. Eighth Judicial Dist. Court*, 100 Nev. 90, 102, 677 P.2d 1044, 1052 (1984) (presuming the propriety of district court actions in the absence of a showing of error); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). To the extent that appellant contends that the district court was required to grant his motion for funds once post-conviction counsel was appointed to represent him, appellant is mistaken. It is within the district court's discretion to authorize expenses related to investigative services. *Kirksey v. State*, 112 Nev. 980, 1003, 923 P.2d 1102, 1117 (1996).

Appellant also contends that the district court erred during the evidentiary hearing by disclosing a prior witness's testimony to a testifying witness. Appellant argues that this amounted to a violation of the exclusionary rule for witnesses, which carries a presumption of prejudice. We disagree. During the evidentiary hearing, trial counsel Norm Reed testified that there was enough DNA evidence to retest but that he and trial counsel Violet Radosta decided not to have the DNA retested because their DNA expert advised against it and the results from retesting could have been used against appellant at trial. Ms. Radosta was then called to testify and stated that they did not retest the DNA evidence because there was no sample left to retest. The district court questioned Ms. Radosta about this statement and told her that Mr. Reed had testified that there was DNA evidence available for retesting. The district court inquired further into the record, determined that there was in fact DNA evidence available for retesting, and allowed Ms. Radosta to opine that she did not retest it based on the expert's advice. We conclude that the district court's inquiry into a factual matter did not violate the

exclusionary rule. Given that the purpose of an evidentiary hearing is to resolve questions of fact, it was not inappropriate for the district court to inquire into discrepancies in Mr. Reed's and Ms. Radosta's testimony and clarify the record. Further, appellant failed to object below.

For the foregoing reasons, we conclude that the district court did not err in denying the petition, and we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Cherry, J.
Cherry

cc: Hon. Abbi Silver, District Judge
Law Office of Julian Gregory, L.L.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk



CERTIFIED COPY

This document is a full, true and correct copy of
the original on file and of record in my office.

DATE: October 20th, 2014
Supreme Court Clerk, State of Nevada

By [Signature] Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 62629
District Court Case No. C212968

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: October 20, 2014

Tracie Lindeman, Clerk of Court

By: Sally Williams
Deputy Clerk

cc (without enclosures):

Hon. Abbi Silver, District Judge
Clark County District Attorney
Attorney General/Carson City
Law Office of Julian Gregory, L.L.C.
Joseph Alexander Henderson

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on OCT 24 2014.

HEATHER UNGERMANN
Deputy District Court Clerk

RECEIVED

OCT 23 2014

CLERK OF THE COURT

1 ORDER

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

DEC 02 2014

BY A. Trujillo
ATHENA TRUJILLO, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

8 STATE OF NEVADA,

) CASE NO. C212968

9 Plaintiff(s),

) DEPT NO. XV

10 v.

11 JOSEPH A. HENDERSON,

12 Defendant(s)

13 DECISION AND ORDER

14
15 THIS matter having come on for hearing on December 2, 2014, for Petition For Writ
16 of Habeas Corpus (Post-Conviction), the Plaintiff being represented by HAGAR
17 TRIPPHID, Deputy District Attorney and the Defendant not being present represented in
18 Proper Person, and after reviewing the moving papers on file herein, this Court makes the
19 following Decision and Order.
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Pursuant to NRS 34.726, NRS 34.810, *Lozada v. State*, and *Sullivan v. State*,
Petitioner's Successive Writ for Habeas Corpus (Post-Conviction) is DENIED.

A claim for a petition for post-conviction relief under NRS 34.724 must be filed
either one year after the entry of judgment of conviction or within one year after the Nevada
Supreme Court's filing of its remittitur from an appeal, unless good cause and prejudice to
the defendant is shown for the delay. *See* NRS 34.726; *see also Sullivan v. State*, 120 Nev.
537 (2004). Additionally, NRS 34.810(3) requires petitioners who file a successive petition
to establish good cause and prejudice for rearguing issues which have been rejected on their
merits in a previous petition or for raising new grounds in a successive petition. *See Lozada*
v. State, 110 Nev. 349 (1994).

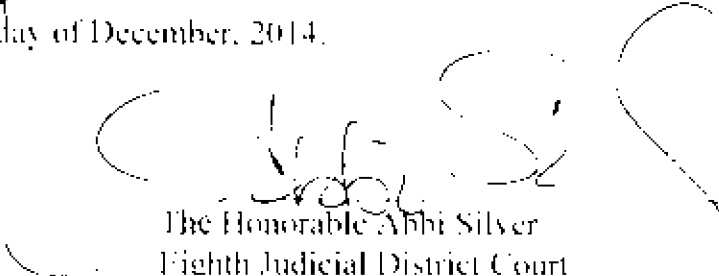
Here, Petitioner brings forth the instant petition four years after the Nevada Supreme
Court affirmed his conviction 2010. Additionally, Petitioner filed a prior timely post-
conviction writ of habeas corpus which this Court heard on the merits and denied after
holding an evidentiary hearing. The Nevada Supreme Court affirmed this Court's denial in
September 2014. In the instant petition, Petitioner argues that (1) he was denied his right to
confront the DNA evidence brought forth against him; (2) the State elicited perjured
testimony from its witness Guenther; and (3) that he received ineffective assistance of
counsel at trial. These arguments, however, were already brought forth in Petitioner's first
timely post-conviction petition which was denied on the merits. Petitioner does not
demonstrate in the instant petition that these arguments are raising new grounds nor does
petitioner argue for good cause and prejudice as held under *Lozada*.

This Court finds that under NRS 34.726 and NRS 34.810, Petitioner's instant petition
is procedurally barred, as it has been filed beyond the one year timeline under NRS 34.726,
and that the arguments in the instant petition have been previously heard on their merits in
Petitioner's prior first petition. Petitioner has not shown good cause and prejudice in this
petition, and therefore under NRS 34.810(2)-(3) and *Lozada*, the instant petition must be
dismissed.

///

Accordingly, Petitioner's Successive Writ for Habeas Corpus (Post-Conviction) is
DENIED.

DATED this 2nd day of December, 2014.

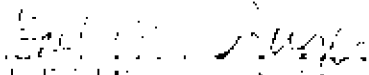

The Honorable Abbi Silver
Eighth Judicial District Court
Department XV

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, the foregoing was e-served, e-mailed, or a
copy of the above document was placed in the attorney's folder in the Clerk's Office, or mailed to
the following:

Joseph A. Henderson
Ely State Prison
PO Box 1989
Ely, NV 89301-1989

Hagar Trippiedi, DDA


Judicial Executive Assistant


CLERK OF THE COURT

1 **NEOJ**
2
3
4

5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 STATE OF NEVADA,)
8)
9 ,)

CASE NO. C212968
DEPT NO. XV

10 Plaintiff,)
11 v.)
12)

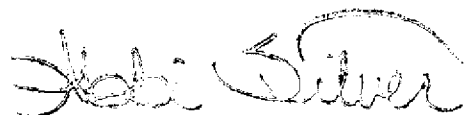
JOSEPH A HENDERSON,)
13)

Defendant.)
14)

15 NOTICE OF ENTRY OF ORDER

16 NOTICE IS HEREBY given that the Court has entered the following DECISION
17 AND ORDER on December 2, 2014, a copy of which is attached hereto.

18 DATED this 2nd day of December, 2014.
19

20 
21

22 The Honorable Abbi Silver
23 Eighth Judicial District Court
Department XV

24 ///

25 ///

26 ///

27 ///

28 ///

DEC 02 2014

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, I e-served, emailed, faxed, mailed or placed a copy of the Notice of Entry of Order in the attorney folder in the Clerk's Office addressed to:

Joseph A. Henderson
Ely State Prison
PO Box 1989
Ely, NV 89301-1989

Hagar Trippiedi, DDA


Judicial Executive Assistant DC XV

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

DEC 02 2014

BY A. Trujillo
ATHENA TRUJILLO, DEPUTY

1 ORDR

5 DISTRICT COURT

6 CLARK COUNTY, NEVADA

8 STATE OF NEVADA,

9 Plaintiff(s),

10 v.

12 JOSEPH A. HENDERSON,

13 Defendant(s)

) CASE NO. C212968

) DEPT NO. XV

14
15 DECISION AND ORDER

16 THIS matter having come on for hearing on December 2, 2014, for Petition For Writ
17 of Habeas Corpus (Post-Conviction), the Plaintiff being represented by HAGAR
18 TRIPPIEDI, Deputy District Attorney and the Defendant not being present represented in
19 Proper Person, and after reviewing the moving papers on file herein, this Court makes the
20 following Decision and Order.
21

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 Pursuant to NRS 34.726, NRS 34.810, *Lozada v. State*, and *Sullivan v. State*,
2 Petitioner's Successive Writ for Habeas Corpus (Post-Conviction) is DENIED.

3 A claim for a petition for post-conviction relief under NRS 34.724 must be filed
4 either one year after the entry of judgment of conviction or within one year after the Nevada
5 Supreme Court's filing of its remittitur from an appeal, unless good cause and prejudice to
6 the defendant is shown for the delay. *See* NRS 34.726; *see also Sullivan v. State*, 120 Nev.
7 537 (2004). Additionally, NRS 34.810(3) requires petitioners who file a successive petition
8 to establish good cause and prejudice for rearguing issues which have been rejected on their
9 merits in a previous petition or for raising new grounds in a successive petition. *See Lozada*
10 *v. State*, 110 Nev. 349 (1994).

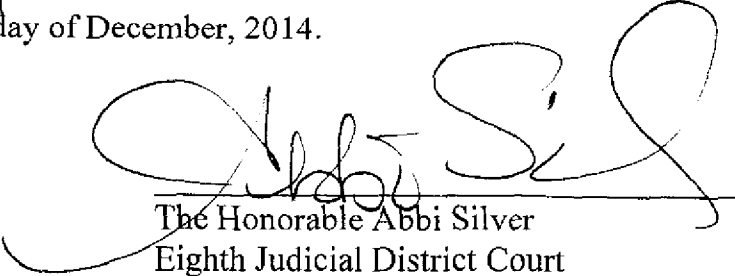
11 Here, Petitioner brings forth the instant petition four years after the Nevada Supreme
12 Court affirmed his conviction 2010. Additionally, Petitioner filed a prior timely post-
13 conviction writ of habeas corpus which this Court heard on the merits and denied after
14 holding an evidentiary hearing. The Nevada Supreme Court affirmed this Court's denial in
15 September 2014. In the instant petition, Petitioner argues that (1) he was denied his right to
16 confront the DNA evidence brought forth against him; (2) the State elicited perjured
17 testimony from its witness Guenther; and (3) that he received ineffective assistance of
18 counsel at trial. These arguments, however, were already brought forth in Petitioner's first
19 timely post-conviction petition which was denied on the merits. Petitioner does not
20 demonstrate in the instant petition that these arguments are raising new grounds nor does
21 petitioner argue for good cause and prejudice as held under *Lozada*.

22 This Court finds that under NRS 34.726 and NRS 34.810, Petitioner's instant petition
23 is procedurally barred, as it has been filed beyond the one year timeline under NRS 34.726,
24 and that the arguments in the instant petition have been previously heard on their merits in
25 Petitioner's prior first petition. Petitioner has not shown good cause and prejudice in this
26 petition, and therefore under NRS 34.810(2)-(3) and *Lozada*, the instant petition must be
27 dismissed.

28 ///

1 Accordingly, Petitioner's Successive Writ for Habeas Corpus (Post-Conviction) is
2 DENIED.

3 DATED this 2nd day of December, 2014.

4
5
6 
7 The Honorable Abbi Silver
8 Eighth Judicial District Court
9 Department XV
10

11 **CERTIFICATE OF SERVICE**

12 I hereby certify that on or about the date e-filed, the foregoing was e-served, e-mailed, or a
13 copy of the above document was placed in the attorney's folder in the Clerk's Office, or mailed to
14 the following:

15 Joseph A. Henderson
16 Ely State Prison
17 PO Box 1989
18 Ely, NV 89301-1989

19 Hagar Trippiedi, DDA

20 
21 Judicial Executive Assistant
22
23
24
25
26
27
28

05C212968

~~0022718004~~

No. C212968

Dept. No. 15

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR
THE COUNTY OF CLARK

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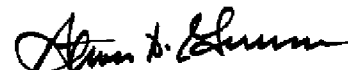
J. HENDERSON

Petitioner/Plaintiff,

v.

STATE OF NEVADA

Respondent/Defendant.




CLERK OF THE COURT

NOTICE OF APPEAL
(BELATED)

Notice is hereby given that J. HENDERSON, Petitioner/Defendant above named,
hereby appeals to the Supreme Court of Nevada from the final judgment/order
(EIGHTH JUDICIAL DISTRICT COURT JUDGE ABIGY SILVA)

entered in this action on the 2ND day of DEC, 20014

Dated this 5TH day of DEC, 20014



Appellant
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

RECEIVED
54 DEC 11 2014
CLERK OF THE COURT

RECEIVED
DEC 11 2014
CLERK OF THE COURT

PETITIONERS REASON FOR NOTICE OF APPEAL

ON 1-11-11 THE PETITIONER FILED A PETITION FOR WRIT OF HABEAS CORPUS, COUNSEL WAS APPOINTED FOR PETITIONER ON 3/17/11 THE STATE FILED ITS RESPONSE ON 3/29/11. ON 8/26/11 COUNSEL FILED A SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS POST CONVICTION, THE STATE FILED ITS RESPONSE ON 9-30-11

THE APPOINTED COUNSEL SUPPLEMENTED THE WRIT OF HABEAS CORPUS (WITHOUT) THE PERMISSION OF THE PETITIONER, REMOVING CRITICAL GROUND/ISSUES THAT WAS NEVER HEARD IN THE HABEAS CORPUS HEARING, JUDGE ABBY SILVA, GRANTED AN EVIDENTIARY HEARING BECAUSE OF THE MERITS IN THE "ORIGINAL" HABEAS CORPUS POST CONVICTION FILED BY THE PETITIONER.

THE PETITIONER HAD AN EXPECTATION TO BELIEVE THAT YEAR OF WORK OF WORK WOULD BE HEARD, COUNSEL DEVIATED AWAY FROM ALL THE HARD WORK PUT INTO THE PETITION. ONCE COURT APPOINTED COUNSEL MISLED THE PETITIONER INTO BELIEVING THAT (ALL) THE GROUNDS/ISSUES FROM THE ORIGINAL HABEAS-CORPUS WOULD BE HEARD, P.KICE (COUNSEL) BECAME INEFFECTIVE,

ON 6-12-14 PETITIONER FILED A SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) "BECAUSE:" COUNSEL P.KICE REMOVED THE CRITICAL ISSUES/GROUNDS AND DIDNT PROPERLY ARGUE THE GROUNDS AT

THE POST CONVICTION HEARING.

THE MANDATORY PROVISION OF NRS 34.726 (1) STATES :
(A) THAT THE DELAY IS NOT THE FAULT OF THE PETITIONER AND

^{NOT} COUNSEL CAUSED THIS FAULT TO THE PETITIONER
BY ARGUING THE ISSUES/GROUNDS THAT WAS GRANTED ON
THE MERITS OF EACH GROUND.

THIS HAS PREJUDICE THE PETITIONER AND
THEIR FOR MEETS NRS 34.726 (1) (A)

AND CAN SHOW DELAY IS NOT THE FAULT OF THE
PETITIONER, BUT CLEARLY (INEFFECTIVE) ASSISTANCE
OF COUNSEL UNDER THE 6TH AMENDMENT OF THE
U.S. CONST.

AFFIRMATION PURSUANT TO: N.R.S. 239B.010

I, HEREBY CERTIFY THAT I AM THE UNDERSIGNED
INDIVIDUAL AND THAT THE ATTACHED DOCUMENT
THAT IS ENTITLED: NOTICE OF APPEAL

_____, DOES NOT
CONTAIN THE SOCIAL SECURITY NUMBER OF ANY
PERSON, UNDER THE PAINS AND PENALTIES OF
PERJURY, THIS, 5, DAY OF, DEC, 20 .

SIGNATURE: Joseph Henderson

INMATE NAME PRINTED: JOSEPH HENDERSON

INMATE NUMBER: 67224

ADDRESS: ELY STATE PRISON, P.O. BOX 1989, ELY, NV 89301

MIR HENDERSON JOSEPH 67224
PO BOX 1989
ELY NV 89321

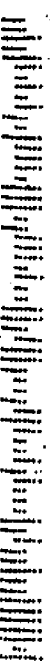
MISS MEGAN JAY GORD

09 DEC 2014 19:22



STEVEN GRIERSON
200 LEWIS AVE 3RD FLOOR
LAS VEGAS N.V.
89155-1660

89101 38500



ELY STATE PRISON
DEC 08 1941
US

05C212968

~~CONFIDENTIAL~~

No. 0212968

Dept. No. 15

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12/11/2014 12:12:00 PM

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR
THE COUNTY OF CLARK

Alvin D. Schuman

CLERK OF THE COURT

J. HENDERSON

Petitioner/Plaintiff,

v.

STATE OF NEVADA

Respondent/Defendant.

CASE APPEAL STATEMENT

1. Name of Appellant filing this appeal statement: J. HENDERSON
2. Identify the judge issuing the decision, judgment, or order appealed from: EIGHTH JUDICIAL DISTRICT COURT ABBY SILVA
3. Identify all parties to the proceedings in the district court (the use of et al. to denote parties is prohibited): STATE OF NEVADA -
4. Identify all parties involved in this appeal (the use of et al. to denote parties is prohibited): PETITIONER / STATE OF NEVADA
5. Set forth the name, law firm, address, and telephone number of all counsel on appeal and identify the parties or party whom they represent:

NONE
Attorney

Address

Telephone Number

Represents

NONE
Attorney

Address

Telephone number

Represents

NONE
Attorney

Address

Telephone number

Represents

6. Indicate whether appellant was represented by appointed or retained counsel in the district

RECEIVED

5 DEC 11 2014

CLERK OF THE COURT

court: Appointed Counsel _____ Retained Counsel _____ Pro Per ☒

7. Indicate whether appellant was represented by appointed or retained counsel on appeal:

Appointed Counsel ☒ Retained Counsel _____ Pro Per _____

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave: Yes ☒ No _____

Date: 1 / 11 / 11

9. Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed): Date: 1 / 11 / 11

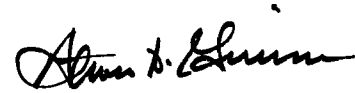
Dated this 5th day of DEC, 20011.

J Henderson
Appellant
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a true and correct copy of the fore going Notice of Appeal (Belated), Case Appeal Statement, was mailed to:

Dated this _____ day of _____, 200__.



CLERK OF THE COURT

ASTA

**IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR
THE COUNTY OF CLARK**

STATE OF NEVADA,

Plaintiff(s),

vs.

JOSEPH A. HENDERSON,

Defendant(s),

Case No: 05C212968

Dept No: XV

CASE APPEAL STATEMENT

1. Appellant(s): J. Henderson

2. Judge: Abbi Silver

3. Appellant(s): J. Henderson

Counsel:

J. Henderson # 67224
P.O. Box 1989
Ely, NV 89301

4. Respondent: The State of Nevada

Counsel:

Steven B. Wolfson, District Attorney
200 Lewis Ave.
Las Vegas, NV 89101

(702) 671-2700

5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A

Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A

6. Appellant Represented by Appointed Counsel In District Court: Yes

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A

9. Date Commenced in District Court: June 29, 2005

10. Brief Description of the Nature of the Action: Criminal

Type of Judgment or Order Being Appealed: Writ of Habeas Corpus

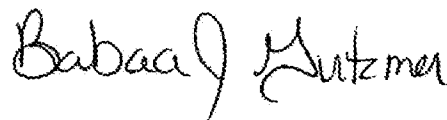
11. Previous Appeal: Yes

Supreme Court Docket Number(s): 52573, 62629

12. Child Custody or Visitation: N/A

Dated This 12 day of December 2014.

Steven D. Grierson, Clerk of the Court



Barbara J. Gutzmer, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: J. Henderson

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 67059
District Court Case No. C212968

FILED

OCT 12 2015

Tracie Lindeman
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 11th day of September, 2015.

IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
October 06, 2015.

Tracie Lindeman, Supreme Court Clerk

By: Sally Williams
Deputy Clerk

06C212968
CCJA
NV Supreme Court Clerks Certificate/Judgn
4493915



IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67059

FILED

SEP 11 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a pro se appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Abbi Silver, Judge.

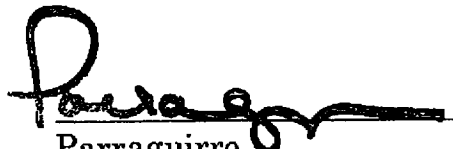
Appellant filed his petition on June 12, 2014, more than 4 years after issuance of the remittitur on direct appeal on March 2, 2010. *Henderson v. State*, Docket No. 52573 (Order of Affirmance, February 3, 2010). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously litigated a post-conviction petition for a writ of habeas corpus, and it constituted an abuse of the writ to the extent he raised claims new and different from those raised in his previous petition.² See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See *Lockett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

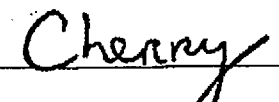
²*Henderson v. State*, Docket No. 62629 (Order of Affirmance, September 18, 2014).

NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Appellant did not attempt to demonstrate good cause to excuse the procedural defects on the face of the petition. Therefore, we conclude that the district court did not err in denying the petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Cherry

cc: Eighth Judicial District Court Dept. 15
Joseph Alexander Henderson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

CERTIFIED COPY

This document is a full, true and correct copy of
the original on file and of record in my office.

DATE: October 12, 2015

Supreme Court Clerk, State of Nevada

By Daniel Williams Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 67059
District Court Case No. C212968

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: October 06, 2015

Tracie Lindeman, Clerk of Court

By: Sally Williams
Deputy Clerk

cc (without enclosures):

Eighth Judicial District Court Dept. 15, District Judge
Joseph Alexander Henderson
Clark County District Attorney
Attorney General/Carson City

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on OCT 12 2015.

HEATHER UNGERMANN
Deputy District Court Clerk

RECEIVED

OCT 12 2015

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED

JAN 24 2022

[Signature]
CLERK OF COURT

PP Joseph A Henderson

PETITIONER

VS.

STATE OF NEVADA

RESPONDENT

CASE NO: C-212963

February 15, 2022
11:00 AM

MOTION CONTESTING: NO JURISDICTION
COME NOW, PETITIONER, JOSEPH A HENDERSON IN THIS
INSTANT MOTION. Judge KIERNY, CARLI COURT ROOM 12B
HAS NO JURISDICTION IN A JUSTICE COURT TO HEAR MATTERS
DEALING WITH HABEAS CORPUS SUCCESSIVE PETITION ON NEWLY
DISCOVERED EVIDENCE FILED IN DISTRICT COURT 2 ON AUG 25TH
2021.

MAGISTRATE: K, CARLI YOU ARE A JUSTICE COURT
JUDGE OR HEARD A DISTRICT COURT CASE IN A JUSTICE
COURT SETTING/VENUE. YOU HAD NO JURISDICTION
WHAT SO EVER TO HEAR MY HABEAS CORPUS PETITION
IN JUSTICE COURT. I DON'T KNOW WHY YOU WOULD
SUBJECT YOURSELF TO COMMIT FRAUD IT IS OBVIOUS
THAT THE EJDC DID NOT TRAIN YOU OR INSTRUCT YOU
TO FOLLOW DCR RULES. AND YOU HAVE ALSO VIOLATED
NEV. RULES OF PROFESSIONAL CONDUCT, YOU CAN NOT
SAY THAT YOU ARE NOT AWARE BECAUSE THERE IS NO
RECORD OF MY CASE EVER BEING IN YOUR COURT ROOM,

RECEIVED
JAN 12 2022
CLERK OF THE COURT

FACTS

Judge KIERNY, YOU HAD OR HAVE NO JURISDICTION OVER CASE NO C-212968, THIS AN HABEAS MATTER PURSUANT NRS. 34.722 PETITION FOR POST CONVICTION RELIEF.

1. YOU DENIED MY MOTION TO TRANSPORT WHEN RJC HAS NO JURISDICTION COMING OUT OF A JUSTICE COURT SETTING / VENUE.
2. IF THERE WAS NO OPPOSITION TO THE PETITIONERS WRIT, AFTER THE STATE WAS WAY PASSED THE 45 DAY RULE WHY DIDNT YOU JUDGE RULE IN THE PETITIONERS FAVOR? YET YOU GAVE THE STATE A CONTINUANCE,
3. JUSTICE COURT 16B RJC HAS VIOLATED THE PETITIONERS DUE PROCESS RIGHTS UNDER THE 14TH AMENDMENT. WHEN YOU KNEW MY CASE WAS IN DISTRICT COURT DEPT 2 YET YOU ISSUED A ORDER UNDER FAULSE PRETENCE.

CONSPIRANCY TO COMMIT FRAUD AND INTENTIONAL MISREPRESENTATION, DECEPTION OR CONCEALMENT OF A MATERIAL FACT KNOWN TO THE PERSON WITH THE INTENT TO DEPRIVE ANOTHER PERSON OF HIS RIGHTS OR TWO OTHERWISE INJURE ANOTHER PERSON PURSUANT TO NRS. 42.001 (2)

YOU AND THE ETDC HAVE COMMITTED
FRAUD BY LACK OF TRAINING AND INSTRUCTIONS
ACCORDING TO DISTRICT RULES.

NOTICE

THE PETITIONER WILL BE SEEKING CIVIL ACTION
FOR FRAUD, CORRUPTION, CONSPIRACY, DELIBERATE
INTENT TO HARM AND INJURE KNOWINGLY THE
JUSTICE COURT CAN NOT HEAR MATTERS THAT HAS ALREADY
BEEN IN THE HIGHER COURTS FOR 17 YRS

YOU HAVE BEEN NOTIFIED

DATE THIS 5TH DAY OF JAN 2022

Joseph Henderson
P.O. Box 1981
ELY Nevada
89301

Mr Henderson for Sept 18 67 124
P.O. Box 1189
Fly Nevada
89301

Steven L. Grierson
Clerk of the Court
200 Lewis ave 3rd floor
Las Vegas. NV. 89155

1
EIGHT DISTRICT JUDICIAL COURT
CLARK COUNTY, NEVADA

FILED
JAN 24 2022
Clerk of Court
✓

Joseph A. Henderson
PETITIONER

CASE NO: C-212968

VS.

STATE OF NEVADA
RESPONDENT

DEPT-2

February 15, 2022
11:00 AM

MOTION FOR NOTICE OF CORRUPTION AND
HINDERANCE.... PROCEDURE VIOLATION.

QUE PROCESS VIOLATION

1) Judge LINDA BELL YOU GAVE A ADMINISTRATIVE ORDER
DEC OF 2021 BACK DATED THE ORDER TO MARCH 12TH 2019 BY THE
FILE STAMPING CLERK OF THE COURT AND DOCUMENT SIGNED BY
YOU ON MARCH 12TH 2019. "THIS IS FRAUD" YOU STATED THAT
YOU WERE RESPONSIBLE FOR SUPERVISING THE ADMINISTRATIVE
BUSINESS OF THE EJDC, ASSURING TO QUALITY AND CONTIN
UITY OF ITS SERVICE.

YOU ARE NOT FACILITATING THE BUSINESS OF EJDC
RULES, IF YOU WERE; YOU WOULD HAVE NEVER FRAUDENTLY
BACK DATED YOUR ADMINISTRATIVE ORDER DENIEING THE
PETITIONERS REQUEST FOR A EVIDENTIARY HEARING.

2) I FILED A PETITION FOR HABEAS CORPUS WRIT
SUCCESSIVE PETITION UNDER NEWLY DISCOVERED
EVIDENCE ON JULY 4TH 2021 SIGHTING CASE NO * C-212968,
YET I DONT KNOW WHY WOULD ISSUE A NEW CASE NO * A-21-

840121-W IN DEPT 2 AND ON DEC 16TH 2021 MY CASE IS PUSHED TO THE LOWER COURT "JUSTICE COURT" IN 16B IN FRONT OF CARLI KERNY. WHEN A JUSTICE COURT JUDGE HAS NO JURISDICTION OR VENUE OVER THIS CASE; IF YOU WERE FACILITATING THE BUSINESS OF EJDC, EDCR 1.30(B) ALSO NRS 3.025.

"WHY ALL THE HINDERANCE AND CORRUPTION?"

3, THERE IS NO CONFLICT ARISING OUT OF THE PETITION FOR WRIT OF HABES CORPUS SUCCESSIVE NEWLY DISCOVERED EVIDENCE IN CASE NO 212968.

4, IT IS MY SOLEMN DUTY TO SEEK A CIVIL COMPLAINT FOR CORRUPTION, BECAUSE YOU CHOOSE NOT TO FOLLOW DISTRICT COURT RULES, AND THE DISTRICT COURT FAILED TO TRAIN YOU AND INSTRUCT YOU TO FOLLOW PROCEDURE.

THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION APPLIED BY THE BILL OF RIGHTS TO THE STATES BY PROHIBITING THE STATE OF NEVADA FROM DENYING DUE PROCESS AND EQUAL PROTECTION AND FROM ABRIDGING THE PRIVILEGES AND IMMUNITIES OF U.S. CITIZENS.

THE EIGHTH JUDICIAL DISTRICT COURT HAS VIOLATED MY DUE PROCESS ON PROCEDURAL RIGHTS, IN WHICH THIS COURT HAS DISREGARDED MY CIVIL RIGHTS.

THE PETITIONERS INTENTIONS WERE GOOD IN THE HABEAS CORPUS NEWLY DISCOVERED EVIDENCE SUCCESSIVE PETITION. WHEN "I" BROUGHT A CLEAR VIOLATION OF STATUE TO THIS COURTS ATTENTION, BUT IT WAS THE EJDC INTENTIONS TO CHANGE THE ORIGINAL CASE NO, HENDER AND REDIRECT THE PETITIONERS WRIT TO THE JUSTICE COURT WHERE THEY HAVE NO JURISDICTION. AND A BACK DATED ADMINISTRATIVE ORDER BY A CHIEF JUDGE...

ON OCT 11TH 2021 THE EJDC GAVE THE STATE OF NEVADA 45 DAYS TO RESPOND PURSUANT TO NRS. 34.360 TO 34.830 66 DAYS LATER ON DEC 16TH 2021 THE STATE PROSECTOR MAKES AN ORAL REQUEST IN OPEN COURT FOR A EXTENSION OF TIME; THE JUSTICE COURT HAD NO JURISDICTION TO HEAR ANY MATTERS IN THE PETITIONERS WRIT "...

YET THE EJDC SANCTIONED THE PETITIONER FOR NOT WRITTING A HEARING DATE ON A SUBMISSION MOTION, WHEN THE DATE WAS ALREADY SET FOR THE WRIT TO BE HEARD....

DATED THIS 5TH DAY OF JAN 2022

RESPECTFULLY
Joseph Henderson
P.O. Box 1989
ELY NEVADA 89301

FILED
JAN 31 2022
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA.

JOSEPH HENDERSON,

CASE NO: C-212968

PETITIONER,

DEPT NO:

VS

DOCKET NO:

THE STATE OF NEVADA,

RESPONDENTS,

"JUDICIAL REVIEW"

COMES NOW, PETITIONER, JOSEPH HENDERSON, IN THIS REQUEST

FOR A "JUDICIAL REVIEW"; THIS REQUEST DEALS WITH THE VIOLATION OF

NRS 174.165 JOINDER/SEVERENCE, UPON PETITIONERS RECENTLY FILE: (POST-

CONVICTION HABEAS CORPUS WRIT; SUCCESSIVE PETITION FOR NEWLY DISCOVERED

EVIDENCE). WHICH CAN BE FILED AT ANY TIME:

THIS REQUEST ENGAGES THE COURTS POWER TO INVALIDATE LEGIS-

LATIVE AND EXECUTIVE ACTIONS AS BEING UNCONSTITUTIONAL. THE DOC -

TRINE PROVIDED BY THE "FOURTEENTH AMENDMENT" FOR DUE-PROCESS AND

EQUAL-PROTECTION OF THE LAW, PROTECTS ALL CITIZENS OF THE UNITED

STATES IMMUNITIES/LIBERTY FROM UNJUST PROSECUTIONS AND, UNFAIR. PRO-

CEEDURES THAT CAUSES HARM AND INJURY.

DATED THIS 5TH DAY OF JAN 2022.

RESPECTFULLY SUBMITTED

BY: Joseph Henderson
JOSEPH HENDERSON #67224

RECEIVED 2

JAN 18 2022

CLERK OF THE COURT

1 CASE HISTORY ON NEWLY DISCOVERED EVIDENCE

2 PETITIONER, JOSEPH HENDERSON WAS VIEWING HIS P.S.I.
3 REPORT PREPARED BY PROBATION & PAROLE AND DISCOVERED THAT HE HAD
4 A CO-DEFENDANT THAT WAS NEVER MENTIONED DURING HENDERSON'S
5 ENTIRE TRIAL; AHUD CHAZIZ SO CALLED DEFENDANT IN CASE #C229335
6 WAS NEVER JOINED AS A CO-DEFENDANT OR SEVERENCE WAS NEVER
7 FILED PURSUANT TO MRS 174.165.

8 PETITIONER, CONTACTED HIS FAMILY AND GAVE CASE #C229335
9 AHUD CHAZIZ, INWHICH THEY DONE A PUBLIC RECORD CHECK AND
10 FOUND OUT THAT: AHUD CHAZIZ PLEAD GUILTY TO ALL COUNTS THAT
11 WAS NEGOTIATED BY A (PLEA-AGREEMENT), INWHICH THE VICTIMS PICKED
12 HIM OUT AS THE PERSON WHO COMMITTED ALL THESE CRIMES, FAMILY
13 MEMBERS ALSO FOUND OUT, IT WAS AHUD CHAZIZ FIRST TIME AS A
14 FELONE YET AN IMMIGRANT, NEW IN THE UNITED STATES. THIS PERSON
15 WAS WITHHELD AS ALSO, HIS CHITTENCE OF GUILT FROM PETITIONERS DE-
16 FENSE - EVIDENCE THAT WAS FAVORABLE TO HENDERSON'S CASE - MR. HENDERSON
17 HAVE A CONSTITUTIONAL RIGHT TO ALL AND ANY EVIDENCE THAT WOULD DO
18 AWAY ANY AND ALL CHARGES 14TH AMENDMENT DUE PROCESS.

19

20 • POINTS AND AUTHORITIES •

21 PURSUANT TO: CALIFORNIA V. TROMBETTA, 467 US 497, 81 L Ed 2d 413,
22 104 SOT 2528; "STATE'S DUTY TO PRESERVE EVIDENCE RELATING TO CRIMINAL PROSECUTION".
23 THE SIGNIFICANT ROLE OF (AHUD CHAZIZ) GUILTY PLEA AGREEMENT, WAS FAVORABLE
24 EVIDENCE EXPECTED TO SHOW INNOCENSE OF PETITIONERS DEFENSE, ITS EVIDENCE
25 POSSESS AN EXCULPATORY VALUE THAT WAS APPARENT BEFORE THE EVIDENCE WAS DE-
26 STROYED AND KEPT AWAY FROM PETITIONERS TRIAL.

1 THE EIGHTH DISTRICT COURT KNOWS THAT, PETITIONERS DUE PROCESS WAS
2 VIOLATED WITH ACCORDANCE OF MRS 174.165 AND THAT CO-DEFENDANT AHUD
3 CHAZIZ DISCOVERY MATERIAL WAS FAVORABLE BECAUSE, HE PLEAD TO COMMITTING
4 ALL CHARGED OFFENSES' PLAN, HE WAS ASKED, "HE DID NOT KNOW HENDERSON AND
5 COULDN'T PICK HIM OUT A LINE UP, PROSECUTION FAILED TO PRESERVE EVIDENCE
6 AND ARGUED THAT, THEY DIDN'T WANT PETITIONER TO INDEPENDANTLY TEST THE
7 SAME. BECAUSE PETITIONER COULD PROVE HIS INNOCENSE THAT, HIS OWN DNA
8 SWABS TAKEN WITHOUT COUNSEL WAS USED TO SAY, "HE WAS THE PERSON OF IN-
9 TEREST", BUT HED CO-DEFENDANT AHUD CHAZIZ OUT IN DEPT 21.

10 BRADY V. MARYLAND, 373 US 83. "WHEN CODEFENDANT PLEAD GUILTY TO
11 CHARGES," YET THIS FAVORABLE EVIDENCE WAS WITH HELD FROM BRADYS DEFENSE,
12 THIS PREJUDICE BRADY. HOWEVER, PETITIONER POSSESS THE SAME VIOLATION
13 THAT BRADY HAS, THE STATE WITH HELD MATERIAL EVIDENCE OF AHUD CHAZIZ
14 GUILTY PLEA AGREEMENT, WHERE HE PLEAD GUILTY TO ALL COUNTS, IN A
15 PLEA FOR LESSER TIME IN PRISON.

16 THE EIGHTH DISTRICT DON'T WANT THIS INFORMATION TO SURFACE BE-
17 CAUSE OF VIOLATION OF MRS 174.165 - 14TH AMENDMENT. AN EVIDENTIALLY NEAR-
18 ING MUST BE HELD TO ESTABLISH THE FAIR AND FACTUAL TRUTH OF CO DEFE-
19 DANT AHUD CHAZIZ EXSISTANCE OF MATERIAL FACT; THAT HE WAS NEVER
20 BROUGHT TOGETHER WITH HENDERSON; PURSUANT TO GIGLIO V. UNITED STATES,
21 31 LED 20 104,405 US 150. "PETITIONER FILED MOTION FOR NEWLY DISCOVERED EVIDENCE,
22 THE GOVERNMENT FAILED TO DISCLOSE AN ALLEGED PROMISE OF LENIENCY MADE TO ITS
23 KEY WITNESS IN RETURN FOR HIS TESTIMONY". AGAIN: THE STATES PROSECUTOR WITH
24 HELD AHUD CHAZIZ IN CASE # C 229335 WHY! BECAUSE AHUD CHAZIZ NEVER
25 KNEW HENDERSON AND IF, THIS COME TO LIGHT, IT'S TRUE EXSISTANCE WILL
26 PROVE HENDERSONS INNOCENSE.

1 PROSECUTION'S FAILURE TO DISCLOSE MATERIAL EVIDENCE. VIO -
2 LATED INMATES' DUE PROCESS RIGHTS BECAUSE NEWLY REVEALED EVI-
3 DENCE SUFFICED TO UNDERMINE CONFIDENCE IN INMATES' CONVIC-
4 TION BECAUSE THE POLICE TOOK DNA FROM PETITIONER AND TESTIFIED
5 TO THAT EVIDENCE IN VIOLATION OF MIRANDA V. ARIZONA, 384 U.S. 436
6 86 S.Ct 1602 (1966). "IF THE SUSPECT IS NOT ADVISED OF THESE RIGHTS OR
7 DOES NOT VALIDLY WAIVE THEM, ANY EVIDENCE OBTAINED DURING THE
8 INTERROGATION [CANNOT] BE USED AGAINST THE SUSPECT AT TRIAL."

9 ON NOVEMBER 14, 2004, PROSECUTION RAN HENDERSON'S DNA
10 COMPARED WITH DNA FROM SAID CRIME THROUGH; (THE CENTRAL REPOSITORY
11 OF NEVADA RECORDS OF CRIMINAL HISTORY) AND GOT [NO] HITS ON YOUR
12 PETITIONER BUT, DID USE PETITIONER'S OWN DNA AT A LATER DATE AGAINST
13 HIM. BECAUSE NO OTHER EVIDENCE COULD LINK HENDERSON TO THE CASE SO,
14 THE STATES PROSECUTION FAILED TO DISCLOSE AHMO CHAZIZ. WEARRY V. BURL
15 CAIN, WARDEN, 577 U.S. 385; 136 S.Ct 1002. (2016) BICKHAM V N.H. STATE PRISON,
16 2008 U.S. DIST LEXIS 14792 (D.N.H. FEB 14 2008).

17
18 EIGHTH JUDICIAL DISTRICT COURT ADMINISTRATIVE

19 ORDER 19-03

20 CHIEF JUDGE! LINDA M. BELL, DENIED REQUEST FOR EVIDENTIARY
21 HEARING; WHEN THE FACTS OF CO-DEFENDANT AHMO CHAZIZ WAS IN DEED
22 A CODEFENDANT THAT PLEADED GUILTY TO SAID CRIMES, THIS MISCAR-
23 AGE OF JUSTICE DO NOT SUPPORT THE FACTS ESPECIALLY WHEN THE
24 DISTRICT COURT ESTABLISHED ALL COURT DATES, PETITIONER'S COURT DATE WAS
25 SET FOR DECEMBER 16, 2021. HABEAS CORPUS/MEMORANDUM AND EVIDENTIARY
26 HEARING MOTIONS WAS ALL FILED AND SET FOR 12/16/2021.

1 "WHY", WOULD THE CHIEF JUDGE IMPLEMENT SUCH A RULE TO AVOID THAT FACTS
2 SET IN PETITIONERS [NEWLY DISCOVERED EVIDENCE / SUCCESSIVE PETITION FOR
3 WRIT OF HABEAS CORPUS]? ITS OBVIOUS THAT MRS 174,165 WAS VIOLATED AND
4 CALIFORNIA V. TROMBETTA, NEV. RULES OF PROF'L CONDUCT 3.4 FAIRNESS OF OPPOS --
5 ING PARTY AND COUNSEL, SCHLAFFER V. STATE, 115 NEV, 167, 979 P2d 712 (1999)
6 "PROSECUTIONS WILLFUL FAILURE TO COMPLY WITH DISCOVERY OBLIGATIONS".
7 RULE 3.8 (d) TIMELY DISCLOSURES TO THE DEFENSE.

8 PETITIONER IS NOT HELD TO THOSE STANDARDS OF PROFESSIONAL COUNSEL
9 ACCORDING TO HAINS V. KERNER, 404 U.S. 519. FOR THE DISTRICT COURT TO USE
10 RULE 2.20(b) WAS PREJUDICE AND BIAS TO THE EXHIBIT OF THE P.I.S. REPORT AS
11 EVIDENCE, HEARING DATES ARE USUALLY SET BY THE COURTS UPON ALL FILINGS OF
12 HABEAS CORPUS WRITS. PURSUANT TO D.C.R. RULE 1.64 / 1.65.

13 FACTS OF THE CASE

14 JOSEPH HENDERSON CASE # ~~AB-840721-W~~, AND AHUD CHAZIZ
15 CASE #229335 WAS NEVER BROUGHT TOGETHER PURSUANT TO MRS 174.165
16 AND IS A VIOLATION OF CONSTITUTIONAL RIGHTS ON DUE PROCESS.
17 PREJUDICE AFFECT:

18 TO HIDE THE MATERIAL FACTS OF AHUD CHAZIZ'S GUILT AWAY
19 FROM HENDERSON'S DEFENSE, PREJUDICE HENDERSON, BECAUSE HE
20 HAD A RIGHT TO PRESENT ALL FAVORABLE EVIDENCE TO HIS JURORS
21 BUT, WAS DENIED THAT GUARANTEED CONSTITUTIONALITY 1.) AHUD CHAZIZ
22 PLEADED GUILTY: 2.) AHUD CHAZIZ WAS IDENTIFIED BY THE VICTIMS:
23 AND 3.) AHUD CHAZIZ DNA WAS FOUND ON THE SCENE.

24 EIGHTH DISTRICT SHOULD WANT TO ESTABLISH TRUTH, FAIRNESS
25 AND FACTS OF CORRUPTION BY HIDDING OUT AHUD CHAZIZ BY THE
26 STATES PROSECUTION OFFICE.

1 CONCLUSION

2 PETITIONER IS INNOCENT, AND THE EIGHTH DISTRICT WANTS TO
3 WITH HOLD AN EVIDENTIARY HEARING, ESPECIALLY WHEN THEY REVIEWED
4 AHUD CHAZIZ CASE AND MY CASE TOGETHER, JUST TO COVER UP THE
5 TRUTH AND NOT TALK ABOUT THE FACTS ON THE RECORD. THIS SHOULD BE
6 REVIEWED - RESEARCHED AND ORDERED ON NRS 174.165;

7 DATED THIS 5TH DAY OF JAN 2022.

8 RESPECTFULLY SUBMITTED

9 BY: Joseph Henderson
10 JOSEPH HENDERSON # 67224

11
12
13 CERTIFICATE OF SERVICE

14 I, JOSEPH HENDERSON, SWEAR UNDER THE PENALTY OF PERJURY
15 THAT I MAILED THROUGH ELY STATE PRISON A TRUE COPY OF THE SAME
16 TO THE FOLLOWING:

17
18 EIGHTH JUDICIAL DIST COURT

NEVADA SUPREME COURT

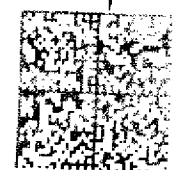
19 200 LEWIS AVE

20 LAS VEGAS, NV 89101

21
22
23
24 BY: Joseph Henderson
25
26

Joseph Henderson #67224
P.O. Box 1884
Ely Nevada 89301

U.S. MAIL
JAN 18 2022 PM 3 L



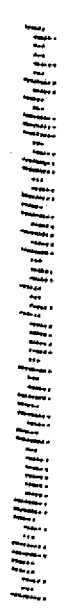
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JAN 18 2022
CLERK OF THE COURT

Mr. Steven Christon
Clerk of the Court
200 Lewis Ave 3rd Floor
Las Vegas Nevada
89155-1160

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ELY STATE PRISON
JAN 11 2022

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED

MAR 17 2022

Steven A. Glavin
CLERK OF COURT

JOSEPH A HENDERSON,
PETITIONER

CASE NO: C 212968
DEPT NO. 2

VS.
THE STATE OF NEVADA
RESPONDENT.

NOTICE OF APPEAL

COMB NOW, PETITIONER, JOSEPH A
HENDERSON, IN THIS INSTANT [NOTICE
OF APPEAL], APPEALING THE DENIAL OF
THE 8TH DISTRICT COURT DECISION HELD
ON ~~MARCH~~ FEB 15TH 2022 AT THE HOUR
OF 12:00 FROM HABEAS CORPUS/ NEWLY
DISCOVERED EVIDENCE SUCCESSIVE
PETITION...

RESPECTFULLY
Joseph Henderson
Joseph Henderson
JOSEPH HENDERSON
P.O. Box 1989
ELY NEVADA
89301

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MAR 17 2022

CLERK OF THE COURT

VERNON A HENDERSON 607224

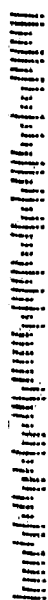
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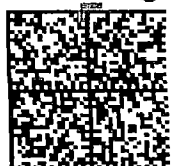
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APPEALS DEPARTMENT
SIXTH JUDICIAL DISTRICT COURT
200 LEWIS AVE
LAS VEGAS NV
89101

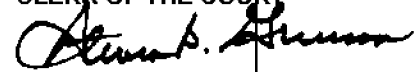


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ELY STATE PRISON
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1 ASTA

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5
6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**
9

10 STATE OF NEVADA,

11 Plaintiff(s),

12 vs.

13 JOSEPH ALEXANDER HENDERSON,

14 Defendant(s),
15

Case No: 05C212968

Dept No: 11

16
17 **CASE APPEAL STATEMENT**
18

19 1. Appellant(s): Joseph Henderson

20 2. Judge: Carli Kierny

21 3. Appellant(s): Joseph Henderson

22 Counsel:

23 Joseph Henderson #67224
24 P.O. Box 1989
Ely, NV 89301

25 4. Respondent: The State of Nevada

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Ave.
Las Vegas, NV 89101

(702) 671-2700

5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A

Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A

6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: Yes

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A

9. Date Commenced in District Court: June 29, 2005

10. Brief Description of the Nature of the Action: Criminal

Type of Judgment or Order Being Appealed: Misc. Order

11. Previous Appeal: Yes

Supreme Court Docket Number(s): 52573, 62629, 67059, 84046

12. Child Custody or Visitation: N/A

Dated This 21 day of March 2022.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Joseph Henderson

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED

APR 19 2022

John J. Blum
CLERK OF COURT

STATE OF NEVADA
PLAINTIFF

VS.

JOSEPH HENDERSON
DEFENDANT

CASE NO: ^C212968

DEPT- 2

OSC 212968

SUBMISSION OF MOTION

COME NOW, THE DEFENDANT JOSEPH
A HENDERSON REQUESTING THIS HONORABLE
COURT TO IMMEDIATELY HEAR THE
DEFENDANTS REQUEST OF THE FACTS, FINDING
AND CONCLUSION OF LAW FROM THE HEARING
ON FEB 15TH 2022,

Date 3/24/22

RESPECTFULLY SUBMITTED
Joseph Henderson

JOSEPH A HENDERSON
P.O BOX 1989
ELY NEVADA
89301

CLERK OF THE

APR 05 2022

RECEIVED

PP
PA

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED

APR 19 2022

John J. Williams
CLERK OF COURT

STATE OF NEVADA
PLAINTIFF

CASE NO: C 212968

VS.

JOSEPH A HENDERSON
DEFENDENT

May 10, 2022
9:00 AM

" THE DEFENDENT IS REQUESTING
THE FACTS, FINDING AND CONCLUSION
OF LAW FROM FEB 15TH 2022 "

COME NOW, THE DEFENDENT JOSEPH
A HENDERSON. IN THIS INSTANT REQUEST
OF THE FACTS, FINDING AND CONCLUSION OF
LAW FROM THE HEARING ON FEB 15TH 2022.

RESPECTFULLY SUBMITTED
BY: Joseph Henderson
Joseph Henderson *67224
P.O. BOX 1989
89301

DATED THIS 24TH OF FEB 2022

Mr. Henderson of Gary
P.O. Box 1984
Ely Nevada
89301

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APR - 5 2022

CLERK OF THE COURT

LAS VEGAS NV 890
MAR 2022 PM 3

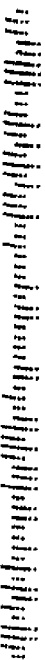
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1106

Steven D. Henderson
Clerk of the Court
2022 There are 3rd Floor
Las Vegas Nevada
89155

FWD

891 422 578 899



1 Joseph A Henderson

2 # 61224 / Pro Per
3 Ely State Prison
4 P.O. BOX 1989
5 ELY, NV 89301

FILED

APR 19 2022

John L. Blum
CLERK OF COURT

6 IN THE eight JUDICIAL DISTRICT COURT

7 OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

8 STATE OF NEVADA

9 Plaintiff,

10 vs.

11 JOSEPH A HENDERSON

12 Defendant

Case No.: C212968

Dept No.:

Notice of Motion

14 **NOTICE OF MOTION**

15 YOU WILL PLEASE TAKE NOTICE, that THE DEFENDANT IS REQUESTING

16 THE FACTS, FINDING AND CONCLUSION OF LAW

17 will come on for hearing before the above-entitled Court on the _____ day of

18 _____, 20____, at the hour of _____ o'clock ____m. in

19 Department _____, of said Court.

20 DATED this 24th day of FEB, 2022.

21
22
23 *Joseph Henderson*

24 # _____ / Pro
25 Per
26 Ely State Prison
27 P.O. BOX 1989
28 ELY, NV 89301

AFFIRMATION PURSUANT TO NRS 239B.030

I, Joseph A Henderson, NDOC# 67224,

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE
ATTACHED DOCUMENT ENTITLED THE DEFENDANT IS REQUEST
ING THE FACTS, FINDING OF LAW FROM FEB 15TH 2022

DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY
PERSONS, UNDER THE PAINS AND PENALTIES OF PERJURY.

DATED THIS 24TH DAY OF FEB, 20 22.

SIGNATURE: Joseph Henderson

INMATE PRINTED NAME: Joseph A Henderson

INMATE NDOC # 67224

INMATE ADDRESS: ELY STATE PRISON
P. O. BOX 1989
ELY, NV 89301

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 84416
District Court Case No. C212968

FILED

MAY - 3 2022

CLERK'S CERTIFICATE

Elizabeth A. Brown
CLERK OF COURT

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDERS this appeal DISMISSED."

Judgment, as quoted above, entered this 7th day of April, 2022.

IN WITNESS WHEREOF, I have subscribed
my name and affixed the seal of the Supreme
Court at my Office in Carson City, Nevada this
May 02, 2022.

Elizabeth A. Brown, Supreme Court Clerk

By: Andrew Lococo
Deputy Clerk

05C212968
CCJD
NV Supreme Court Clerks Certificate/Judgm
4990824



IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

No. 84416

FILED

APR 07 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER DISMISSING APPEAL

This appeal was initiated by the filing of a pro se notice of appeal. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

Appellant filed a notice of appeal in district court case number 05C212968. However, this court's review of this appeal reveals jurisdictional defects. First, no recent appealable order was entered in district court case number 05C212968. Second, to the extent that appellant's appeal is in regard to the postconviction petition for a writ of habeas corpus filed in related district court case number A-21-840121-W, that district court case number was not designated in this notice of appeal. See NRAP 3(c)(1)(B) (requiring a notice of appeal to "designate the judgment, order or part thereof being appealed"). Lastly, no decision had been made on the petition when appellant filed his notice of appeal, and thus, appellant's notice of appeal from the habeas corpus petition is

premature. See NRS 177.015 (3) (stating that a defendant only may appeal from a final judgment or verdict). Accordingly, this court
ORDERS this appeal DISMISSED.

1 Hardesty, J.
Hardesty

Stiglich, J.
Stiglich

Herndon, J.
Herndon

cc: Hon. Carli Lynn Kierny, District Judge
Joseph Alexander Henderson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 84416
District Court Case No. C212968

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: May 02, 2022

Elizabeth A. Brown, Clerk of Court

By: Andrew Lococo
Deputy Clerk

cc (without enclosures):

Joseph Alexander Henderson
Clark County District Attorney \ Alexander G. Chen
Hon. Carli Lynn Kierny, District Judge

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on MAY - 3 2022.

HEATHER UNGERMANN

Deputy District Court Clerk

RECEIVED
APPEALS

MAY - 3 2022

CLERK OF THE COURT

FILED

JUN 03 2022

CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA

VS-

JOSEPH A HENDERSON

CASE NO: 05-C-212968

SUBMISSION OF MOTION

COMING NOW, THE DEFENDENT JOSEPH A HENDERSON IS REQUESTING THIS COURT TO PLEASE IMMEDIATELY HEAR THE DEFENDENT'S REQUEST OF HOW JULIAN GREGORY STOOD IN FOR THE DEFENDENT? WHEN IN PRO SE, THE STATUS OF THE DEFENDENT'S SUCCESSIVE PETITION WRIT ON NEWLY DISCOVERED EVIDENCE...

DATE 21ST OF MAY 2022

RESPECTFULLY SUBMITTED
By Joseph HendersonJOSEPH A HENDERSON 67224
P.O. Box 1989
GIL NEVADA
89301

FILED

JUN 03 2022

CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

PP
DPA

STATE OF NEVADA
PLAINTIFF

CASE: NO⁰⁵ C212968
DEPT: 11

VS-

JOSEPH A HENDERSON
DEFENDENT

June 28, 2022
9:00 AM

"THE DEFENDENT IS REQUESTING
THE STATUS OF THE SUCCESSIVE PETITION
NEW EVIDENCE HABUS CORPUS, AND
RESPONDING TO WHY ANY LAWYER -
SUCH AS GREGORY, JULIAN WOULD
STAND IN FOR THE DEFENDANT WHEN
HE'S PRO SE..."

COME NOW, THE DEFENDENT JOSEPH
A HENDERSON IN THIS INSTANT REQUEST
OF THE STATUS OF THE HABUS CORPUS -
SUCCESSIVE PETITION NEWLY DISCOVERED -
EVIDENCE? ALSO, THE DEFENDENT DOES NOT
UNDERSTAND WHY JULIAN GREGORY WOULD
STAND IN FOR THIS PRO SE, ALSO THE
FACTS, FINDING AND CONCLUSION OF LAW
THE DEFENDING WAS REQUESTING AND NOTHING
TO DO WITH JULIAN GREGORY,

RECEIVED

JUN - 2 2022

CLERK OF COURT

THE DEFENDANT WAS SEEKING THE FACTS,
FINDING AND CONCLUSIONS OF LAW ON
YOUR FINDING TO THE SUCCESSIVE PETITION
THAT WAS TO BE HEARD ON FEB 15TH 2022.

I WAS ALSO INFORMED THAT THE PETITIONER
WAS GIVEN A NEW JUDGE ON THIS CURRENT
CASE, I DON'T KNOW WHAT'S GOING ON OR
THE STATUS OF THIS CURRENT CASE.

I'VE BEEN HAVING AN ISSUE WITH NOT
PROPERLY BEING INFORMED OF ANY AND ALL
DECISIONS CONCERNING THE SUCCESSIVE
PETITION I FILED IN YOUR COURT ROOM.

PLEASE ALLOW THE DEFENDANT TO BE INFORMED
OF ANY AND ALL DECISIONS CONCERNING CASE
NO ~~XX~~ 05 E-212968..

RESPECTFULLY SUBMITTED
BY: Joseph Henderson #61224
P.O. Box 1984 EVI NV 89301
Joseph Henderson

DATED THIS 21ST OF MAY 2022

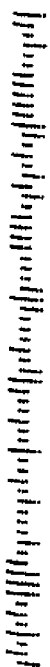
Joseph A. Mendenhall
P.O. Box 19889
El Paso, TX
89301

LAS VEGAS NV 890
31 MAY 2022PM 4 L

1116

Steven Whiston
Clerk of the Court
200 Lewis Ave 3rd Floor
Las Vegas Nevada
89155-4660

89101-6300000



Heather S. Hume

CLERK OF THE COURT

ORDR
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JOSHUA JUDD
Deputy District Attorney
Nevada Bar #014890
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JOSEPH ALEXANDER HENDERSON,
#1502730

Defendant.

CASE NO: **05C212968**

DEPT NO: **IX**

ORDER DENYING DEFENDANT'S REQUEST FOR FACTS, FINDINGS
AND CONCLUSIONS OF LAW FROM FEBRUARY 15, 2022

DATE OF HEARING: **MAY 10, 2022**

TIME OF HEARING: **9:00 A.M.**

THIS MATTER having prevented before the above entitled Court on the 10th day of
MAY, 2022; Defendant not present, IN PROPER PERSON; Plaintiff represented by
STEVEN B. WOLFSON, District Attorney, through JOSHUA JUDD, Deputy District
Attorney; and without argument, based upon the pleadings, and with good cause appearing,

//

//

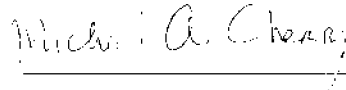
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1 **IT IS HEREBY ORDERED** that DEFENDANT'S REQUEST FOR FACTS,
2 FINDINGS AND CONCLUSIONS OF LAW FROM FEBRUARY 15, 2022, shall be and is
3 DENIED.

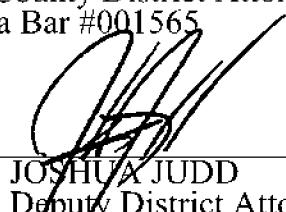
Dated this 6th day of June, 2022



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

7DB 33B 65F1 755E
Michael Cherry
District Court Judge

9 BY



10 JOSHUA JUDD
11 Deputy District Attorney
Nevada Bar #014890

28 hjc/SVU

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 The State of Nevada vs Joseph A
Henderson

CASE NO: 05C212968

7 DEPT. NO. Department 9

8
9 **AUTOMATED CERTIFICATE OF SERVICE**

10 Electronic service was attempted through the Eighth Judicial District Court's
11 electronic filing system, but there were no registered users on the case. The filer has been
12 notified to serve all parties by traditional means.
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FILED

SEP - 1 2022

Elizabeth A. Brown
CLERK OF COURT

I would like to appeal the
denial decision of my writ of habeas
corpus successive petition on newly
discovered evidence "Pure innocence"
on case number "05-C212968"

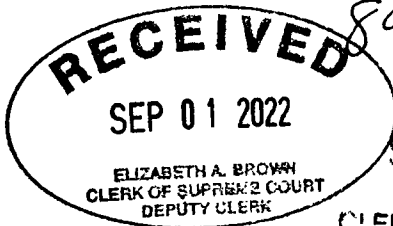
"From the District Court"

Thank you.

Mr Henderson Joseph #67224
PO Box 650

Indian Springs W.V.
89070

Date 8-27-22



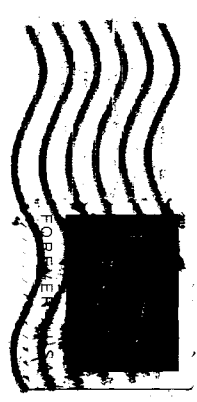
RECEIVED
APPEALS
SEP 19 2022
CLERK OF THE COURT

05C212968
NOASC
Notice of Appeal (Criminal)
5006388



Mr. Henderson Joseph 6734
488 Ave 655
Location Springs W.V.
89070

LAS VEGAS NV 890
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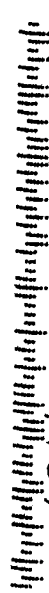


High Desert State Prison

AUG 29 2022

Unit 6 A/B

8970133703



Deanne Court & Nevada
Justice of the Peace
209 S. Carson at Suite 201
Carson City, Nevada
89701

FILED

SEP - 8 2022

William A. Glavin
CLERK OF COURT

CLERK OF THE COURT
NEV SUPREME COURT

AUG-29TH 2022

I WOULD LIKE TO PLEASE APPEAL THE DECISION OF THE
EIGHTH DISTRICT COURT ON CASE # 05C212968 SUCCESSIVE
PETITION WRIT OF HABEAS CORPUS ON NEWLY DISCOVERED
EVIDENCE "PURE INNOCENCE..."

ALSO, CAN YOU PLEASE FORWARD ME BACK
STAMP COPY BACK... THANK YOU

JOSEPH HENDERSON #67224
PO BOX 650
INDIAN SPRING NV 89070

RECEIVED
APPEALS

SEP 19 2022

CLERK OF THE COURT

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ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

05C212968

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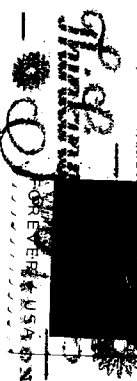
Notice of Appeal (Criminal)

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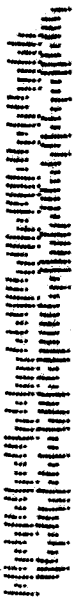
Joseph Henderson 61224
P.O. Box 650
Indian Springs NV
89076

LAS VEGAS NV 890
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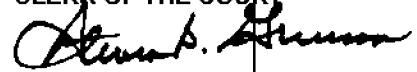


Supreme Court of Nevada
Office of the Court
201 South Carson St suite 201
Carson City Nevada 89701

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89701-479153



HDSP
SEP 05 2022
UNIT 7 A/B



1 ASTA

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6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**
9

10 STATE OF NEVADA,

11 Plaintiff(s),

12 vs.

13 JOSEPH ALEXANDER HENDERSON,

14 Defendant(s),
15

Case No: 05C212968

Dept No: 11

16
17 **CASE APPEAL STATEMENT**
18

19 1. Appellant(s): Joseph Henderson

20 2. Judge: Carli Kierny

21 3. Appellant(s): Joseph Henderson

22 Counsel:

23 Joseph Henderson #67224
24 P.O. Box 650
Indian Springs, NV 89070

25 4. Respondent: The State of Nevada

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Ave.
Las Vegas, NV 89101

(702) 671-2700

5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A

Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A

6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: Yes

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A

9. Date Commenced in District Court: June 29, 2005

10. Brief Description of the Nature of the Action: Criminal

Type of Judgment or Order Being Appealed: Writ of Habeas Corpus

11. Previous Appeal: Yes

Supreme Court Docket Number(s): 52573, 62629, 67059, 84046, 84416

12. Child Custody or Visitation: N/A

Dated This 19 day of September 2022.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Joseph Henderson



1 ASTA

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6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**
9

10 STATE OF NEVADA,

11 Plaintiff(s),

12 vs.

13 JOSEPH ALEXANDER HENDERSON,

14 Defendant(s),
15

Case No: 05C212968

Dept No: 11

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20 2. Judge: Carli Kierny

21 3. Appellant(s): Joseph Henderson

22 Counsel:

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24 P.O. Box 650
Indian Springs, NV 89070

25 4. Respondent: The State of Nevada

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Ave.
Las Vegas, NV 89101

(702) 671-2700

5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A

Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A

6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: Yes

7. Appellant Represented by Appointed Counsel On Appeal: N/A

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200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Joseph Henderson

Heather S. Smith
CLERK OF THE COURT

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISILLER
Chief Deputy District Attorney
Nevada Bar #013730
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-

JOSEPH HENDERSON,
#1502730

Defendant.

CASE NO: A-21-840121-W
05C212968
DEPT NO: 1

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER**

DATE OF HEARING: AUGUST 25, 2022
TIME OF HEARING: 10:30 AM

THIS CAUSE having come on for hearing before the Honorable BITA YEAGER, District Judge, on the 2th day of August, 2022, the Petitioner not being present, proceeding in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through STACY KOLLINS, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On July 11, 2005, Joseph Henderson, (hereinafter "Petitioner") was charged by way of Information with the following: Count 1 – Conspiracy to Commit Burglary, Count 2 –

1 Burglary While in Possession of a Firearm, Count 3 – Conspiracy to Commit First Degree
2 Kidnapping, Counts 4 and 5 – First Degree Kidnapping With Use of a Deadly Weapon, Count
3 6 – Conspiracy to Commit Sexual Assault, Counts 7, 8, and 9 – Sexual Assault With Use of a
4 Deadly Weapon, Count 10 – Conspiracy to Commit Robbery, Counts 11 and 12 – Robbery
5 With Use of a Deadly Weapon, Count 13 – Open or Gross Lewdness, and Count 14 – Battery
6 With Use of a Deadly Weapon Resulting in Substantial Bodily Harm. On June 27, 2008, a jury
7 found Petitioner guilty of all counts.

8 On August 28, 2008, Petitioner was sentenced as follows: Count 1 – twelve months in
9 the Clark County Detention Center; Count 2 – sixty-two months to one hundred fifty-six
10 months in the Nevada Department of Corrections (“NDOC”), to run concurrent with Count 1;
11 Count 3 – twenty-four months to sixty months in the NDOC, to run consecutive to Count 2;
12 Count 4 – sixty months to life in the NDOC, plus an equal and consecutive term of sixty
13 months to life for the Use of a Deadly Weapon, to run consecutive to Count 3; Count 5 – sixty
14 months to life in the NDOC, plus an equal and consecutive term of sixty months to life for the
15 Use of a Deadly Weapon, to run consecutive to Count 4; Count 6 – twenty-four months to
16 sixty months in the NDOC, to run consecutive to Count 5; Count 7 – one hundred twenty
17 months to life in the NDOC, plus an equal and consecutive term of one hundred twenty months
18 to life for the Use of a Deadly Weapon, to run Concurrent with Count 6; Count 8 – one hundred
19 twenty months to life in the NDOC, plus an equal and consecutive term of one hundred twenty
20 months to life for the Use of a Deadly Weapon, to run Consecutive to Count 7; Count 9 – one
21 hundred twenty months to life in the NDOC, plus an equal and consecutive term of one
22 hundred twenty months to life for the Use of a Deadly Weapon, to run Consecutive to Count
23 8; Count 10 – twenty-four months to sixty months in the NDOC, to run consecutive to Count
24 9; Count 11 – seventy-two months to one hundred eighty months in the NDOC, plus an equal
25 and consecutive term of seventy-two months to one hundred eighty months for the Use of a
26 Deadly Weapon, to run concurrent with Count 10; Count 12 – seventy-two months to one
27 hundred eighty months in the NDOC, plus an equal and consecutive term of seventy-two
28

1 months to one hundred eighty months for the Use of a Deadly Weapon, to run consecutive to
2 Count 11; Count 13 – twelve months in the Clark County Detention Center, to run concurrent
3 with Count 12; and Count 14 – sixty-two months to one hundred fifty-six months in the NDOC,
4 to run consecutive to Count 13. Petitioner received 1,251 days credit for time served. A special
5 sentence of lifetime supervision was imposed to commence upon release from any term of
6 imprisonment, probation or parole.

7 The Judgment of Conviction was filed September 24, 2008. Petitioner filed a Notice of
8 Appeal on October 9, 2008. The Nevada Supreme Court affirmed Defendant's conviction on
9 February 3, 2010. Remittitur issued on March 2, 2010.

10 Petitioner filed his pro per Petition for Writ of Habeas Corpus (Post-Conviction) on
11 January 11, 2011. Through counsel, Petitioner filed a supplemental petition on August 26,
12 2011. After an evidentiary hearing, the district court denied the petition on October 22, 2012.
13 The Findings of Fact, Conclusions of Law, and Order were filed on November 21, 2012.
14 Petitioner filed a Notice of Appeal on February 12, 2013. The Nevada Supreme Court affirmed
15 the denial of the writ on September 18, 2014. Remittitur issued on October 20, 2014.

16 Petitioner filed a pro per “Successive” Petition for Writ of Habeas Corpus on June 12,
17 2014. The district court denied this Successive Petition on December 2, 2014. Petitioner filed
18 a Notice of Appeal on December 11, 2014. The Nevada Supreme Court affirmed the denial of
19 the writ on September 11, 2015. Remittitur issued October 12, 2015.

20 On August 25, 2021, Petitioner filed a Petition for Writ of Habeas Corpus (Post-
21 Conviction) “Successive” “Newly Discovered Evidence” (hereinafter “8/25/21 Petition”), a
22 Memorandum in Support of “Successive” Writ of Habeas Corpus Petition (Newly Discovered
23 Evidence) (hereinafter “Memorandum”), and an Affidavit/Declaration requesting this Court
24 refrain from appointing him counsel. On October 11, 2021, he filed a Request for Evidentiary
25 Hearing (hereinafter “Request”). On December 3, 2021, he filed a Petition for Writ of Habeas
26 Corpus (Post-Conviction) Second Amended Petition Successive Newly Discovered Evidence
27 (hereinafter “12/2/21 Petition”). On December 23, 2021, Petitioner filed a Motion for
28

1 Extension of Time, asking for an additional 45 days so he may hire an attorney. These filings
2 will be referred to collectively as the "Successive Petition." On January 7, 2022, the State filed
3 its Response. On August 25, 2022, this Court heard argument on the Successive Petition. This
4 Court denies the Successive Petition for the reasons stated as follows.

5 FACTUAL HISTORY

6 On the night of September 3, 2004, Dr. Eric Bernzweig ("Eric") and his fiancée, Julie
7 Kim ("Julie"), were sleeping at their residence located at 7833 Lonesome Harbor, Las Vegas,
8 Clark County, Nevada. At approximately 12:30 a.m. that night, an olive-skinned man rang the
9 doorbell. The olive-skinned man told Eric that he was his neighbor and that his son had thrown
10 his keys into Eric's backyard. The olive-skinned man asked if he could look for his keys in the
11 backyard. Eric closed and locked the front door and in effort to help his alleged neighbor, went
12 to the backyard, turned the lights on, and attempted to find the keys, to no avail. The olive-
13 skinned man then asked Eric if he could go to the backyard and look for the keys with him, at
14 which time Eric let him in and took him through his house to the backyard.

15 After not finding the keys in the backyard, the olive-skinned man told Eric he was going
16 to go to his car to get a flashlight to aid in the search for the keys. Eric went to his garage to
17 try to find a flashlight. Eric returned from the garage, to find the olive-skinned man in his
18 house with two masked Black male individuals, both wielding guns with laser sights. DNA
19 evidence eventually revealed Petitioner to be one of the masked intruders. The intruders tied
20 Julie's hands with plastic ties. They tried to tie Eric up with the plastic ties but when the plastic
21 ties did not fit, they handcuffed Eric instead, and took him to upstairs portion of the house.

22 The olive-skinned man demanded to know where Eric kept the safe. Eric told them that
23 he did not have a safe. In an attempt to appease the intruders, Eric gave them approximately a
24 thousand dollars in cash he had hidden in a closet. While the intruders were occupied, Eric
25 was able to get out of his handcuffs. He attempted to get downstairs, but was caught by one of
26 the masked intruders. While scuffling with one of the intruders, Eric was pistol-whipped two
27
28

1 or three times, which split his head open. Eventually, the intruders tied Eric up with electrical
2 cords and left him to bleed on the floor.

3 While the olive-skinned man and the other masked intruder were looking for the safe
4 with Eric, Petitioner was downstairs with Julie. Petitioner held her at gunpoint, put a pair of
5 Eric's swim trunks over her head, put a cat toy in her mouth and threatened to kill her if she
6 screamed. He then began to fondle her, placed his mouth on her breasts and sexually assaulted
7 her by inserting his fingers into her vagina. He then forced Julie to spread her legs and sexually
8 assaulted her by inserting his penis in her vagina. Petitioner then took Julie upstairs to the
9 master bedroom, placed her face down on the bed and sexually assaulted her for a third time
10 by inserting his penis in her vagina.

11 Shortly after Petitioner's last sexual assault, the intruders tied up Julie's legs and left
12 the home. Julie worked her way loose and discovered Eric lying in a pool of blood. She untied
13 him and they went downstairs to call the police.

14 Julie was taken to University Medical Center, where she underwent a sexual assault
15 examination, which included the collection of buccal swabs, vaginal swabs, and breast swabs
16 from the area of her breasts where the Petitioner put his mouth. Additionally, crime scene
17 investigators collected, among other things, the top sheet and fitted sheet from the master
18 bedroom.

19 Las Vegas Metropolitan Police Department ("LVMPD") forensic scientist David
20 Welch was able to develop unknown male profile from the foreign DNA material detected on
21 the breast swabs of the victim. Welch also tested one of the vaginal swabs but was unable to
22 develop a profile from the vaginal swab. The DNA profile from the unknown male was
23 searched against the local DNA Index System and no matches were found. The DNA profile
24 was then uploaded to the National DNA Index System for comparison. Later, a CODIS match
25 was discovered and came back to Petitioner, who was already in custody for another matter.

26 LVMPD Detective Michael Jefferies obtained a search warrant for a buccal swab from
27 Petitioner, to confirm the DNA match was true and correct. In March 2005, LVMPD forensic
28

1 scientist Kathy M. Guenther ("Guenther"), using the unknown male profile created by Welch
2 and the profile created from Petitioner's buccal swab, discovered a positive match or positive
3 comparison with Petitioner's DNA on all 13 locations used by LVMPD forensic scientist to
4 match DNA at the time. Under the statistical threshold set in the LVMPD laboratory, the
5 chances of a random selective sample to have the same profile was six hundred billion
6 (6,000,000,000) to one (1). Because six hundred billion is hundred times the earth's population
7 at the time, under laboratory standards identity is assumed. In March of 2005, Petitioner was
8 officially confirmed as the source of the foreign DNA material taken from Julie Kim body, at
9 which time he was arrested.

10 In July of 2005, the LVMPD forensic lab added two additional markers for DNA
11 matching, and now had 15 threshold points to match. Consequently, Guenther conducted
12 further DNA testing from Julie's sexual assault examination. Guenther re-profiled the
13 Petitioner known sample in order to compare his sample with the DNA testing of the rest of
14 the sexual assault examination kit. The testing included extractions from the buccal swab and
15 vaginal swabs from Julie, as well as the bed sheets removed from the bed in the master
16 bedroom, and the bathrobe found in the master bedroom. Semen with sufficient spermatozoa
17 was detected on one of the bedsheets (in two separate stains) and the vaginal swab. Once again,
18 Petitioner was found to be a complete match with the DNA profiles created by the extractions
19 from the soiled bedsheet and the vaginal swab.

20 21 **ANALYSIS**

22 **I. THE PETITION IS PROCEDURALLY BARRED**

23 The filings that constitute the Successive Petition are untimely, successive, and an
24 abuse of the writ. Petitioner fails to demonstrate good cause or sufficient prejudice to permit
25 him to evade the procedural bars. There are no facts which, if true, would entitle Petitioner to
26 relief, so no evidentiary hearing is required.

27 **A. The Petition is time-barred.**

28

1 The Petition is time-barred pursuant to NRS 34.726(1):

2 Unless there is good cause shown for delay, a petition that challenges the
3 validity of a judgment or sentence must be filed within 1 year of the entry
4 of the judgment of conviction or, if an appeal has been taken from the
5 judgment, within 1 year after the Supreme Court issues its remittitur. For
6 the purposes of this subsection, good cause for delay exists if the petitioner
7 demonstrates to the satisfaction of the court:

- 8 (a) That the delay is not the fault of the petitioner; and
9 (b) That dismissal of the petition as untimely will unduly prejudice
10 the petitioner.

11 “[T]he Legislature has determined that one year provides sufficient time within which
12 to raise claims that trial and appellate counsel provided ineffective assistance.” Rippo v. State,
13 134 Nev. 411, 421, 423 P.3d 1084, 1097, amended on denial of reh'g, 432 P.3d 167 (Nev.
14 2018). The one-year time limit for preparing petitions for post-conviction relief under NRS
15 34.726 is strictly applied because the “procedural default rules ... are supposed to discourage
16 the perpetual filing of habeas petitions.” Rippo at 423, 423 P.3d at 1096.

17 The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain
18 meaning. Pellegrini v. State, 117 Nev. 860, 873 74, 34 P.3d 519, 528 (2001). As per the
19 language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from
20 the date the judgment of conviction is filed or a remittitur from a timely direct appeal is issued.
21 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133- 34 (1998).

22 The one-year time limit for preparing petitions for post-conviction relief under NRS
23 34.726 is strictly construed. In Gonzales v. State, the Nevada Supreme Court rejected a habeas
24 petition filed two days late despite evidence presented by the defendant that he purchased
25 postage through the prison and mailed the petition within the one-year time limit. 118 Nev.
26 590, 596, 53 P.3d 901, 904 (2002). In contrast with the short amount of time to file a notice of
27 appeal, a prisoner has a full year to file a post-conviction habeas petition, so there is no
28 injustice in a strict application of NRS 34.726(1), despite any alleged difficulties with the
postal system. Id. at 595, 53 P.3d at 903.

1 Remittitur from Petitioner's direct appeal issued on March 10, 2010. Petitioner had until
2 March 10, 2011, to file a timely petition for writ of habeas corpus. This Petition was filed on
3 August 25, 2021, more than eleven years after remittitur. Under NRS 34.726(1), this Petition
4 is untimely. Absent a showing of good cause to excuse this delay, the petition must be denied.

5 **B. The Petition Is Successive and an Abuse of the Writ**

6 Second or successive petitions include those that allege new or different grounds but a
7 judge or justice finds that the petitioner's failure to assert those grounds in a prior petition
8 would constitute an abuse of the writ. The Successive Petition is an abuse of the writ.

9 NRS 34.810(2) reads:

10 A second or successive petition must be dismissed if the judge or justice
11 determines that it fails to allege new or different grounds for relief and that the
12 prior determination was on the merits or, if new and different grounds are
13 alleged, the judge or justice finds that the failure of the petitioner to assert those
14 grounds in a prior petition constituted an abuse of the writ.

15 Second or successive petitions will only be decided on the merits if the petitioner can
16 show good cause and prejudice. NRS 34.810(3). The burden of proving specific facts that
17 show good cause for his failure to raise his claims earlier falls on the petitioner. NRS
18 34.810(3). Petitioner must also show actual prejudice. NRS 34.810(3).

19 The Nevada Supreme Court has stated: "Without such limitations on the availability of
20 post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-
21 conviction remedies. In addition, meritless, successive and untimely petitions clog the court
22 system and undermine the finality of convictions." Lozada v. State, 110 Nev. 349, 358, 871
23 P.2d 944, 950 (1994).

24 The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly
25 require a careful review of the record, successive petitions may be dismissed based solely on
26 the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In
27 other words, if the claim or allegation was previously available with reasonable diligence, it is
28 an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467,
497-98 (1991).

Petitioner has previously litigated two petitions for writ of habeas corpus. To the extent Petitioner raises new or different claims from those raised before, the Petition is an abuse of the writ. NRS 34.810(2). Petitioner himself recognizes his abuse of the writ, as the filings that comprise the instant Petition are actually and correctly titled “successive.” The “newly-discovered” evidence cited in the Petition has been in Petitioner’s possession since 2008. To raise these claims now is abusive, as his claims could have been raised in his appeal or in his first or second habeas petitions. NRS 34.810.

C. These Claims Are Waived

The Nevada Supreme Court has held that “challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings. . . . [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings.*” Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). NRS 34.810(1)(b)(2) states “The court shall dismiss a petition if the court determines that . . . the petitioner’s conviction was the result of a trial and the grounds for the petition could have been . . . raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.”

Petitioner’s claim in the 8/25/21 filing concerns a co-defendant who was arrested and charged after Petitioner. The co-defendant was identified in Petitioner’s Presentence Investigation Report (“PSI”). See Motion to Amend Petition: NRS 34.724 Exhibit “A” Added Only, filed October 11, 2021, at 8. That page shows it was faxed on August 27, 2008.

Petitioner was clearly aware of the PSI prepared in 2008, as his attorney, in his presence, referred to the PSI during the sentencing hearing on August 28, 2008. See generally Reporter’s Transcript of Sentencing, filed November 7, 2008. “I just wanted to point out there is an error on the PSI report, but my client would still like to go forward today with sentencing.” Id. at 2. His attorney also acknowledged receiving a supplemental PSI that corrected Petitioner’s

1 asserted error. Id. at 12. Petitioner's attorney affirmed to the Court that she provided both PSI
2 reports to Petitioner. Id. at 13.

3 Rather than assert the confession of his co-defendant meant Petitioner could not also
4 have been a participant, as he does here, Petitioner argued at sentencing that "The police
5 framed me. I mean, either the police, somebody had to frame me. I was framed." Id. at 8.
6 Petitioner's counsel, rather than arguing that her client could not have been the man who left
7 his DNA on the victim, merely urged the Court to "not be persuaded by this one victim's
8 experience." Id. at 11-12. As miserable as being raped at gunpoint while her fiancé was pistol-
9 whipped and her home invaded must have been for the victim, Petitioner's attorney claimed
10 "it certainly could have been worse." Id. Counsel did not, however, assert the co-defendant's
11 very existence exonerated her client.

12 The existence of Mr. Chaziz is not newly discovered. His status as a co-defendant was
13 brought to Petitioner's attention prior to sentencing. Any claim regarding this person could
14 have been raised on direct appeal, or in either of Petitioner's previous habeas petitions. Since
15 Petitioner did not raise any claims concerning his co-defendant on appeal, the issue is now
16 waived, more than a decade later.

17 The claims in the 12/2/21 Petition are also waived. In that filing, Petitioner raises
18 substantive claims of Fourth and Fifth Amendment violations. Because the facts related to
19 these claims were available to Petitioner at the time of his direct appeal in 2008, the claims are
20 waived now. On appeal, Petitioner asserted the State consumed all available DNA material.
21 The Nevada Supreme Court held this claim was belied by the record. See Order of Affirmance,
22 Docket No. 52573, filed February 3, 3010, at 1. Petitioner claimed the trial court's denial of
23 his motion to preclude improper use of DNA evidence prejudiced him, but the Supreme Court
24 held that no improper DNA evidence or argument was presented to the jury. Id. at 2. Petitioner
25 did not claim, as he does here, that his due process rights were violated because his attorney
26 was not present when a cotton swab collected DNA from inside his cheek. Because Petitioner
27
28

1 knew his attorney was not present for DNA collection at the time of the collection, this claim
2 is waived for failure to raise it on direct appeal.

3 **D. Application of the procedural bars is mandatory.**

4 The Nevada Supreme Court has held that courts have a *duty* to consider whether a
5 defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial
6 Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found
7 that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions
8 is mandatory," noting:

9 Habeas corpus petitions that are filed many years after conviction are an
10 unreasonable burden on the criminal justice system. The necessity for a
11 workable system dictates that there must exist a time when a criminal
12 conviction is final.

13 Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court]
14 when properly raised by the State." Id. at 233, 112 P.3d at 1075. Ignoring these procedural
15 bars is an arbitrary and unreasonable exercise of discretion. Id. at 234, 112 P.3d at 1076. The
16 Nevada Supreme Court has granted no discretion to the district courts regarding whether to
17 apply the statutory procedural bars; the rules *must* be applied.

18 This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013).
19 There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of
20 the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307
21 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's
22 petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The
23 procedural bars are so fundamental to the post-conviction process that they must be applied
24 by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.
25 Parties cannot stipulate to waive the procedural default rules. State v. Haberstroh, 119 Nev.
26 173, 180-81, 69 P.3d 676, 681-82 (2003).

II. THE PETITION FAILS TO DEMONSTRATE GOOD CAUSE OR ACTUAL PREJUDICE

To avoid procedural default, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or to otherwise comply with the statutory requirements, *and* that he will be unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep’t of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). “A court *must* dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner.” Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis added). Petitioner has failed to demonstrate good cause or actual prejudice.

A. Petitioner fails to show good cause for filing outside the statutory timeframe

“To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external impediment could be “that the factual or legal basis for a claim was not reasonably available to counsel, or that ‘some interference by officials’ made compliance impracticable.” Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

The Nevada Supreme Court has clarified that a defendant cannot attempt to manufacture good cause. See Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. at 236, 773 P.2d at 1230). Excuses such as the

1 lack of assistance of counsel when preparing a petition, as well as the failure of trial counsel
2 to forward a copy of the file to a petitioner have been found not to constitute good cause. See
3 Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by statute on other grounds as
4 recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State,
5 111 Nev. 335, 890 P.2d 797 (1995).

6 A petitioner raising good cause to excuse procedural bars must do so within a
7 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34
8 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see
9 generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably
10 available to the petitioner during the statutory time period did not constitute good cause to
11 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good
12 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446,
13 453 120 S. Ct. 1587, 1592 (2000).

14 The factual basis for Petitioner’s claims was available at the time he defaulted.
15 Petitioner has shown no good cause for failing to present his habeas claims earlier. He cites no
16 impediment external to the defense that prevented him from complying with the procedural
17 rules. He offers no cogent explanation for his years-long delay. The only attempt Petitioner
18 makes to explain the delay in filing is that he has “newly discovered evidence.” 8/25/21
19 Petition at 4; Memorandum at 1.

20 Petitioner asserts he only discovered the existence of Ahud Chaziz when he recently
21 read his PSI after having it in his prison cell since 2008: “After serving 16 year in the Nevada
22 Department of Corrections (NDOC), Petitioner was reviewing the PSI report that was prepared
23 by Parole and Probation.” Memorandum at 3. He “expresses his actual innocence with newly
24 discovered evidence of a [so-called co-defendant] he just recently learned about by reading a
25 ‘PSI’ report done by Parole and Probation, after Petitioner was found guilty, not during his
26 trial proceedings.” Id. at 8.

1 The record shows Petitioner knew of Mr. Chaziz much earlier than December 2021, so
2 Mr. Chaziz is not newly discovered evidence. Petitioner's PSI was completed on August 18,
3 2008. Id. The PSI identified Ahud Chaziz as co-defendant. Id. Counsel discussed the PSI with
4 Petitioner before sentencing on September 9, 2008. See Reporter's Transcript of Evidentiary
5 Hearing, filed November 13, 2012, at 68-69. Petitioner discussed Mr. Chaziz at the evidentiary
6 hearing. Id. at 151.

7 A document in Petitioner's possession for thirteen years cannot serve as "newly
8 discovered" evidence. A person that Petitioner wanted to subpoena in 2008 cannot serve as
9 "newly discovered" evidence. Because Mr. Chaziz is not newly discovered evidence, he
10 cannot serve as good cause for Petitioner failing to raise his claims earlier.

11 **B. Petitioner fails to present a valid claim of actual innocence**

12 Petitioner alleges he has presented a claim of actual innocence, based upon newly
13 discovered evidence, due to his review of his Presentence Investigation Report that was
14 prepared in 2008. 8/25/21 Petition, at 8. When a petitioner cannot demonstrate good cause, the
15 court may nonetheless excuse a procedural bar if the petitioner demonstrates that failure to
16 consider the petition would result in a fundamental miscarriage of justice. Pellegrini v.
17 State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). To demonstrate prejudice, a defendant
18 must show "not merely that the errors of [the proceeding] created possibility of prejudice, but
19 that they worked to his actual and substantial disadvantage, in affecting the state proceedings
20 with error of constitutional dimensions." Hogan v Warden, 109 Nev. at 960, 860 P.2d at 716
21 (internal quotation omitted), Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545.

22 "The conviction of a petitioner who was actually innocent would be a fundamental
23 miscarriage of justice sufficient to overcome the procedural bars to an untimely or successive
24 petition." Mitchell v. State, 122 Nev. 1269, 1273, 149 P.3d 33, 36 (2006). However, "actual
25 innocence means factual innocence, not mere legal insufficiency." Mitchell, 122 Nev. at
26 1273-74, 149 P.3d at 36 (quoting Bousley v. United States, 523 U.S. 614, 623-24, 118 S.Ct.
27 1604 (1998)). A fundamental miscarriage of justice requires "a colorable showing" that the
28

petitioner is “actually innocent of the crime.” Pellegrini, 117 Nev. at 887, 34 P.3d at 537. This requires that the petitioner present *new* evidence of his innocence. See, e.g., House v. Bell, 547 U.S. 518, 537, 126 S.Ct. 2064, 2077 (2006) (“a gateway claim requires ‘new reliable evidence—whether it is exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.’” (quoting Schlup v. Delo, 513 U.S. 298, 324, 115 S.Ct. 851, 865 (1995))). “Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim.” Schlup, 513 U.S. at 316, 115 S.Ct. at 861.

Petitioner cannot show that any alleged errors during the underlying proceedings disadvantaged him by their constitutional dimensions. He fails to identify new evidence of his innocence, nor does he show a constitutional violation resulted in a fundamental miscarriage of justice that worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.

1. Ahud Chaziz’ guilty plea

Petitioner says Ahud Chaziz pled guilty on March 16, 2009, to the crimes for which Petitioner was convicted. Memorandum at 1. He claims a constitutional right to all material in the Chaziz case in addition to his own. Id. at 5. He asserts a right to have introduced Chaziz at trial since the victims identified Chaziz as the unmasked assailant but did not identify Petitioner as one of the masked assailants. Id. at 6. He asserts a Brady violation because the State did not turn over Chaziz’ guilty plea, made six months after Petitioner’s trial. Id. Petitioner feels that if the jury had known one of several assailants would confess six months in the future, the jury would not have convicted Petitioner of being another of the assailants. Id.

The facts presented at trial and in the charging information show three men conspired to commit the crimes. See Information filed July 11, 2005. Petitioner wholly fails to demonstrate that the guilt of Mr. Chaziz as one of the three men in any way demonstrates

1 Petitioner's innocence of being another of the men. He also fails to demonstrate the State
2 committed any constitutional violation regarding Mr. Chaziz's existence, as his existence was
3 known to Petitioner and was not exculpatory. DNA evidence from Petitioner, not from Mr.
4 Chaziz, was found on the victim's vagina, on her breasts, and on her bedsheets. Therefore,
5 Petitioner cannot show prejudice.

6 **2. Joinder and severance**

7 Petitioner requested joinder at his 2012 evidentiary hearing, arguing Mr. Chaziza's case
8 should have been joined with his own so that Mr. Chaziza could have been compelled to testify
9 in Petitioner's favor.¹ See Reporter's Transcript of Evidentiary Hearing, filed November 13,
10 2012, at 151.

11 I know for a fact this is a problem that I'm having also with the, this guy
12 Chaziza, he could have cleared me. If me and him have the same case, if me
13 and him, if I was supposed to be with him and we supposed to be the guys
14 who knocked on the door, why wasn't we convicted together? Why wasn't
15 we together? Because I told my lawyer, I said hey, go and investigate him
16 because he can clear me. Once he [Mr. Chaziza] say that it wasn't me, then
it's gonna put a real big discrepancy in anything. But nobody chose to do
nothing about it.

17 Id.

18 The expectation that Mr. Chaziza could have been compelled to testify in Petitioner's
19 favor six months before he pled guilty himself ignores Mr. Chaziza's right to avoid self-
20 incrimination. Nonetheless, the fact Petitioner claimed his attorneys were ineffective for
21 failing to interview Mr. Chaziza indicates Petitioner knew of his existence. The State pointed
22 out that when Mr. Chaziza pled guilty after Petitioner's trial, he admitted to committing the
23 crimes with Petitioner, and that Mr. Chaziza was never accused of being the rapist. Id. at 154.
24 The Court held that "it's of no consequence to this Court either that defendant was concerned
25 or wanted to know why the co-defendant wasn't interviewed." Id. at 165.

26
27
28 ¹ The spelling of the co-defendant's name differs from document to document.

1 Petitioner laments the State never filed a severance to separate the trials of Petitioner
2 and Mr. Chaziza. See generally Memorandum. Petitioner complains the State failed to join
3 Petitioner and his co-defendant at trial, as Petitioner has a constitutional Fourteenth
4 Amendment right to severance. Memorandum at 2. Petitioner feels the State “hid” Mr. Chaziz
5 by assigning him a different case number. Id. at 11-12. As an initial matter, Mr. Chaziza never
6 went to trial. Secondly, the defense must file a severance if it wants defendants tried separately,
7 not the State. Finally, the two defendants were not indicted together so there was never an
8 opportunity nor a necessity to sever their trials.

9 Petitioner’s claim that his “right” to severance was compromised because the two
10 defendants were not joined makes little sense. Petitioner asks, “Why didn’t state’s prosecutor
11 hand over a severance to the Petitioner’s defense counsel when they had Ahud Chaziz in
12 custody for one and a half years?” Id. at 5. He asserts the State should have filed a “joinder of
13 severance and/or NRS 174.165 Relief from Prejudicial Joinder.” Id. at 4. He says “it do appear
14 that Petitioner was prejudiced by the State not joining [sic] nor filing severance in either court
15 to establish probable cause to suspect that a crime has been committed and that the Petitioner
16 committed it.” Id.

17 Petitioner also asserts severance was required where the State charges the crime of felon
18 in possession of a firearm. Id. He claims that since he “was charge with a firearm,” the State
19 violated his rights by hiding Chaziz, as NRS 174.165 thus entitled Petitioner to severance. Id.
20 He alleges the State should have produced Mr. Chaziz “with a severance.” Id. at 8. Petitioner
21 was not charged as a felon in possession of a weapon.

22 NRS 174.165 discusses severance, not mandatory joinder. Petitioner cites no authority
23 showing two defendants who commit a crime together must be tried together. This is fatal to
24 his claim that he had a right to be tried with Mr. Chaziz. A party seeking review bears the
25 responsibility “to cogently argue, and present relevant authority” to support his assertions.
26 Edwards v. Emperor’s Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38
27 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d
28

1 80, 83 (1991) (defendant's failure to present legal authority resulted in no reason for the district
2 court to consider defendant's claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987)
3 (an arguing party must support his arguments with relevant authority and cogent argument;
4 "issues not so presented need not be addressed"); Randall v. Salvation Army, 100 Nev. 466,
5 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation
6 to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d
7 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the
8 merits).

9 Because Petitioner does not show he was entitled to have his trial joined with that of
10 Mr. Chaziz, if Mr. Chaziz had had a trial, he cannot show prejudice sufficient to evade the
11 procedural bars. Petitioner's demand for joinder so he could receive severance does not clarify
12 matters.

13 3. DNA testing

14 Petitioner again asserts he was not permitted to test the DNA evidence against him.
15 Memorandum at 3, 7. See also 12/3/21 Petition at 9, 13. He wanted to test the DNA from the
16 victim to show it matched Mr. Chaziz's DNA, not the skin cells taken from Petitioner's mouth
17 via buccal swab. Id. at 7. Petitioner fails to explain how the State's having Mr. Chaziz in
18 custody increases the likelihood that the DNA match implicated Mr. Chaziz. He claims that
19 since Mr. Chaziz was in State's custody at some point, Petitioner should not have to meet the
20 burden to show this "newly discovered evidence probably would have resulted in acquittal."
21 Id. Petitioner feels the State "fabricated DNA and intentionally used all of it so Petitioner could
22 not independently test, which is a violation of constitutionality." Id. at 8.

23 This issue has been adjudicated by the Nevada Supreme Court and is now the law of
24 the case. See Order of Affirmance, Docket No. 52573, filed February 3, 2010, at 1 ("Because
25 Henderson's claim that the State did not preserve DNA material from each sample for defense
26 retesting is belied by the record, we conclude that the district court did not abuse its
27 discretion."); Order of Affirmance, Docket No. 62629, filed September 18, 2014, at 2 ("Thus,

1 appellant's claim that trial counsel failed to obtain a [DNA] expert is belied by the record.
2 Further, trial counsel testified that, based on the DNA expert's advice and determination that
3 the testing procedures were done correctly and that appellant was the source of the three
4 separate DNA samples, trial counsel decided not to retest the DNA.").

5 Because these claims have been addressed on their merits, they cannot provide
6 sufficient prejudice to evade the procedural bars.

7 **4. Miscellaneous Claims**

8 Petitioner cites Nevada Rules of Professional Conduct 1.18(2) (screening of potential
9 clients for conflicts) to assert that his attorneys avoided learning about Mr. Chaziz.
10 Memorandum at 9-10. He claims his attorneys violated Rule 3.4(a) (withholding evidence) by
11 failing to sever the two defendants. Id. at 10. The District Attorney's Office is also accused of
12 violating a handful of Nevada Rules of Professional Conduct, including Rules 1.3 (diligence),
13 3.3 (candor toward tribunal), 3.8 (responsibilities of prosecutors), 8.3 (reporting professional
14 misconduct), NRS 47.240 (conclusive presumptions), NRS 48.015 (relevant evidence), and
15 NRS 48.035 (excluding relevant evidence). Id. at 12-13.

16 In his other new habeas filing, Petitioner asserts his Miranda rights were violated when
17 the State swabbed his mouth pursuant to a subpoena without the presence of his attorney.
18 12/3/21 Petition at 8. He claims his conviction is "void" because the court lost jurisdiction
19 over him when his counsel was not present. Id. at 9, 10. He reads Miranda v. Arizona to assert
20 that he cannot face trial against DNA taken without an attorney. Id. at 10. Petitioner requests
21 relief from the "shameful-crafty intentional injustice" committed by the prosecutor, court, and
22 defense attorney. Id. at 11. Because "Petitioner was a convicted felon in the state of Nevada,"
23 he feels the State violated NRS 176.09123(3) by taking a DNA sample. Id. This claim ignores
24 NRS 176.09123(5) which allows a court to order a specimen. Furthermore, a cheek swab is
25 not an interrogation under Miranda.

26 Because these claims could have been raised on direct appeal, they are now waived.
27
28

1 **III. The Successive Petition is Barred by the Doctrine of Laches**

2 The instant Successive Petition is also barred by the doctrine of equitable laches. Hart
3 v. State, 116 Nev. 558, 1 P.3d 969 (2000). Under NRS 34.800,

4 1. A petition may be dismissed if delay in the filing of the petition:

5 (a) Prejudices the respondent or the State of Nevada in responding
6 to the petition, unless the petitioner shows that the petition is
7 based upon grounds of which the petitioner could not have had
8 knowledge by the exercise of reasonable diligence before the
9 circumstances prejudicial to the State occurred; or

10 (b) Prejudices the State of Nevada in its ability to conduct a retrial of
11 the petitioner, unless the petitioner demonstrates that a
12 fundamental miscarriage of justice has occurred in the
13 proceedings resulting in the judgment of conviction or sentence.

14 2. A period exceeding 5 years between the filing of a judgment of conviction,
15 an order imposing a sentence of imprisonment or a decision on direct appeal
16 of a judgment of conviction and the filing of a petition challenging the
17 validity of a judgment of conviction creates a rebuttable presumption of
18 prejudice to the State. In a motion to dismiss the petition based on that
19 prejudice, the respondent or the State of Nevada must specifically plead
20 laches. The petitioner must be given an opportunity to respond to the
21 allegations in the pleading before a ruling on the motion is made.

22 The Nevada Supreme Court has held that in applying the doctrine of laches to an
23 individual case, several factors should be considered, including, "(1) whether there was an
24 inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the
25 defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist
26 that prejudice the State." Hart, 116 Nev. at 563-64, 1 P.3d at 972.

27 Petitioner was found guilty in 2008, thirteen years ago. The facts supporting his claims
28 were known to him at the time of his direct appeal in 2008. The failure to raise the claims
earlier shows a knowing acquiescence to existing conditions. The delay between the judgment
of conviction on September 24, 2008 and the filing of the instant petitions is inexcusable.
Petitioner fails to provide any legitimate excuse for waiting to file this particular petition.

1 If the Court granted the Successive Petition, the State would suffer substantial
2 prejudice. The State would face extreme difficulty in locating witnesses to these crimes
3 thirteen years after they occurred. Even if the State were able to locate its witnesses again, it
4 is certain their recollections would be much less clear now than they were at trial in 2008. The
5 State may also not be able to re-gather evidence that may have been lost or destroyed because
6 of the lengthy passage of time. Therefore, the State would suffer significant prejudice if
7 Petitioner were allowed to overturn his conviction and head back to trial. As such, this Petition
8 is barred by the doctrine of equitable laches.

9 IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

10 Petitioner requests an evidentiary hearing to resolve his Petition. There is no need for
11 an evidentiary hearing because the Successive Petition can be summarily dismissed as
12 procedurally barred.

13 The Nevada Supreme Court has held that if a petition can be resolved without
14 expanding the record, no evidentiary hearing is necessary. NRS 34.770; Marshall v. State, 110
15 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002).
16 A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual
17 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled
18 by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove, 100 Nev. at
19 503, 686 P.2d at 225 (holding that “[a] defendant seeking post-conviction relief is not entitled
20 to an evidentiary hearing on factual allegations belied or repelled by the record”). “A claim is
21 ‘belied’ when it is contradicted or proven to be false by the record as it existed at the time the
22 claim was made.” Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

23 It is improper to hold an evidentiary hearing simply to make a complete record. See
24 State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) (“The
25 District Court considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted
26 ‘to make as complete a record as possible.’ This is an incorrect basis for an evidentiary
27 hearing.”). NRS 34.770 determines when a defendant is entitled to an evidentiary hearing:
28

- 1 1. The judge or justice, upon review of the return, answer and all supporting
2 documents which are filed, shall determine whether an evidentiary hearing
3 is required. A petitioner must not be discharged or committed to the custody
4 of a person other than the respondent *unless an evidentiary hearing is held*.
- 5 2. If the judge or justice determines that the petitioner is not entitled to relief
6 and an evidentiary hearing is not required, he shall dismiss the petition
7 without a hearing.
- 8 3. If the judge or justice determines that an evidentiary hearing is required,
9 he shall grant the writ and shall set a date for the hearing.

10 Further, the United States Supreme Court has held that an evidentiary hearing is not
11 required simply because counsel's actions are challenged as being unreasonable strategic
12 decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge
13 post hoc rationalization for counsel's decision making that contradicts the available evidence
14 of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis
15 for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain
16 issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing
17 Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the
18 *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466
19 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

20 Here, there is no need for an evidentiary hearing because the Petition can be summarily
21 dismissed as time-barred. Petitioner has failed to plead specific facts that could establish good
22 cause and prejudice to overcome the procedural bars. There is no need to expand the record to
23 establish this Petition was filed outside the statutorily-required timeframe. Further, a hearing
24 is not required to show Petitioner could have learned of Mr. Chaziz in 2008 by reading the
25 documents in his possession.

26 **ORDER**

27 THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus
28 (Post-Conviction) shall be, and it is, hereby denied.

DATED this ____ day of October, 2022.

Dated this 21st day of October, 2022

Bita Yeager

DISTRICT JUDGE

CFA 4B8 603B B8C1

Bita Yeager

District Court Judge

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

BY *Karen Misiiler*
KAREN MISIILER
Chief Deputy District Attorney
Nevada Bar #013730

km/appellate

1 **CSERV**

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3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 Joseph Henderson, Plaintiff(s)

CASE NO: A-21-840121-W

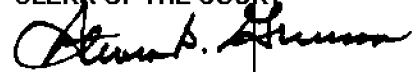
7 vs.

DEPT. NO. Department 1

8 Warden William Guttere,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 Electronic service was attempted through the Eighth Judicial District Court's
13 electronic filing system, but there were no registered users on the case. The filer has been
14 notified to serve all parties by traditional means.
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NEO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JOSEPH A. HENDERSON,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 05C212968

Dept No: I

**NOTICE OF ENTRY OF FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

PLEASE TAKE NOTICE that on October 21, 2022, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on October 27, 2022.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 27 day of October 2022, I served a copy of this Notice of Entry on the following:

☒ By e-mail:

Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☒ The United States mail addressed as follows:

Joseph Henderson # 67224
P.O. Box 650
Indian Springs, NV 89070

Julian Gregory
Special Public Defender
330 S. Third St., 8th Fl
Las Vegas, NV 89101

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

Heather S. Smith
CLERK OF THE COURT

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISILLER
Chief Deputy District Attorney
Nevada Bar #013730
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-

JOSEPH HENDERSON,
#1502730

Defendant.

CASE NO: A-21-840121-W
05C212968
DEPT NO: 1

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER**

DATE OF HEARING: AUGUST 25, 2022
TIME OF HEARING: 10:30 AM

THIS CAUSE having come on for hearing before the Honorable BITA YEAGER, District Judge, on the 2th day of August, 2022, the Petitioner not being present, proceeding in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through STACY KOLLINS, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On July 11, 2005, Joseph Henderson, (hereinafter "Petitioner") was charged by way of Information with the following: Count 1 – Conspiracy to Commit Burglary, Count 2 –

1 Burglary While in Possession of a Firearm, Count 3 – Conspiracy to Commit First Degree
2 Kidnapping, Counts 4 and 5 – First Degree Kidnapping With Use of a Deadly Weapon, Count
3 6 – Conspiracy to Commit Sexual Assault, Counts 7, 8, and 9 – Sexual Assault With Use of a
4 Deadly Weapon, Count 10 – Conspiracy to Commit Robbery, Counts 11 and 12 – Robbery
5 With Use of a Deadly Weapon, Count 13 – Open or Gross Lewdness, and Count 14 – Battery
6 With Use of a Deadly Weapon Resulting in Substantial Bodily Harm. On June 27, 2008, a jury
7 found Petitioner guilty of all counts.

8 On August 28, 2008, Petitioner was sentenced as follows: Count 1 – twelve months in
9 the Clark County Detention Center; Count 2 – sixty-two months to one hundred fifty-six
10 months in the Nevada Department of Corrections (“NDOC”), to run concurrent with Count 1;
11 Count 3 – twenty-four months to sixty months in the NDOC, to run consecutive to Count 2;
12 Count 4 – sixty months to life in the NDOC, plus an equal and consecutive term of sixty
13 months to life for the Use of a Deadly Weapon, to run consecutive to Count 3; Count 5 – sixty
14 months to life in the NDOC, plus an equal and consecutive term of sixty months to life for the
15 Use of a Deadly Weapon, to run consecutive to Count 4; Count 6 – twenty-four months to
16 sixty months in the NDOC, to run consecutive to Count 5; Count 7 – one hundred twenty
17 months to life in the NDOC, plus an equal and consecutive term of one hundred twenty months
18 to life for the Use of a Deadly Weapon, to run Concurrent with Count 6; Count 8 – one hundred
19 twenty months to life in the NDOC, plus an equal and consecutive term of one hundred twenty
20 months to life for the Use of a Deadly Weapon, to run Consecutive to Count 7; Count 9 – one
21 hundred twenty months to life in the NDOC, plus an equal and consecutive term of one
22 hundred twenty months to life for the Use of a Deadly Weapon, to run Consecutive to Count
23 8; Count 10 – twenty-four months to sixty months in the NDOC, to run consecutive to Count
24 9; Count 11 – seventy-two months to one hundred eighty months in the NDOC, plus an equal
25 and consecutive term of seventy-two months to one hundred eighty months for the Use of a
26 Deadly Weapon, to run concurrent with Count 10; Count 12 – seventy-two months to one
27 hundred eighty months in the NDOC, plus an equal and consecutive term of seventy-two
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1 months to one hundred eighty months for the Use of a Deadly Weapon, to run consecutive to
2 Count 11; Count 13 – twelve months in the Clark County Detention Center, to run concurrent
3 with Count 12; and Count 14 – sixty-two months to one hundred fifty-six months in the NDOC,
4 to run consecutive to Count 13. Petitioner received 1,251 days credit for time served. A special
5 sentence of lifetime supervision was imposed to commence upon release from any term of
6 imprisonment, probation or parole.

7 The Judgment of Conviction was filed September 24, 2008. Petitioner filed a Notice of
8 Appeal on October 9, 2008. The Nevada Supreme Court affirmed Defendant's conviction on
9 February 3, 2010. Remittitur issued on March 2, 2010.

10 Petitioner filed his pro per Petition for Writ of Habeas Corpus (Post-Conviction) on
11 January 11, 2011. Through counsel, Petitioner filed a supplemental petition on August 26,
12 2011. After an evidentiary hearing, the district court denied the petition on October 22, 2012.
13 The Findings of Fact, Conclusions of Law, and Order were filed on November 21, 2012.
14 Petitioner filed a Notice of Appeal on February 12, 2013. The Nevada Supreme Court affirmed
15 the denial of the writ on September 18, 2014. Remittitur issued on October 20, 2014.

16 Petitioner filed a pro per “Successive” Petition for Writ of Habeas Corpus on June 12,
17 2014. The district court denied this Successive Petition on December 2, 2014. Petitioner filed
18 a Notice of Appeal on December 11, 2014. The Nevada Supreme Court affirmed the denial of
19 the writ on September 11, 2015. Remittitur issued October 12, 2015.

20 On August 25, 2021, Petitioner filed a Petition for Writ of Habeas Corpus (Post-
21 Conviction) “Successive” “Newly Discovered Evidence” (hereinafter “8/25/21 Petition”), a
22 Memorandum in Support of “Successive” Writ of Habeas Corpus Petition (Newly Discovered
23 Evidence) (hereinafter “Memorandum”), and an Affidavit/Declaration requesting this Court
24 refrain from appointing him counsel. On October 11, 2021, he filed a Request for Evidentiary
25 Hearing (hereinafter “Request”). On December 3, 2021, he filed a Petition for Writ of Habeas
26 Corpus (Post-Conviction) Second Amended Petition Successive Newly Discovered Evidence
27 (hereinafter “12/2/21 Petition”). On December 23, 2021, Petitioner filed a Motion for
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1 Extension of Time, asking for an additional 45 days so he may hire an attorney. These filings
2 will be referred to collectively as the "Successive Petition." On January 7, 2022, the State filed
3 its Response. On August 25, 2022, this Court heard argument on the Successive Petition. This
4 Court denies the Successive Petition for the reasons stated as follows.

5 FACTUAL HISTORY

6 On the night of September 3, 2004, Dr. Eric Bernzweig ("Eric") and his fiancée, Julie
7 Kim ("Julie"), were sleeping at their residence located at 7833 Lonesome Harbor, Las Vegas,
8 Clark County, Nevada. At approximately 12:30 a.m. that night, an olive-skinned man rang the
9 doorbell. The olive-skinned man told Eric that he was his neighbor and that his son had thrown
10 his keys into Eric's backyard. The olive-skinned man asked if he could look for his keys in the
11 backyard. Eric closed and locked the front door and in effort to help his alleged neighbor, went
12 to the backyard, turned the lights on, and attempted to find the keys, to no avail. The olive-
13 skinned man then asked Eric if he could go to the backyard and look for the keys with him, at
14 which time Eric let him in and took him through his house to the backyard.

15 After not finding the keys in the backyard, the olive-skinned man told Eric he was going
16 to go to his car to get a flashlight to aid in the search for the keys. Eric went to his garage to
17 try to find a flashlight. Eric returned from the garage, to find the olive-skinned man in his
18 house with two masked Black male individuals, both wielding guns with laser sights. DNA
19 evidence eventually revealed Petitioner to be one of the masked intruders. The intruders tied
20 Julie's hands with plastic ties. They tried to tie Eric up with the plastic ties but when the plastic
21 ties did not fit, they handcuffed Eric instead, and took him to upstairs portion of the house.

22 The olive-skinned man demanded to know where Eric kept the safe. Eric told them that
23 he did not have a safe. In an attempt to appease the intruders, Eric gave them approximately a
24 thousand dollars in cash he had hidden in a closet. While the intruders were occupied, Eric
25 was able to get out of his handcuffs. He attempted to get downstairs, but was caught by one of
26 the masked intruders. While scuffling with one of the intruders, Eric was pistol-whipped two
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1 or three times, which split his head open. Eventually, the intruders tied Eric up with electrical
2 cords and left him to bleed on the floor.

3 While the olive-skinned man and the other masked intruder were looking for the safe
4 with Eric, Petitioner was downstairs with Julie. Petitioner held her at gunpoint, put a pair of
5 Eric's swim trunks over her head, put a cat toy in her mouth and threatened to kill her if she
6 screamed. He then began to fondle her, placed his mouth on her breasts and sexually assaulted
7 her by inserting his fingers into her vagina. He then forced Julie to spread her legs and sexually
8 assaulted her by inserting his penis in her vagina. Petitioner then took Julie upstairs to the
9 master bedroom, placed her face down on the bed and sexually assaulted her for a third time
10 by inserting his penis in her vagina.

11 Shortly after Petitioner's last sexual assault, the intruders tied up Julie's legs and left
12 the home. Julie worked her way loose and discovered Eric lying in a pool of blood. She untied
13 him and they went downstairs to call the police.

14 Julie was taken to University Medical Center, where she underwent a sexual assault
15 examination, which included the collection of buccal swabs, vaginal swabs, and breast swabs
16 from the area of her breasts where the Petitioner put his mouth. Additionally, crime scene
17 investigators collected, among other things, the top sheet and fitted sheet from the master
18 bedroom.

19 Las Vegas Metropolitan Police Department ("LVMPD") forensic scientist David
20 Welch was able to develop unknown male profile from the foreign DNA material detected on
21 the breast swabs of the victim. Welch also tested one of the vaginal swabs but was unable to
22 develop a profile from the vaginal swab. The DNA profile from the unknown male was
23 searched against the local DNA Index System and no matches were found. The DNA profile
24 was then uploaded to the National DNA Index System for comparison. Later, a CODIS match
25 was discovered and came back to Petitioner, who was already in custody for another matter.

26 LVMPD Detective Michael Jefferies obtained a search warrant for a buccal swab from
27 Petitioner, to confirm the DNA match was true and correct. In March 2005, LVMPD forensic
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1 scientist Kathy M. Guenther ("Guenther"), using the unknown male profile created by Welch
2 and the profile created from Petitioner's buccal swab, discovered a positive match or positive
3 comparison with Petitioner's DNA on all 13 locations used by LVMPD forensic scientist to
4 match DNA at the time. Under the statistical threshold set in the LVMPD laboratory, the
5 chances of a random selective sample to have the same profile was six hundred billion
6 (6,000,000,000) to one (1). Because six hundred billion is hundred times the earth's population
7 at the time, under laboratory standards identity is assumed. In March of 2005, Petitioner was
8 officially confirmed as the source of the foreign DNA material taken from Julie Kim body, at
9 which time he was arrested.

10 In July of 2005, the LVMPD forensic lab added two additional markers for DNA
11 matching, and now had 15 threshold points to match. Consequently, Guenther conducted
12 further DNA testing from Julie's sexual assault examination. Guenther re-profiled the
13 Petitioner known sample in order to compare his sample with the DNA testing of the rest of
14 the sexual assault examination kit. The testing included extractions from the buccal swab and
15 vaginal swabs from Julie, as well as the bed sheets removed from the bed in the master
16 bedroom, and the bathrobe found in the master bedroom. Semen with sufficient spermatozoa
17 was detected on one of the bedsheets (in two separate stains) and the vaginal swab. Once again,
18 Petitioner was found to be a complete match with the DNA profiles created by the extractions
19 from the soiled bedsheet and the vaginal swab.

20 21 ANALYSIS

22 **I. THE PETITION IS PROCEDURALLY BARRED**

23 The filings that constitute the Successive Petition are untimely, successive, and an
24 abuse of the writ. Petitioner fails to demonstrate good cause or sufficient prejudice to permit
25 him to evade the procedural bars. There are no facts which, if true, would entitle Petitioner to
26 relief, so no evidentiary hearing is required.

27 **A. The Petition is time-barred.**

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1 The Petition is time-barred pursuant to NRS 34.726(1):

2 Unless there is good cause shown for delay, a petition that challenges the
3 validity of a judgment or sentence must be filed within 1 year of the entry
4 of the judgment of conviction or, if an appeal has been taken from the
5 judgment, within 1 year after the Supreme Court issues its remittitur. For
6 the purposes of this subsection, good cause for delay exists if the petitioner
7 demonstrates to the satisfaction of the court:

- 8 (a) That the delay is not the fault of the petitioner; and
9 (b) That dismissal of the petition as untimely will unduly prejudice
10 the petitioner.

11 “[T]he Legislature has determined that one year provides sufficient time within which
12 to raise claims that trial and appellate counsel provided ineffective assistance.” Rippo v. State,
13 134 Nev. 411, 421, 423 P.3d 1084, 1097, amended on denial of reh'g, 432 P.3d 167 (Nev.
14 2018). The one-year time limit for preparing petitions for post-conviction relief under NRS
15 34.726 is strictly applied because the “procedural default rules ... are supposed to discourage
16 the perpetual filing of habeas petitions.” Rippo at 423, 423 P.3d at 1096.

17 The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain
18 meaning. Pellegrini v. State, 117 Nev. 860, 873 74, 34 P.3d 519, 528 (2001). As per the
19 language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from
20 the date the judgment of conviction is filed or a remittitur from a timely direct appeal is issued.
21 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133- 34 (1998).

22 The one-year time limit for preparing petitions for post-conviction relief under NRS
23 34.726 is strictly construed. In Gonzales v. State, the Nevada Supreme Court rejected a habeas
24 petition filed two days late despite evidence presented by the defendant that he purchased
25 postage through the prison and mailed the petition within the one-year time limit. 118 Nev.
26 590, 596, 53 P.3d 901, 904 (2002). In contrast with the short amount of time to file a notice of
27 appeal, a prisoner has a full year to file a post-conviction habeas petition, so there is no
28 injustice in a strict application of NRS 34.726(1), despite any alleged difficulties with the
postal system. Id. at 595, 53 P.3d at 903.

1 Remittitur from Petitioner's direct appeal issued on March 10, 2010. Petitioner had until
2 March 10, 2011, to file a timely petition for writ of habeas corpus. This Petition was filed on
3 August 25, 2021, more than eleven years after remittitur. Under NRS 34.726(1), this Petition
4 is untimely. Absent a showing of good cause to excuse this delay, the petition must be denied.

5 **B. The Petition Is Successive and an Abuse of the Writ**

6 Second or successive petitions include those that allege new or different grounds but a
7 judge or justice finds that the petitioner's failure to assert those grounds in a prior petition
8 would constitute an abuse of the writ. The Successive Petition is an abuse of the writ.

9 NRS 34.810(2) reads:

10 A second or successive petition must be dismissed if the judge or justice
11 determines that it fails to allege new or different grounds for relief and that the
12 prior determination was on the merits or, if new and different grounds are
13 alleged, the judge or justice finds that the failure of the petitioner to assert those
14 grounds in a prior petition constituted an abuse of the writ.

15 Second or successive petitions will only be decided on the merits if the petitioner can
16 show good cause and prejudice. NRS 34.810(3). The burden of proving specific facts that
17 show good cause for his failure to raise his claims earlier falls on the petitioner. NRS
18 34.810(3). Petitioner must also show actual prejudice. NRS 34.810(3).

19 The Nevada Supreme Court has stated: "Without such limitations on the availability of
20 post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-
21 conviction remedies. In addition, meritless, successive and untimely petitions clog the court
22 system and undermine the finality of convictions." Lozada v. State, 110 Nev. 349, 358, 871
23 P.2d 944, 950 (1994).

24 The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly
25 require a careful review of the record, successive petitions may be dismissed based solely on
26 the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In
27 other words, if the claim or allegation was previously available with reasonable diligence, it is
28 an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467,
497-98 (1991).

1 Petitioner has previously litigated two petitions for writ of habeas corpus. To the extent
2 Petitioner raises new or different claims from those raised before, the Petition is an abuse of
3 the writ. NRS 34.810(2). Petitioner himself recognizes his abuse of the writ, as the filings that
4 comprise the instant Petition are actually and correctly titled “successive.” The “newly-
5 discovered” evidence cited in the Petition has been in Petitioner’s possession since 2008. To
6 raise these claims now is abusive, as his claims could have been raised in his appeal or in his
7 first or second habeas petitions. NRS 34.810.

8 **C. These Claims Are Waived**

9 The Nevada Supreme Court has held that “challenges to the validity of a guilty plea and
10 claims of ineffective assistance of trial and appellate counsel must first be pursued in post-
11 conviction proceedings. . . . [A]ll other claims that are appropriate for a direct appeal must be
12 pursued on direct appeal, or they will be *considered waived in subsequent proceedings.*”
13 Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added)
14 (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). NRS
15 34.810(1)(b)(2) states “The court shall dismiss a petition if the court determines that . . . the
16 petitioner’s conviction was the result of a trial and the grounds for the petition could have been
17 . . . raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction
18 relief.”

19 Petitioner’s claim in the 8/25/21 filing concerns a co-defendant who was arrested and
20 charged after Petitioner. The co-defendant was identified in Petitioner’s Presentence
21 Investigation Report (“PSI”). See Motion to Amend Petition: NRS 34.724 Exhibit “A” Added
22 Only, filed October 11, 2021, at 8. That page shows it was faxed on August 27, 2008.

23 Petitioner was clearly aware of the PSI prepared in 2008, as his attorney, in his presence,
24 referred to the PSI during the sentencing hearing on August 28, 2008. See generally Reporter’s
25 Transcript of Sentencing, filed November 7, 2008. “I just wanted to point out there is an error
26 on the PSI report, but my client would still like to go forward today with sentencing.” Id. at 2.
27 His attorney also acknowledged receiving a supplemental PSI that corrected Petitioner’s
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1 asserted error. Id. at 12. Petitioner's attorney affirmed to the Court that she provided both PSI
2 reports to Petitioner. Id. at 13.

3 Rather than assert the confession of his co-defendant meant Petitioner could not also
4 have been a participant, as he does here, Petitioner argued at sentencing that "The police
5 framed me. I mean, either the police, somebody had to frame me. I was framed." Id. at 8.
6 Petitioner's counsel, rather than arguing that her client could not have been the man who left
7 his DNA on the victim, merely urged the Court to "not be persuaded by this one victim's
8 experience." Id. at 11-12. As miserable as being raped at gunpoint while her fiancé was pistol-
9 whipped and her home invaded must have been for the victim, Petitioner's attorney claimed
10 "it certainly could have been worse." Id. Counsel did not, however, assert the co-defendant's
11 very existence exonerated her client.

12 The existence of Mr. Chaziz is not newly discovered. His status as a co-defendant was
13 brought to Petitioner's attention prior to sentencing. Any claim regarding this person could
14 have been raised on direct appeal, or in either of Petitioner's previous habeas petitions. Since
15 Petitioner did not raise any claims concerning his co-defendant on appeal, the issue is now
16 waived, more than a decade later.

17 The claims in the 12/2/21 Petition are also waived. In that filing, Petitioner raises
18 substantive claims of Fourth and Fifth Amendment violations. Because the facts related to
19 these claims were available to Petitioner at the time of his direct appeal in 2008, the claims are
20 waived now. On appeal, Petitioner asserted the State consumed all available DNA material.
21 The Nevada Supreme Court held this claim was belied by the record. See Order of Affirmance,
22 Docket No. 52573, filed February 3, 3010, at 1. Petitioner claimed the trial court's denial of
23 his motion to preclude improper use of DNA evidence prejudiced him, but the Supreme Court
24 held that no improper DNA evidence or argument was presented to the jury. Id. at 2. Petitioner
25 did not claim, as he does here, that his due process rights were violated because his attorney
26 was not present when a cotton swab collected DNA from inside his cheek. Because Petitioner
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1 knew his attorney was not present for DNA collection at the time of the collection, this claim
2 is waived for failure to raise it on direct appeal.

3 **D. Application of the procedural bars is mandatory.**

4 The Nevada Supreme Court has held that courts have a *duty* to consider whether a
5 defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial
6 Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found
7 that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions
8 is mandatory," noting:

9 Habeas corpus petitions that are filed many years after conviction are an
10 unreasonable burden on the criminal justice system. The necessity for a
11 workable system dictates that there must exist a time when a criminal
12 conviction is final.

13 Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court]
14 when properly raised by the State." Id. at 233, 112 P.3d at 1075. Ignoring these procedural
15 bars is an arbitrary and unreasonable exercise of discretion. Id. at 234, 112 P.3d at 1076. The
16 Nevada Supreme Court has granted no discretion to the district courts regarding whether to
17 apply the statutory procedural bars; the rules *must* be applied.

18 This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013).
19 There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of
20 the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307
21 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's
22 petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The
23 procedural bars are so fundamental to the post-conviction process that they must be applied
24 by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.
25 Parties cannot stipulate to waive the procedural default rules. State v. Haberstroh, 119 Nev.
26 173, 180-81, 69 P.3d 676, 681-82 (2003).

II. THE PETITION FAILS TO DEMONSTRATE GOOD CAUSE OR ACTUAL PREJUDICE

To avoid procedural default, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or to otherwise comply with the statutory requirements, *and* that he will be unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). “A court *must* dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner.” Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis added). Petitioner has failed to demonstrate good cause or actual prejudice.

A. Petitioner fails to show good cause for filing outside the statutory timeframe

“To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external impediment could be “that the factual or legal basis for a claim was not reasonably available to counsel, or that ‘some interference by officials’ made compliance impracticable.” Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

The Nevada Supreme Court has clarified that a defendant cannot attempt to manufacture good cause. See Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. at 236, 773 P.2d at 1230). Excuses such as the

1 lack of assistance of counsel when preparing a petition, as well as the failure of trial counsel
2 to forward a copy of the file to a petitioner have been found not to constitute good cause. See
3 Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by statute on other grounds as
4 recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State,
5 111 Nev. 335, 890 P.2d 797 (1995).

6 A petitioner raising good cause to excuse procedural bars must do so within a
7 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34
8 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see
9 generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably
10 available to the petitioner during the statutory time period did not constitute good cause to
11 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good
12 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446,
13 453 120 S. Ct. 1587, 1592 (2000).

14 The factual basis for Petitioner’s claims was available at the time he defaulted.
15 Petitioner has shown no good cause for failing to present his habeas claims earlier. He cites no
16 impediment external to the defense that prevented him from complying with the procedural
17 rules. He offers no cogent explanation for his years-long delay. The only attempt Petitioner
18 makes to explain the delay in filing is that he has “newly discovered evidence.” 8/25/21
19 Petition at 4; Memorandum at 1.

20 Petitioner asserts he only discovered the existence of Ahud Chaziz when he recently
21 read his PSI after having it in his prison cell since 2008: “After serving 16 year in the Nevada
22 Department of Corrections (NDOC), Petitioner was reviewing the PSI report that was prepared
23 by Parole and Probation.” Memorandum at 3. He “expresses his actual innocence with newly
24 discovered evidence of a [so-called co-defendant] he just recently learned about by reading a
25 ‘PSI’ report done by Parole and Probation, after Petitioner was found guilty, not during his
26 trial proceedings.” Id. at 8.

1 The record shows Petitioner knew of Mr. Chaziz much earlier than December 2021, so
2 Mr. Chaziz is not newly discovered evidence. Petitioner's PSI was completed on August 18,
3 2008. Id. The PSI identified Ahud Chaziz as co-defendant. Id. Counsel discussed the PSI with
4 Petitioner before sentencing on September 9, 2008. See Reporter's Transcript of Evidentiary
5 Hearing, filed November 13, 2012, at 68-69. Petitioner discussed Mr. Chaziz at the evidentiary
6 hearing. Id. at 151.

7 A document in Petitioner's possession for thirteen years cannot serve as "newly
8 discovered" evidence. A person that Petitioner wanted to subpoena in 2008 cannot serve as
9 "newly discovered" evidence. Because Mr. Chaziz is not newly discovered evidence, he
10 cannot serve as good cause for Petitioner failing to raise his claims earlier.

11 **B. Petitioner fails to present a valid claim of actual innocence**

12 Petitioner alleges he has presented a claim of actual innocence, based upon newly
13 discovered evidence, due to his review of his Presentence Investigation Report that was
14 prepared in 2008. 8/25/21 Petition, at 8. When a petitioner cannot demonstrate good cause, the
15 court may nonetheless excuse a procedural bar if the petitioner demonstrates that failure to
16 consider the petition would result in a fundamental miscarriage of justice. Pellegrini v.
17 State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). To demonstrate prejudice, a defendant
18 must show "not merely that the errors of [the proceeding] created possibility of prejudice, but
19 that they worked to his actual and substantial disadvantage, in affecting the state proceedings
20 with error of constitutional dimensions." Hogan v Warden, 109 Nev. at 960, 860 P.2d at 716
21 (internal quotation omitted), Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545.

22 "The conviction of a petitioner who was actually innocent would be a fundamental
23 miscarriage of justice sufficient to overcome the procedural bars to an untimely or successive
24 petition." Mitchell v. State, 122 Nev. 1269, 1273, 149 P.3d 33, 36 (2006). However, "actual
25 innocence means factual innocence, not mere legal insufficiency." Mitchell, 122 Nev. at
26 1273-74, 149 P.3d at 36 (quoting Bousley v. United States, 523 U.S. 614, 623-24, 118 S.Ct.
27 1604 (1998)). A fundamental miscarriage of justice requires "a colorable showing" that the
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petitioner is “actually innocent of the crime.” Pellegrini, 117 Nev. at 887, 34 P.3d at 537. This requires that the petitioner present *new* evidence of his innocence. See, e.g., House v. Bell, 547 U.S. 518, 537, 126 S.Ct. 2064, 2077 (2006) (“a gateway claim requires ‘new reliable evidence—whether it is exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.’” (quoting Schlup v. Delo, 513 U.S. 298, 324, 115 S.Ct. 851, 865 (1995))). “Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim.” Schlup, 513 U.S. at 316, 115 S.Ct. at 861.

Petitioner cannot show that any alleged errors during the underlying proceedings disadvantaged him by their constitutional dimensions. He fails to identify new evidence of his innocence, nor does he show a constitutional violation resulted in a fundamental miscarriage of justice that worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.

1. Ahud Chaziz’ guilty plea

Petitioner says Ahud Chaziz pled guilty on March 16, 2009, to the crimes for which Petitioner was convicted. Memorandum at 1. He claims a constitutional right to all material in the Chaziz case in addition to his own. Id. at 5. He asserts a right to have introduced Chaziz at trial since the victims identified Chaziz as the unmasked assailant but did not identify Petitioner as one of the masked assailants. Id. at 6. He asserts a Brady violation because the State did not turn over Chaziz’ guilty plea, made six months after Petitioner’s trial. Id. Petitioner feels that if the jury had known one of several assailants would confess six months in the future, the jury would not have convicted Petitioner of being another of the assailants. Id.

The facts presented at trial and in the charging information show three men conspired to commit the crimes. See Information filed July 11, 2005. Petitioner wholly fails to demonstrate that the guilt of Mr. Chaziz as one of the three men in any way demonstrates

1 Petitioner's innocence of being another of the men. He also fails to demonstrate the State
2 committed any constitutional violation regarding Mr. Chaziz's existence, as his existence was
3 known to Petitioner and was not exculpatory. DNA evidence from Petitioner, not from Mr.
4 Chaziz, was found on the victim's vagina, on her breasts, and on her bedsheets. Therefore,
5 Petitioner cannot show prejudice.

6 **2. Joinder and severance**

7 Petitioner requested joinder at his 2012 evidentiary hearing, arguing Mr. Chaziza's case
8 should have been joined with his own so that Mr. Chaziza could have been compelled to testify
9 in Petitioner's favor.¹ See Reporter's Transcript of Evidentiary Hearing, filed November 13,
10 2012, at 151.

11 I know for a fact this is a problem that I'm having also with the, this guy
12 Chaziza, he could have cleared me. If me and him have the same case, if me
13 and him, if I was supposed to be with him and we supposed to be the guys
14 who knocked on the door, why wasn't we convicted together? Why wasn't
15 we together? Because I told my lawyer, I said hey, go and investigate him
16 because he can clear me. Once he [Mr. Chaziza] say that it wasn't me, then
it's gonna put a real big discrepancy in anything. But nobody chose to do
nothing about it.

17 Id.

18 The expectation that Mr. Chaziza could have been compelled to testify in Petitioner's
19 favor six months before he pled guilty himself ignores Mr. Chaziza's right to avoid self-
20 incrimination. Nonetheless, the fact Petitioner claimed his attorneys were ineffective for
21 failing to interview Mr. Chaziza indicates Petitioner knew of his existence. The State pointed
22 out that when Mr. Chaziza pled guilty after Petitioner's trial, he admitted to committing the
23 crimes with Petitioner, and that Mr. Chaziza was never accused of being the rapist. Id. at 154.
24 The Court held that "it's of no consequence to this Court either that defendant was concerned
25 or wanted to know why the co-defendant wasn't interviewed." Id. at 165.

26
27
28 ¹ The spelling of the co-defendant's name differs from document to document.

1 Petitioner laments the State never filed a severance to separate the trials of Petitioner
2 and Mr. Chaziza. See generally Memorandum. Petitioner complains the State failed to join
3 Petitioner and his co-defendant at trial, as Petitioner has a constitutional Fourteenth
4 Amendment right to severance. Memorandum at 2. Petitioner feels the State “hid” Mr. Chaziz
5 by assigning him a different case number. Id. at 11-12. As an initial matter, Mr. Chaziza never
6 went to trial. Secondly, the defense must file a severance if it wants defendants tried separately,
7 not the State. Finally, the two defendants were not indicted together so there was never an
8 opportunity nor a necessity to sever their trials.

9 Petitioner’s claim that his “right” to severance was compromised because the two
10 defendants were not joined makes little sense. Petitioner asks, “Why didn’t state’s prosecutor
11 hand over a severance to the Petitioner’s defense counsel when they had Ahud Chaziz in
12 custody for one and a half years?” Id. at 5. He asserts the State should have filed a “joinder of
13 severance and/or NRS 174.165 Relief from Prejudicial Joinder.” Id. at 4. He says “it do appear
14 that Petitioner was prejudiced by the State not joining [sic] nor filing severance in either court
15 to establish probable cause to suspect that a crime has been committed and that the Petitioner
16 committed it.” Id.

17 Petitioner also asserts severance was required where the State charges the crime of felon
18 in possession of a firearm. Id. He claims that since he “was charge with a firearm,” the State
19 violated his rights by hiding Chaziz, as NRS 174.165 thus entitled Petitioner to severance. Id.
20 He alleges the State should have produced Mr. Chaziz “with a severance.” Id. at 8. Petitioner
21 was not charged as a felon in possession of a weapon.

22 NRS 174.165 discusses severance, not mandatory joinder. Petitioner cites no authority
23 showing two defendants who commit a crime together must be tried together. This is fatal to
24 his claim that he had a right to be tried with Mr. Chaziz. A party seeking review bears the
25 responsibility “to cogently argue, and present relevant authority” to support his assertions.
26 Edwards v. Emperor’s Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38
27 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d
28

1 80, 83 (1991) (defendant's failure to present legal authority resulted in no reason for the district
2 court to consider defendant's claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987)
3 (an arguing party must support his arguments with relevant authority and cogent argument;
4 "issues not so presented need not be addressed"); Randall v. Salvation Army, 100 Nev. 466,
5 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation
6 to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d
7 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the
8 merits).

9 Because Petitioner does not show he was entitled to have his trial joined with that of
10 Mr. Chaziz, if Mr. Chaziz had had a trial, he cannot show prejudice sufficient to evade the
11 procedural bars. Petitioner's demand for joinder so he could receive severance does not clarify
12 matters.

13 3. DNA testing

14 Petitioner again asserts he was not permitted to test the DNA evidence against him.
15 Memorandum at 3, 7. See also 12/3/21 Petition at 9, 13. He wanted to test the DNA from the
16 victim to show it matched Mr. Chaziz's DNA, not the skin cells taken from Petitioner's mouth
17 via buccal swab. Id. at 7. Petitioner fails to explain how the State's having Mr. Chaziz in
18 custody increases the likelihood that the DNA match implicated Mr. Chaziz. He claims that
19 since Mr. Chaziz was in State's custody at some point, Petitioner should not have to meet the
20 burden to show this "newly discovered evidence probably would have resulted in acquittal."
21 Id. Petitioner feels the State "fabricated DNA and intentionally used all of it so Petitioner could
22 not independently test, which is a violation of constitutionality." Id. at 8.

23 This issue has been adjudicated by the Nevada Supreme Court and is now the law of
24 the case. See Order of Affirmance, Docket No. 52573, filed February 3, 2010, at 1 ("Because
25 Henderson's claim that the State did not preserve DNA material from each sample for defense
26 retesting is belied by the record, we conclude that the district court did not abuse its
27 discretion."); Order of Affirmance, Docket No. 62629, filed September 18, 2014, at 2 ("Thus,

1 appellant's claim that trial counsel failed to obtain a [DNA] expert is belied by the record.
2 Further, trial counsel testified that, based on the DNA expert's advice and determination that
3 the testing procedures were done correctly and that appellant was the source of the three
4 separate DNA samples, trial counsel decided not to retest the DNA.").

5 Because these claims have been addressed on their merits, they cannot provide
6 sufficient prejudice to evade the procedural bars.

7 **4. Miscellaneous Claims**

8 Petitioner cites Nevada Rules of Professional Conduct 1.18(2) (screening of potential
9 clients for conflicts) to assert that his attorneys avoided learning about Mr. Chaziz.
10 Memorandum at 9-10. He claims his attorneys violated Rule 3.4(a) (withholding evidence) by
11 failing to sever the two defendants. Id. at 10. The District Attorney's Office is also accused of
12 violating a handful of Nevada Rules of Professional Conduct, including Rules 1.3 (diligence),
13 3.3 (candor toward tribunal), 3.8 (responsibilities of prosecutors), 8.3 (reporting professional
14 misconduct), NRS 47.240 (conclusive presumptions), NRS 48.015 (relevant evidence), and
15 NRS 48.035 (excluding relevant evidence). Id. at 12-13.

16 In his other new habeas filing, Petitioner asserts his Miranda rights were violated when
17 the State swabbed his mouth pursuant to a subpoena without the presence of his attorney.
18 12/3/21 Petition at 8. He claims his conviction is "void" because the court lost jurisdiction
19 over him when his counsel was not present. Id. at 9, 10. He reads Miranda v. Arizona to assert
20 that he cannot face trial against DNA taken without an attorney. Id. at 10. Petitioner requests
21 relief from the "shameful-crafty intentional injustice" committed by the prosecutor, court, and
22 defense attorney. Id. at 11. Because "Petitioner was a convicted felon in the state of Nevada,"
23 he feels the State violated NRS 176.09123(3) by taking a DNA sample. Id. This claim ignores
24 NRS 176.09123(5) which allows a court to order a specimen. Furthermore, a cheek swab is
25 not an interrogation under Miranda.

26 Because these claims could have been raised on direct appeal, they are now waived.
27
28

1 **III. The Successive Petition is Barred by the Doctrine of Laches**

2 The instant Successive Petition is also barred by the doctrine of equitable laches. Hart
3 v. State, 116 Nev. 558, 1 P.3d 969 (2000). Under NRS 34.800,

4 1. A petition may be dismissed if delay in the filing of the petition:

5 (a) Prejudices the respondent or the State of Nevada in responding
6 to the petition, unless the petitioner shows that the petition is
7 based upon grounds of which the petitioner could not have had
8 knowledge by the exercise of reasonable diligence before the
9 circumstances prejudicial to the State occurred; or

10 (b) Prejudices the State of Nevada in its ability to conduct a retrial of
11 the petitioner, unless the petitioner demonstrates that a
12 fundamental miscarriage of justice has occurred in the
13 proceedings resulting in the judgment of conviction or sentence.

14 2. A period exceeding 5 years between the filing of a judgment of conviction,
15 an order imposing a sentence of imprisonment or a decision on direct appeal
16 of a judgment of conviction and the filing of a petition challenging the
17 validity of a judgment of conviction creates a rebuttable presumption of
18 prejudice to the State. In a motion to dismiss the petition based on that
19 prejudice, the respondent or the State of Nevada must specifically plead
20 laches. The petitioner must be given an opportunity to respond to the
21 allegations in the pleading before a ruling on the motion is made.

22 The Nevada Supreme Court has held that in applying the doctrine of laches to an
23 individual case, several factors should be considered, including, "(1) whether there was an
24 inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the
25 defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist
26 that prejudice the State." Hart, 116 Nev. at 563-64, 1 P.3d at 972.

27 Petitioner was found guilty in 2008, thirteen years ago. The facts supporting his claims
28 were known to him at the time of his direct appeal in 2008. The failure to raise the claims
earlier shows a knowing acquiescence to existing conditions. The delay between the judgment
of conviction on September 24, 2008 and the filing of the instant petitions is inexcusable.
Petitioner fails to provide any legitimate excuse for waiting to file this particular petition.

1 If the Court granted the Successive Petition, the State would suffer substantial
2 prejudice. The State would face extreme difficulty in locating witnesses to these crimes
3 thirteen years after they occurred. Even if the State were able to locate its witnesses again, it
4 is certain their recollections would be much less clear now than they were at trial in 2008. The
5 State may also not be able to re-gather evidence that may have been lost or destroyed because
6 of the lengthy passage of time. Therefore, the State would suffer significant prejudice if
7 Petitioner were allowed to overturn his conviction and head back to trial. As such, this Petition
8 is barred by the doctrine of equitable laches.

9 **IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

10 Petitioner requests an evidentiary hearing to resolve his Petition. There is no need for
11 an evidentiary hearing because the Successive Petition can be summarily dismissed as
12 procedurally barred.

13 The Nevada Supreme Court has held that if a petition can be resolved without
14 expanding the record, no evidentiary hearing is necessary. NRS 34.770; Marshall v. State, 110
15 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002).
16 A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual
17 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled
18 by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove, 100 Nev. at
19 503, 686 P.2d at 225 (holding that “[a] defendant seeking post-conviction relief is not entitled
20 to an evidentiary hearing on factual allegations belied or repelled by the record”). “A claim is
21 ‘belied’ when it is contradicted or proven to be false by the record as it existed at the time the
22 claim was made.” Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

23 It is improper to hold an evidentiary hearing simply to make a complete record. See
24 State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) (“The
25 District Court considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted
26 ‘to make as complete a record as possible.’ This is an incorrect basis for an evidentiary
27 hearing.”). NRS 34.770 determines when a defendant is entitled to an evidentiary hearing:
28

- 1 1. The judge or justice, upon review of the return, answer and all supporting
2 documents which are filed, shall determine whether an evidentiary hearing
3 is required. A petitioner must not be discharged or committed to the custody
4 of a person other than the respondent *unless an evidentiary hearing is held*.
- 5 2. If the judge or justice determines that the petitioner is not entitled to relief
6 and an evidentiary hearing is not required, he shall dismiss the petition
7 without a hearing.
- 8 3. If the judge or justice determines that an evidentiary hearing is required,
9 he shall grant the writ and shall set a date for the hearing.

10 Further, the United States Supreme Court has held that an evidentiary hearing is not
11 required simply because counsel's actions are challenged as being unreasonable strategic
12 decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge
13 post hoc rationalization for counsel's decision making that contradicts the available evidence
14 of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis
15 for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain
16 issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing
17 Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the
18 *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466
19 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

20 Here, there is no need for an evidentiary hearing because the Petition can be summarily
21 dismissed as time-barred. Petitioner has failed to plead specific facts that could establish good
22 cause and prejudice to overcome the procedural bars. There is no need to expand the record to
23 establish this Petition was filed outside the statutorily-required timeframe. Further, a hearing
24 is not required to show Petitioner could have learned of Mr. Chaziz in 2008 by reading the
25 documents in his possession.

26 **ORDER**

27 THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus
28 (Post-Conviction) shall be, and it is, hereby denied.

DATED this ____ day of October, 2022.

Dated this 21st day of October, 2022

Bita Yeager

DISTRICT JUDGE

CFA 4B8 603B B8C1

Bita Yeager

District Court Judge

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

BY *Karen Misiiler*
KAREN MISIILER
Chief Deputy District Attorney
Nevada Bar #013730

km/appellate

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Joseph Henderson, Plaintiff(s)

CASE NO: A-21-840121-W

7 vs.

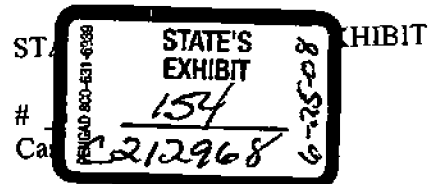
DEPT. NO. Department 1

8 Warden William Guttere,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 Electronic service was attempted through the Eighth Judicial District Court's
13 electronic filing system, but there were no registered users on the case. The filer has been
14 notified to serve all parties by traditional means.
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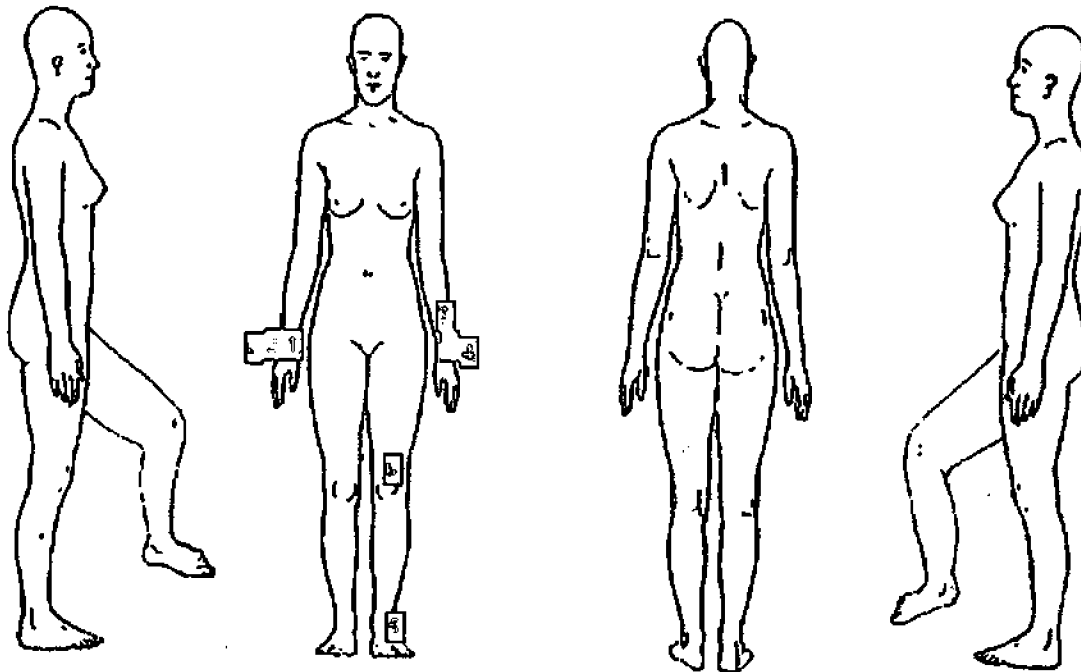
DOCUMENTARY EXHIBITS



ROSE HEART INC.

Case #
040903-0158

Body Graphic



Jurisdiction: LVMPD

ST/ A

Case
STATES
EXHIBIT
156
312965
EXHIBIT

DNA Summary Chart

Victim Julie C. Kim
Event # 04 0903-0152

	Sample [✓]	Sample [EX]	Sample [✓]
	Julie C. Kim Buccal Swabs	Neck/Breast Swab Julie C. Kim	Joseph Henderson Buccal Swabs
D3S1358	15,16	15,17	15,17
vWA	14,18	15,19	15,19
FGA	19,23	23,27	23,27
AMELO	X,X	X,Y	X,Y
D8S1179	13,14	12,12	12,12
D21S11	30,30	27,27	27,27
D18S51	14,18	15,16	15,16
D5S818	10,11	11,13	11,13
D13S317	10,11	11,12	11,12
D7S820	11,12	11,11	11,11
D16S539	9,11	9,10	9,10
TH01	7,9	8,9,3	8,9,3
TPOX	8,12	10,11	10,11
CSF1PO	10,12	11,12	11,12
Pop Stats		<1 in 600 Billion	

Profile Generated 11/16/2004 Profile Generated 11/16/2004 Profile Generated 07/25/05
[✓]Sufficient Sample for Retest [EX] Extract Only for Retest 03/19 KMG



DNA Summary Chart

Victim Julie C. Kim
Event # 04 0903-0152

	Sample [✓]	Sample [✓]	Sample [✓]	Sample [✓]
	Julie C. Kim Buccal Swabs	Vaginal swab-male contributor	Top Bed sheet-male contributor	Joseph Henderson Buccal Swabs
D3S1358	15,16	15,17	15,17	15,17
VWA	14,18	15,19	15,19	15,19
FGA	19,23	below threshold	23,27	23,27
AMELO	X,X	X,Y	X,Y	X,Y
D8S1179	13,14	12,12	12,12	12,12
D21S11	30,30	27,27	27,27	27,27
D18S51	14,18	15,16	15,16	15,16
D5S818	10,11	11,13	11,13	11,13
D13S317	10,11	below threshold	11,12	11,12
D7S820	11,12	11,11	11,11	11,11
D16S539	9,11	9,10	9,10	9,10
TH01	7,9	8,9,3	8,9,3	8,9,3
TPOX	8,12	10,11	10,11	10,11
CSF1PO	10,12	11,12	11,12	11,12
D2S1338	17,24	20,24	20,24	20,24
D19S433	13,16.2	13,15.2	13,15.2	13,15.2
Pop Stats		<1 in 600 Billion	<1 in 600 Billion	

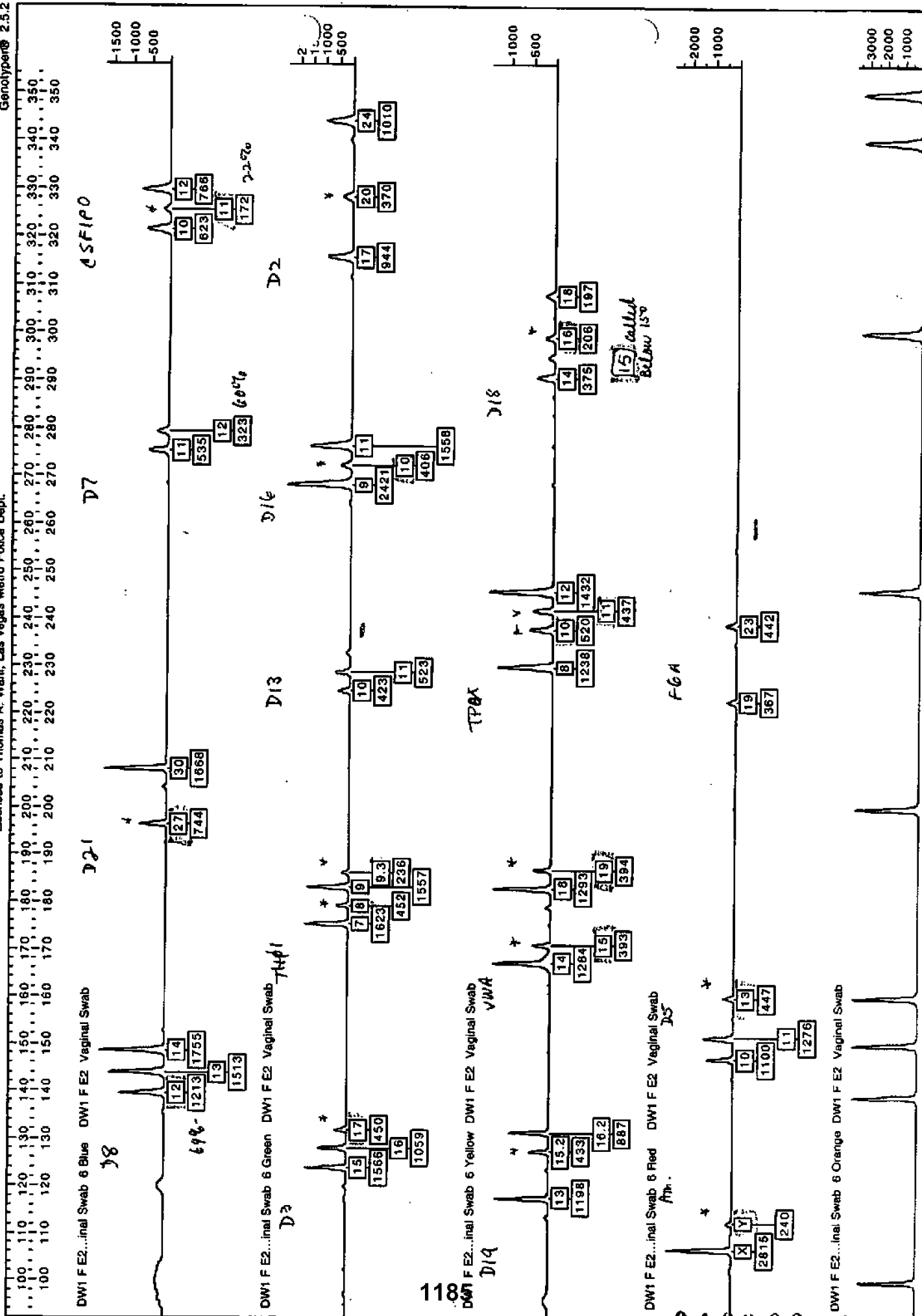
Profile Generated 07/25/05 Profile Generated 07/25/05 Profile Generated 07/25/05 Profile Generated 07/25/05

[✓] Sufficient Sample for Retest

[EX] Extract Only for Retest

Identifier Loci added

C 812968
 MARKE
 DEFT'S
 DEFENDANT'S
 EXHIBIT
 4
 C 812968
 6-27-0
 ON



~~the~~ DNA profile from the breast swab is found in fewer than 1 in 600 Billion individuals
040903-01512 (Originally logged
debris Reel - in as

Assault: 9/3/04

Began Testing: 10/30/04

Completed: 11/15/04

Report written 11/16/04

Report distributed 12/21/04

A. Consent Form

B. Assault info

C. Drawings

D. Blood samples

E. Buccal swab standards - km

F. vag. swabs AP+, P30+, sperm \Rightarrow km

G. rectal swabs AP-

H. oral swabs AP-

I. debris / underwear / sections

- breast swabs - unknown male

- send copies of protocols to Harry

- Feb 2005 - Joseph Henderson hit in CODIS

- CA confirmed his match via re-test

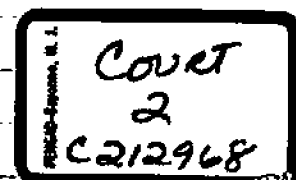
- Mar 21, 2005 \Rightarrow re-test of sample

- July 25, 2005 supplemental DNA report from Kathy

- semen on bed sheets (top & bottom)

- mixed vaginal swab

- David's match



Feb 16, 2005 - CODIS match memo sent
to CA by Kathy (best swab profile list
against Henderson)
Kathy (2 in felon profile at
the time)

March 18, 2005 - request from - 93,000 cases
Det Wilds to analyze swab from Henderson

- March 19 - report written
- Mar 21 - report distributed
- Henderson matches best swab sample

- veg swab extracted 7/1/05
- 7/13/05 - extracted Julie Kim (swab swab)
- 1/20/05 - ran Identifier on Joseph Henderson

Cauc	1 in	36	Quadrillion	} 71 in 6.00 billion
Blk	1 in	2.1	Quadrillion	
SEA	1 in	98	Quadrillion	
SWH	1 in	483	Quadrillion	

- 13 loci used in case for veg
swab stats. D13S317 & FGA excluded

topsheet
semen (P)

7/23/05 - extracted 2 semen stains from
topsheet independently

all 15 loci

Cauc	1 in	20.5	Quadrillion
Blk	1 in	979	Quadrillion
SEA	1 in	35	Quadrillion
SWH	1 in	2.77	Quadrillion

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1188 - 1201
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U.S. MAIL**

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CONTINUES
IN NEXT
VOLUME**

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: 05C212968

Docket No: 85367

RECORD ON APPEAL VOLUME 4

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(a) Ground Five: Petitioner was deprived of his right to Confrontation and Compulsory process in violation of his 6th and 14th amendment rights under the U.S. Constitution

Supporting FACTS (Tell your story briefly without citing cases or law.):

(b) Ground Six: The trial Court's failure to dismiss the charges against Petitioner and failure to preclude evidence against Petitioner violated Petitioner's 6th and 14th amendment rights to due process and a fair trial under U.S. Const.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(c) Ground Seven: The trial Court erred when it denied Petitioner's Motion in limine to preclude the State from presenting evidence or arguing Petitioner's ID was assumed as a result of DNA testing in violation of the 6th and 14th amendments to U.S. Const.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(d) Ground Eight: Petitioner's right to due process was violated when the Court denied defense motion for a mistrial after the testimony of Kim Murga in violation of the 6th and 14th amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

Background

On September 03, 2004, approximately thirty minutes past midnight, Eric Bernweig and his girlfriend Julie Kim were victims of a home invasion robbery. Three men, one white and two black, gained entry into the home ostensibly in search of money. During the course of the robbery one of the black males subjected Ms. Kim to multiple acts of sexual assault in various areas throughout the home. At some point Ms. Kim was taken upstairs and while tied up she was raped a second time. In her bedroom, on her bed, she was subjected to further restraints as her assailant then tied her legs.

While Ms. Kim was being raped, the other two men were beating Mr. Bernweig up and ransacking the home in search of a safe and more money. Mr. Bernweig gave the men approximately one thousand dollars in hundred dollar bills and asserted it was all he had. Mr. Bernweig was also restrained but managed to slip his restraints and was pistol whipped about the head and face when he was discovered.

Shortly thereafter, the assailants fled. Ms. Kim managed to free herself and went to the aid of her boyfriend who was lying in a pool of blood. The couple called 911 and police arrived but the assailants were gone. Mr. Bernweig drove to Summerlin for hospital attention from a colleague while Ms. Kim was transported to UMC where she is seen by Linda Ebbert, RN and Sexual Assault Nurse Examiner (SANE). Ebbert completes a rape kit, having interviewed, photographed and swabbed Julie Kim. Ms. Kim informed Ebbert that her assailant licked her nipples at one point. As a result of that information, swabs were taken of the nipples of Ms. Kim. In addition to blood being drawn and taking oral, vaginal, rectal and buccal swabs, Ebbert took swabs of blood from Ms. Kim's left forearm, left hand, and left knee. It was noted that there was also blood on the bridge of her nose. Ms. Kim asserted the blood was not her own but that of her boyfriend.

Nurse Ebbert conducted a pelvic examination with the use of toluidine blue dye and

reported that there was no adherence made with the blue dye and stated "Light Staining microscope was negative for any Sperm on Slides prepared by this nurse."

The rape kit was eventually turned over to LVMPD. Detective Michael Jeffries was assigned to the case which was assigned Event number 040903-0152. Jeffries requested the rape kit be examined by the LVMPD's DNA Lab. The examination was conducted by Criminalist David P. Welch of the LVMPD. Welch concluded his exam and findings on November 16, 2004. Welch reported that DNA was detected on the breast swabs of victim Julie Kim, DNA from an unknown male. The DNA profile from the unknown male was searched against the local DNA Index System. No matches were found. Petitioner's DNA was on file in both Nevada and California and the profile did not come back as a match to him. Further, Welch reported that Semen was detected on the

Vaginal Swabs of the Victim, "however, no spermatozoa were observed. Therefore, no significant DNA-STR typing results were obtained."

Once detective Jeffries learns that no suspect can be identified from the analysis, he submits the profile to Kathy M. Guenther, another Criminalist with the LMPD, who submitted the profile to her contacts in the California Department of Justice on January 7, 2005 requesting that they "Please start the match confirmation procedure." According to Guenther's preliminary testimony, officials in California "...went ahead and pulled their sample [DNA] and tested it again..." (prelim. Transcr. of 6/9/05 at p. 118 ln. 19-23). This was the "CODIS" hit purportedly by federal authorities (4/28/05 prelim. Tr. at pp. 138-139).

So, the profile generated from the breast swabs of Ms. Kim ~~was~~ sent to a comparison lab in California in hopes of discovering a match. On February 13, 2005, Guenther is allegedly notified by CDJ that the profile submitted matched their known DNA for Petitioner, Joseph Henderson.

(Note: Skipped 5e)

Guenther informed Jeffries of this information and with it, Detective Jeffries obtains a Search Warrant to take buccal Swabs of Petitioner's mouth. The Swabs were given to Guenther for analysis and she generate a profile that was a match for Petitioner's DNA from the obtained buccal Swabs and the DNA obtained from the breast Swabs of the victim, Ms. Kim.

Petitioner at this point was effectively locked in as the prime suspect of the charged crimes.

THE STATE DEPRIVED PETITIONER
OF HIS RIGHT TO BE CONFRONTED WITH
THE EVIDENCE AND WITNESSES AGAINST HIM

This violation occurred when the State failed to provide Petitioner the evidence Guenther submitted to the comparison lab. Petitioner required that evidence for testing to insure that it was not unfairly and unreliably manufactured. It is apparent that

the DNA "profiles" are indeed manufactured as evinced by Guenther's trial testimony stating "The DNA goes through a lot of steps. I won't go through all the boring steps of the DNA process, but at the end we end up with a numeric profile generated from our genetic analyzer." (Trial Tr. of 6/27/08 at p. 111).

Petitioner was not afforded any discovery concerning this "genetic analyzer." Does this machine ingest biological specimens? Is it sterilized before and after each use? By whom? Who can verify that? Does it merely do math and scan markers? What software does it use? What hardware? How reliable is this soft or hardware?

Petitioner was never given opportunity to confront his actual accuser, the genetic analyzer.

Further, if the profile Guenther sent to federal authorities in California was indeed flawed, how reliable is the Codis match? What steps did CDOJ

Take to match Petitioner to the profile
Gwenther provided them? She asked them
to make a match and "confirm" it and they
did. But, did they do so fairly? Was
Petitioner's Profile in California merely
Similar, Strikingly Similar, or Spot-on-Exact?
Did the federal authorities alter their
Calibrations to bring about the match or
increase the probability of a match? Could
their Conclusions be a matter of interpretation?
These are all questions Petitioner should have
been able to explore but he was deprive
of that right. Petitioner could not Confront
his accusers, Cross-examine them and Compel
Expert Testimony to Contradict them. This
was a Violation of Petitioner's 6th & 14th
Amendment rights to the U.S. Constitution

THE STATE ELICITED PERJURED TESTIMONY
FROM ITS EXPERT WITNESS - GUENTHER AND
FAILED TO CORRECT WHAT THEY KNEW TO BE
FALSE.

Guenther testified as follows:

A. ... I detected the presence of Semen on
two stains on ^{the} top bed sheet. I tested
those and obtained DNA profiles from those.

Q. From two independent stains?

A. Yes.

Q. Sufficient Spermatozoa for you to get a
profile?

A. Yes, certainly.

Q. Did you document those findings as well?

A. Yes, I did.

Q. And again this was in July of 2005 when
you were looking at two more CSI; is that
correct?

A. That's correct.

Q. Prior to the -- to Dave Welch's initial Crime Scene Screening and your initial Comparison of the known DNA of Joseph Henderson?

A. That's correct.

Here, the jury hears testimony from this expert that she detected semen, tested stains, obtained DNA profiles from them because there was sufficient spermatozoa to get a profile and she had all of this from the very outset, having obtained it prior to Dave Welch's initial Crime Scene Screening and her initial Comparison of the known DNA of Petitioner. It's a regular "gotcha" argument. The jury could reasonably infer that the State had Petitioner's sperm from the beginning and obtain a profile with it first.

We know this is completely untrue as Welch conducted his analysis in November of 2004. The perjury went uncorrected and

prejudiced Petitioner & that his Conviction was wrongfully obtained with this perjured testimony.

THE STATE FAILED TO MEET ITS BURDEN OF PROVING PETITIONER GUILTY OF EACH ELEMENT OF EACH OFFENSE BEYOND A REASONABLE DOUBT.

Petitioner is alleged to have committed the crimes in this case with two co-conspirators, however there was no evidence presented by way of testimony of a co-conspirator or perpetrator that Petitioner was in any way party to these crimes. There was no testimony from the victims that Petitioner was one of their assailants; no eye witness identification testimony presented; no fingerprints nor confession that puts Petitioner at the scene of these crimes.

In this case, the State was in a position where they merely had to prove the crimes took place in general. Then, the

State asserts that Petitioner's DNA was found at the scene and it is automatically presumed in the minds of the jury that the State has proven its case and the defendant is guilty. This is because of the almost mythic infallibility jurors routinely afford confident scientific experts as they attempt to explain their cutting-edge technology. Because the average person can hardly understand the scientific mumbo-jumbo, we bow to the assertion that it's correct and concede that we are not qualified to question it.

For this reason, it is imperative that the State not abuse its authority when using this science. When the State points its finger and asserts that it is the defendant's DNA that is found in a case such as this, that defendant will surely be convicted. Consequently, the process to get to that point,

must be pristine, virtually error free, before it can be presumed that the information is correct and the State has met its burden of proof. Otherwise the process would be fundamentally unfair. In this case, the victim, Ms. Kim knelt in a pool of her husband's blood (DNA) at the scene of the crime. When she arrived at UMC and was seen by SANE Nurse Ebbert, Ebbert noted that there was blood on Ms. Kim's face, hand, arm and knee. There can be no question that blood splatter, contaminate DNA, has come into contact with the victim before any swabs were taken. Ms. Kim went to check on her boyfriend and concerned for him she

5n

Pressed her body to his and picked up foreign DNA all over her person, from head to knee. The State of the Evidence is that at that point, Ms. Kim was nearly nude, without panties or brassiere. It could reasonably be assumed that the Contaminate DNA came into contact with Ms. Kim's breast and pelvis either directly or through contact soaked through her night gown. In any case, if Ms Kim's person was contaminated by Eric Bernweig's DNA, how reliable is the profile generated from the swabs taken subsequent to the Contamination? Not Very!

In the instant case, Criminalists Welch and Guenther assert that the analysis they performed on the DNA was through PCR amplification. PCR is an acronym for "Polymerase Chain reaction." PCR tests are

Extremely sensitive to Contaminating DNA at the Crime Scene and within the Test Laboratory. During PCR, Contaminants may be amplified up to a billion times their original Concentration. Contamination can influence PCR results, Particularly in the absence of Proper handling techniques and Proper Controls for Contamination. Sensitivity is the main advantage of PCR tests. However, the increased Sensitivity also makes PCR tests more vulnerable to trace Contaminants, i.e., DNA from unexpected Sources.

The State was careful to avoid presenting evidence of Julie Kim's Contamination as their case hinged upon the interpretation of these tests. The evidence of the Contamination is irrefutable, see Exhibit "A" attached hereto. In light of this evidence, the profile generated from the Swabs of Julie Kim were presumptively unreliable and the State failed to meet its burden of proof.

PETITIONER SUFFERED THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In this case, the State sought to prove Petitioner's guilt by showing his DNA was left on the person of the victim, Ms. Kim.

The only plausible defense available to Petitioner was to challenge the reliability of the experts findings. There was no "strategic" reasoning that could remotely justify abandoning this course of action.

Petitioner contends that Counsel was ineffective when:

A. Counsel failed to call into question and have tested the evidence of California authorities' lab work matching Petitioner to Nevada's profile.

B. Counsel failed to move for the suppression of the State's profiles generated with or

"possibly" generated with Contaminated DNA.

C. Counsel failed to make the jury aware that the State failed to maintain the integrity of its evidence, conducting analysis with potentially contaminated DNA.

D. Counsel failed to make the jury aware that Julie Kim's actions in pressing herself to Eric Bernweig's bloody body and kneeling in a pool of his blood may have effectively contaminated herself so as to make all subsequent testing presumptively unreliable thus giving rise to reasonable doubt.

E. Counsel failed to impeach the credibility of Expert Guenther who claimed to have located sufficient spermatozoa to obtain a genetic profile when Expert Welch and SANE Nurse Ekbert asserted there was virtually no spermatozoa at all.

F. Counsel failed to make the jury aware that witness Linda Ebbert performed a blue dye test that revealed no spermatozoa.

G. Counsel failed to make the jury aware that Expert Witness Guenther committed perjury.

PETITIONER WAS DEPRIVED OF HIS
RIGHT TO CONFRONTATION AND COMPULSORY
PROCESS

State's Witness, Criminalist Welch consumed all of the evidence of the breast swabs of Julie Kim. Consequently, Petitioner was deprived the opportunity to test the swabs himself and compel expert testimony to refute the State's experts on the outcome of the breast swabs. Petitioner could not confront this evidence against him.

THE TRIAL COURT'S FAILURE TO
DISMISS THE CASE FOR FAILURE TO
PRESERVE EVIDENCE VIOLATED PETITIONER'S
RIGHT TO DUE PROCESS AND A FAIR
TRIAL

Trial Counsel filed a motion to dismiss due to Welch's failure to preserve some portion of the breast swab so the defense could test it. The Trial Court refused to dismiss and refused to provide an instruction that the mishandled DNA evidence prejudiced Petitioner. This action was violative of the 6th & 14th Amendments to the U.S. Constitution.

THE TRIAL COURT REFUSED TO
PRECLUDE THE STATE FROM ARGUING AND
PRESENTING EVIDENCE THAT PETITIONER'S
IDENTITY IS ASSUMED AS A RESULT OF
THE DNA TESTING

Petitioner's motion in limine challenged the nature and extent by which the State's experts could testify and the prosecutor could argue regarding conclusions of the DNA testing. The motion in limine asked the Court not to allow inaccurate and unreliable testimony concerning DNA evidence. The government should not have been able to present nor argue statistical evidence to suggest that the DNA evidence indicates the likelihood of the defendant's guilt rather than the odds of the evidence having him found in a randomly selective sample. The prosecution could elicit that the DNA match is one in whatever number of people randomly selected from the population would also match the DNA found. That is random match probability. However, giving a percentage that the DNA was found to be Petitioner was impermissible. That was/is Source Probability.

Additionally, an expert should be precluded from stating, and the prosecutor precluded from arguing identity is assumed.

In trial, the prosecutor asked its expert, Guenther, the following:

Q. To a reasonable degree of scientific certainty, what is your conclusion regarding the vaginal swab vis-a-vis the known profile of Joseph Henderson re-profiled in July 2005?

A. That the sperm DNA profile from the vaginal swab, male portion, matches the DNA profile from Joseph Henderson and Joseph Henderson is the source of that DNA. (6/26/08 TTr. at pg. 131)

This was impermissible source probability testimony asserting invariably (100%) that it was Petitioner. This violated Petitioner's right to a fair trial under the 6th Amendment, U.S. Constitution.

The violation occurred again when the State asked:

Q. Ma'am, in your professional opinion,

to a reasonable degree of Scientific Certainty, who was the Contributor?

A. The male Contributor is Joseph Henderson.
(6/27/08 TTr. at pg. 21).

Again, this was not random match probability testimony but rather Source probability and leaves the impression that it is 100% invariable.

The State elicited this same prejudicial testimony from its witness, Kim Murga, who also was presented as an Expert.

A. The individual who left the DNA on the breast Swab of -- on the breast sample of Julie Kim is Joseph Henderson. (6/27/08 TTr. at p. 34).

A. The individual who contributed to the DNA mixture, the male profile in the vaginal Swab is Joseph Henderson. (6/27/08 TTr. at pg. 34).

These actions violated Petitioner's 6th and 14th Amendment rights under the U.S. Constitution to a fair trial.

PETITIONER'S RIGHT TO DUE PROCESS
WAS VIOLATED WHEN THE COURT DENIED
DEFENSE MOTION FOR MISTRIAL AFTER
THE TESTIMONY OF KIM MURGA

The State's Key Witness or Expert Witness, Kim Murga, was used to bolster the State's case as she testified to the veracity of and credibility of witnesses Welch and Guenther. Using this expert to vouch for the credibility of the State's other experts was improper. Murga's testimony was cumulative and highly prejudicial. Additionally, she referenced material evidence not timely disclosed to the defense. These actions

were violative of Petitioner's 6th and 14th
amendment rights under the U.S. Constitution.

Conclusion

For the reasons set forth in this
petition, Petitioner prays this Court
will REVERSE his conviction and remand
this matter back to the prosecutor's
office for further disposition.

Respectfully,

Joseph Henderson
Joseph A. Henderson

DATED: This 2nd day of January, 2011.

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 2nd day of the month of January,
of the year 2011,

Joseph Henderson
Signature of petitioner

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

None
Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Joseph Henderson
Petitioner

None
Attorney for petitioner

UNIVERSITY MEDICAL CENTER
1800 West Charleston Boulevard
Las Vegas, Nevada 89102

Las Vegas Metro Event Number - 040903-0158

MODE OF ARRIVAL: Las Vegas Metro Police Department

TIME OF SERVICE: 3:28 on 09/03/2004

CHIEF COMPLAINT: Sexual assault.

- HISTORY OF PRESENT ILLNESS: The patient states that there was a knock at her door at about 11:30 last evening and that there was an Hispanic male who came to the door and he said that someone had thrown his keys into the backyard. The patient states that her boyfriend went into the garage to find a flashlight to assist him and then suddenly there were 2 black males that came into the home. The patient states she and her boyfriend were both tied with plastic bands and that she was sexually assaulted on the couch, pn missionary position by a black male and then she was sexually assaulted on the bed with her in missionary position. She states that the male who sexually assaulted her also tied her ankles. She states that after the assailants were gone, she was able to get loose from the restrains and that is when law enforcement became involved with the case. The patient does state that there was penetration of the vagina with the penis of the assailant 2 times. There was also finger penetration. She denies any anal or oral penetration. The patient does state the suspect did masturbate her, she is unsure if he did ejaculate. She does say that he sucked on her nipples, areas of the nipples are swabbed and placed in the sexual assault kit for saliva. She states there was a black gun used and that she has not had consensual intercourse in the last 5 days. The patient is very upset and nervous but cooperative and very straight forward with her answers during her examination.

PHYSICAL EXAMINATION:

GENERAL: This is an alert, oriented 29-year-old Oriental female who is here for a sexual assault examination.

HEENT: There is blood noted over the bridge of the nose. The patient states this is from her boyfriend, who had a cut to his head and injury to his mouth. She had no complaints of injury in this area.

HEART: Regular rate and rhythm.

LUNGS: Respirations are even and unlabored.

ABDOMEN: Soft and nontender.

EXTREMITIES: The patient is able to move all extremities without difficulty. She does have blood on her left forearm, on her left hand and on her left knee. These areas are also swabbed. She does state that this is from her boyfriend, however.

PELVIC: Pelvic examination is done with the use of toluidine blue dye. There is a increased redness at the introitus of the patient's vagina. Please see anatomical drawing sheet for this. No adherence was made with the toluidine blue dye. The increased redness is at 6 o'clock on the introitus. Light staining microscope was negative for any sperm on slides prepared by this nurse. The slide is enclosed in the sexual assault kit for further review by the Las Vegas Metro Crime Lab.

Sexual assault panel is done on the patient. Pregnancy test is reported as negative. Urine toxicology screen is negative. ETOH is less than 10. Zithromax 1 gram is given p.o. prophylactically, Tequin 400 mg, p.o., Ovral 2 tablets during her visit and 2 to take in 12-hours. The patient is also given Flagyl 2 grams p.o. She is given crackers to eat at this time and is encouraged to have breakfast as soon as she leaves. The patient is given instructions on sexually transmitted diseases, sexual assault instructions and sitz baths. She is to follow with the Rape Crisis Center. In 7 days

PATIENT: KIM, JULIE S

ACCOUNT#: 00075882522

MR#: 000-625-003

JOB #: 327018

ADM. DATE: 09/03/2004

Dictated by: Linda Ebbert, RN

Attending:

EMERGENCY ROOM NOTE

EXHIBIT-A

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Petition

For Writ of Habeas Corpus (Post-Conviction)
(Title of Document)

filed in District Court Case No. C212968

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-OR-

B. For the administration of a public program or
for an application for a federal or state grant.

Joseph Henderson
(Signature)

1/2/11
(Date)

Certificate of Service by Mail

I, Joseph A. Henderson, hereby certify that
on this 2ND day of January, 2011, I
mailed a true and correct copy of the
foregoing Petition For Writ OF HABEAS CORPUS,
addressed to:

Eldon K. McDaniel
Warden, ESP
P.O. Box 1989
Bty., NV. 89301

David Roger
Clark County District Attorney
200 Lewis Avenue, 3rd Floor
Las Vegas, NV. 89155

Catherine Cortez Masto
Attorney General
100 North Carson Street
Carson City, NV. 89701-4717

Mr Joseph Henderson

MR JOSEPH A HENDERSON 07224
PO BOX 1989
ELY NV. 89301

FILED

JAN 18 2011

John L. Silver
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

JOSEPH HENDERSON,

Petitioner,

vs.

STATE OF NEVADA,
Respondent,

Case No: C212968

Dept No: 15

ORDER FOR PETITION FOR
WRIT OF HABEAS CORPUS

Petitioner filed a petition for writ of habeas corpus (Post-Conviction Relief) on January 11, 2011. The Court has reviewed the petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's Calendar on the 31st day of March, 2011, at the hour of

9:00 ^A o'clock for further proceedings.

John L. Silver
District Court Judge

RECEIVED

JAN 18 2011

CLERK OF THE COURT

05C212968

OPWH

Order for Petition for Writ of Habeas Corpus

1168427



ff-copy

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Case No. C212968

Dept. No. ~~14~~ 15

FILED

JAN 11 2011

Alan L. Blum
CLERK OF COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

JOSEPH A. HENDERSON
Petitioner,

v.

STATE OF NEVADA
Respondent.

**PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)**

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

RECEIVED

JAN 07 2011

CLERK OF THE COURT

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: ELY STATE PRISON WHITEPINE NEVADA

2. Name and location of court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT

3. Date of judgment of conviction: SEPTEMBER 24th 2008

4. Case number: C212968

5. (a) Length of sentence: 10 LIFE SENTENCES PLUS 40 years to 90 years

(b) If sentence is death, state any date upon which execution is scheduled: _____

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes _____ No X

If "yes", list crime, case number and sentence being served at this time: _____

7. Nature of offense involved in conviction being challenged: ROBBERY, KIDNAP, ASSULT, SEXUAL ASSULT, BURGLARY, CONSPIRACY:

8. What was your plea? (check one):

(a) Not guilty X (b) Guilty _____ (c) Nolo contendere _____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details: _____

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)
(a) Jury X (b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No X

12. Did you appeal from the judgment of conviction? Yes X No _____

13. If you did appeal, answer the following:

(a) Name of Court: EIGHTH JUDICIAL DISTRICT COURT #16

(b) Case number or citation: C212968

(c) Result: FOUND GUILTY BY JURY

(d) Date of result: JUNE 26th 2008

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: _____

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?

Yes X No _____

16. If your answer to No. 15 was "yes", give the following information:

(a)(1) Name of court: EIGHTH JUDICIAL DISTRICT COURT #16

(2) Nature of proceeding: MOTION TO DISMISS COUNSEL; MOTION FOR DISCOVERY;

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes _____ No X

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes _____ No _____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such a result: _____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes _____ No _____

Citation or date of decision: _____

(2) Second petition, application or motion? Yes _____ No _____

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes _____ No _____

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) _____

(a) Which of the grounds is the same: _____ NA

(b) The proceedings in which these grounds were raised:	NA
---	----

NA

NA

NA

If yes, state what court and case number:

VALERIE RADOSTA: NORMAN REED: SEDRICK BASSETTE

If yes, specify where and when it is to be served, if you know:

1

(a) Ground One: The State deprived Petitioner of his right to be confronted with the evidence and witnesses against him in violation of the 6th and 14th Amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(b) Ground Two: The State elicited perjured testimony from its expert witness Guenther and failed to correct the known perjury in violation of Petitioner's 6th and 14th amendment rights to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(c) Ground Three: The State failed to meet its burden of proving Petitioner guilty of each element of each offense beyond a reasonable doubt, in violation of Petitioner's rights under the 6th and 14th Amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(d) Ground Four: Petitioner suffered ineffective assistance of counsel at trial in violation of the 6th and 14th Amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(a) Ground Five: Petitioner was deprived of his right to Confrontation and Compulsory process in violation of his 6th and 14th Amendment rights under the U.S. Constitution

Supporting FACTS (Tell your story briefly without citing cases or law.): _____

(b) Ground Six: The trial Court's failure to dismiss the charges against Petitioner and failure to preclude evidence against Petitioner violated Petitioner's 6th and 14th Amendment rights to due process and a fair trial under U.S. Const.

Supporting FACTS (Tell your story briefly without citing cases or law.): _____

(c) Ground Seven: The trial Court erred when it denied Petitioner's Motion in limine to preclude the State from presenting evidence or arguing Petitioner's ID was assumed as a result of DNA testing in violation of the 6th and 14th Amendments to U.S. Const.

Supporting FACTS (Tell your story briefly without citing cases or law.): _____

(d) Ground Eight: Petitioner's right to due process was violated when the Court denied defense motion for a mistrial after the testimony of Kim Murga in violation of the 6th and 14th Amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.): _____

Background

On September 03, 2004, approximately thirty minutes past midnight, Eric Bernweig and his girlfriend Julie Kim were victims of a home invasion robbery. Three men, one white and two black, gained entry into the home ostensibly in search of money. During the course of the robbery one of the black males subjected Ms. Kim to multiple acts of sexual assault in various areas throughout the home. At some point Ms. Kim was taken upstairs and while tied up she was raped a second time. In her bedroom, on her bed, she was subjected to further restraints as her assailant then tied her legs.

While Ms. Kim was being raped, the other two men were beating Mr. Bernweig up and ransacking the home in search of a safe and more money. Mr. Bernweig gave the men approximately one thousand dollars in hundred dollar bills and asserted it was all he had. Mr. Bernweig was also restrained but managed to slip his restraints and was pistol whipped about the head and face when he was discovered.

Shortly thereafter, the assailants fled. Ms. Kim managed to free herself and went to the aid of her boyfriend who was lying in a pool of blood. The Couple called 911 and police arrived but the assailants were gone. Mr. Bernweig drove to Summerlin for hospital attention from a Colleague while Ms. Kim was transported to UMC where she is seen by Linda Ebbert, RN and Sexual Assault Nurse Examiner (SANE). Ebbert completes a rape kit, having interviewed, photographed and swabbed Julie Kim. Ms. Kim informed Ebbert that her assailant licked her nipples at one point. As a result of that information, swabs were taken of the nipples of Ms. Kim. In addition to blood being drawn and taking oral, vaginal, rectal and buccal swabs, Ebbert took swabs of blood from Ms. Kim's left forearm, left hand, and left knee. It was noted that there was also blood on the bridge of her nose. Ms. Kim asserted the blood was not her own but that of her boyfriend.

Nurse Ebbert conducted a pelvic examination with the use of toluidine blue dye and

reported that there was no adherence made with the blue dye and stated "Light Staining microscope was negative for any Sperm on slides prepared by this nurse."

The rape kit was eventually turned over to LVMPD. Detective Michael Jeffries was assigned to the case which was assigned event number 040903-0152. Jeffries requested the rape kit be examined by the LVMPD's DNA Lab. The examination was conducted by Criminalist David P. Welch of the LVMPD. Welch concluded his exam and findings on November 16, 2004. Welch reported that DNA was detected on the breast swabs of victim Julie Kim, DNA from an unknown male. The DNA profile from the unknown male was searched against the local DNA Index System. No matches were found. Petitioner's DNA was on file in both Nevada and California and the profile did not come back as a match to him. Further, Welch reported that Semen was detected on the

Vaginal Swabs of the Victim, "however, no Spermatozoa were observed. Therefore, no Significant DNA-STR typing results were obtained."

Once detective Jeffries learns that no suspect can be identified from the analysis, he submits the profile to Kathy M. Guenther, another Criminalist with the LMPD, who submitted the profile to her contacts in the California Department of Justice on January 7, 2005 requesting that they "Please start the match Confirmation procedure." According to Guenther's preliminary testimony, officials in California "...went ahead and pulled their sample [DNA] and tested it again..." (prelim. Transcr. of 6/9/05 at p. 118 ln. 19-23). This was the "CODIS" hit purportedly by federal authorities (4/28/05 Prelim. Tr. at pp. 138-139).

So, the profile generated from the breast swabs of Ms. Kim ~~was~~ sent to a Comparison lab in California in hopes of discovering a match. On February 13, 2005, Guenther is allegedly notified by CDJ that the profile submitted matched their known DNA for Petitioner, Joseph Henderson.

(NOTE: Skipped 5e)

Guenther informed Jeffries of this information and with it, Detective Jeffries obtains a Search Warrant to take buccal Swabs of Petitioner's mouth. The Swabs were given to Guenther for analysis and she generate a profile that was a match for Petitioner's DNA from the obtained buccal Swabs and the DNA obtained from the breast Swabs of the victim, Ms. Kim.

Petitioner at this point was effectively locked in as the prime suspect of the charged crimes.

THE STATE DEPRIVED PETITIONER
OF HIS RIGHT TO BE CONFRONTED WITH
THE EVIDENCE AND WITNESSES AGAINST HIM

This violation occurred when the State failed to provide Petitioner the evidence Guenther submitted to the Comparison lab. Petitioner required that evidence for testing to insure that it was not unfairly and unreliably manufactured. It is apparent that

the DNA "profiles" are indeed manufactured as evinced by Guenther's trial testimony stating "The DNA goes through a lot of steps. I won't go through all the boring steps of the DNA process, but at the end we end up with a numeric profile generated from our genetic analyzer." (Trial Tr. of 6/27/08 at p. 111).

Petitioner was not afforded any discovery concerning this "genetic analyzer." Does this machine ingest biological specimens? Is it sterilized before and after each use? By whom? Who can verify that? Does it merely do math and scan markers? What software does it use? What hardware? How reliable is this soft or hardware?

Petitioner was never given opportunity to confront his actual accuser, the genetic analyzer.

Further, if the profile Guenther sent to federal authorities in California was indeed flawed, how reliable is the Codis match? What steps did CDOJ

Take to match Petitioner to the profile
Gwenther provided them? She asked them
to make a match and "confirm" it and they
did. But, did they do so fairly? Was
Petitioner's Profile in California merely
Similar, Strikingly Similar, or Spot-on-Exact?
Did the federal authorities alter their
Calibrations to bring about the match or
increase the probability of a match? Could
their Conclusions be a matter of interpretation?

These are all questions Petitioner should have
been able to explore but he was deprive
of that right. Petitioner could not Confront
his accusers, Cross-examine them and Compel
expert Testimony to Contradict them. This
was a Violation of Petitioner's 6th & 14th
Amendment rights to the U.S. Constitution

THE STATE ELICITED PERJURED TESTIMONY
FROM ITS EXPERT WITNESS - GUENTHER AND
FAILED TO CORRECT WHAT THEY KNEW TO BE
FALSE.

Guenther testified as follows:

A. ... I detected the presence of Semen on
two stains on ^{the} top bed sheet. I tested
those and obtained DNA profiles from those.

Q. From two independent stains?

A. Yes.

Q. Sufficient Spermatozoa for you to get a
profile?

A. Yes, certainly.

Q. Did you document those findings as well?

A. Yes, I did.

Q. And again this was in July of 2005 when
you were looking at two more CSI; is that
correct?

A. That's correct.

Q. Prior to the -- to Dave Welch's initial Crime Scene Screening and your initial Comparison of the known DNA of Joseph Henderson?

A. That's correct.

Here, the jury hears testimony from this expert that she detected semen, tested stains, obtained DNA profiles from them because there was sufficient spermatozoa to get a profile and she had all of this from the very outset, having obtained it prior to Dave Welch's initial Crime Scene Screening and her initial Comparison of the known DNA of Petitioner. It's a regular "gotcha" moment. The jury could reasonably infer that the State had Petitioner's sperm from the beginning and obtain a profile with it first.

We know this is completely untrue as Welch conducted his analysis in November of 2004. The perjury went uncorrected and

prejudiced Petitioner & that his Conviction was wrongfully obtained with this perjured testimony.

THE STATE FAILED TO MEET ITS BURDEN OF PROVING PETITIONER GUILTY OF EACH ELEMENT OF EACH OFFENSE BEYOND A REASONABLE DOUBT.

Petitioner is alleged to have committed the crimes in this case with two co-conspirators, however there was no evidence presented by way of testimony of a co-conspirator or perpetrator that Petitioner was in any way party to these crimes. There was no testimony from the victims that Petitioner was one of their assailants; no eye witness identification testimony presented; no fingerprints nor confession that puts Petitioner at the scene of these crimes.

In this case, the State was in a position where they merely had to prove the crimes took place in general. Then, the

State asserts that Petitioner's DNA was found at the scene and it is automatically presumed in the minds of the jury that the State has proven its case and the defendant is guilty. This is because of the almost mythic infallibility jurors routinely afford confident Scientific Experts as they attempt to explain their cutting-edge technology. Because the average person can hardly understand the scientific mumbo-jumbo, we bow to the assertion that it's correct and concede that we are not qualified to question it.

For this reason, it is imperative that the State not abuse its authority when using this science. When the State points its finger and asserts that it is the defendant's DNA that is found in a case such as this, that defendant will surely be convicted. Consequently, the process to get to that point,

must be pristine, virtually error free, before it can be presumed that the information is correct and the State has met its burden of proof. Otherwise the process would be fundamentally unfair. In this case, the victim, Ms. Kim knelt in a pool of her husband's blood (DNA) at the scene of the crime. When she arrived at UMC and was seen by SANE Nurse Ebbert, Ebbert noted that there was blood on Ms. Kim's face, hand, arm and knee. There can be no question that blood splatter, contaminate DNA, has come into contact with the victim before any swabs were taken. Ms. Kim went to check on her boyfriend and concerned for him she

Sn

pressed her body to his and picked up foreign DNA all over her person, from head to knee. The State of the evidence is that at that point, Ms. Kim was nearly nude, without panties or brassiere. It could reasonably be assumed that the contaminate DNA came into contact with Ms. Kim's breast and pelvis either directly or through contact soaked through her night gown. In any case, if Ms. Kim's person was contaminated by Eric Bernweig's DNA, how reliable is the profile generated from the swabs taken subsequent to the contamination? Not very!

In the instant case, Criminalists Welch and Guenther assert that the analysis they performed on the DNA was through PCR amplification. PCR is an acronym for "polymerase chain reaction." PCR tests are

Extremely sensitive to Contaminating DNA at the Crime Scene and within the Test Laboratory. During PCR, Contaminants may be amplified up to a billion times their original Concentration. Contamination can influence PCR results, Particularly in the absence of Proper handling techniques and Proper Controls for Contamination. Sensitivity is the main advantage of PCR tests. However, the increased sensitivity also makes PCR tests more vulnerable to trace Contaminants, i.e., DNA from unexpected sources.

The State was careful to avoid presenting evidence of Julie Kim's Contamination as their case hinged upon the interpretation of these tests. The evidence of the Contamination is irrefutable, see Exhibit "A" attached hereto. In light of this evidence, the profile generated from the Swabs of Julie Kim were presumptively unreliable and the State failed to meet its burden of proof.

PETITIONER SUFFERED THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In this case, the State sought to prove Petitioner's guilt by showing his DNA was left on the person of the victim, Ms. Kim.

The only plausible defense available to Petitioner was to challenge the reliability of the experts findings. There was no "strategic" reasoning that could remotely justify abandoning this course of action.

Petitioner contends that Counsel was ineffective when:

A. Counsel failed to call into question and have tested the evidence of California authorities' lab work matching Petitioner to Nevada's profile.

B. Counsel failed to move for the suppression of the State's profiles generated with or

"Possibly" generated with Contaminated DNA.

C. Counsel failed to make the jury aware that the State failed to maintain the integrity of its evidence, conducting analysis with potentially contaminated DNA.

D. Counsel failed to make the jury aware that Julie Kim's actions in pressing herself to Eric Bernweig's bloody body and kneeling in a pool of his blood may have effectively contaminated herself so as to make all subsequent testing presumptively unreliable thus giving rise to reasonable doubt.

E. Counsel failed to impeach the credibility of Expert Guenther who claimed to have located sufficient spermatozoa to obtain a genetic profile when Expert Welch and SANE Nurse Ekbert asserted there was virtually no spermatozoa at all.

F. Counsel failed to make the jury aware that witness Linda Ebbert performed a blue dye test that revealed no spermatazoa.

G. Counsel failed to make the jury aware that expert witness Guenther committed perjury.

PETITIONER WAS DEPRIVED OF HIS
RIGHT TO CONFRONTATION AND COMPULSORY
PROCESS

State's witness, Criminalist Welch consumed all of the evidence of the breast swabs of Julie Kim. Consequently, Petitioner was deprived the opportunity to test the swabs himself and compel expert testimony to refute the State's experts on the outcome of the breast swabs. Petitioner could not confront this evidence against him.

THE TRIAL COURT'S FAILURE TO
DISMISS THE CASE FOR FAILURE TO
PRESERVE EVIDENCE VIOLATED PETITIONER'S
RIGHT TO DUE PROCESS AND A FAIR
TRIAL

Trial Counsel filed a motion to dismiss due to Welch's failure to preserve some portion of the breast swab so the defense could test it. The Trial Court refused to dismiss and refused to provide an instruction that the mishandled DNA evidence prejudiced Petitioner. This action was violative of the 6th & 14th Amendments to the U.S. Constitution.

THE TRIAL COURT REFUSED TO
PRECLUDE THE STATE FROM ARGUING AND
PRESENTING EVIDENCE THAT PETITIONER'S
IDENTITY IS ASSUMED AS A RESULT OF
THE DNA TESTING

Petitioner's motion in Limine Challenged the nature and extent by which the State's experts could testify and the prosecutor could argue regarding Conclusions of the DNA testing. The motion in limine asked the Court not to allow inaccurate and unreliable testimony concerning DNA evidence. The government should not have been able to present nor argue statistical evidence to suggest that the DNA evidence indicates the likelihood of the defendant's guilt rather than the odds of the evidence having him found in a randomly selective sample. The prosecution could elicit that the DNA match is one in whatever number of people randomly selected from the population would also match the DNA found. That is random match probability. However, giving a percentage that the DNA was found to be Petitioner was impermissible. That was/is Source Probability.

Additionally, an expert should be precluded from stating, and the prosecutor precluded from arguing identity is assumed.

In trial, the prosecutor asked its expert, Guenther, the following:

Q. To a reasonable degree of scientific certainty, what is your conclusion regarding the vaginal swab vis-a-vis the known profile of Joseph Henderson re-profiled in July 2005?

A. That the Sperm DNA profile from the vaginal swab, male portion, matches the DNA profile from Joseph Henderson and Joseph Henderson is the source of that DNA. (6/26/08 TTr. at pg. 131)

This was impermissible source probability testimony asserting invariably (100%) that it was Petitioner. This violated Petitioner's right to a fair trial under the 6th Amendment, U.S. Constitution.

The violation occurred again when the State asked:

Q. Ma'am, in your professional opinion,

to a reasonable degree of scientific certainty, who was the Contributor?

A. The male Contributor is Joseph Henderson.

(6/27/08 TTr. at pg. 21).

Again, this was not random match probability testimony but rather Source probability and leaves the impression that it is 100% invariable.

The State elicited this same prejudicial testimony from its witness, Kim Murga, who also was presented as an Expert.

A. The individual who left the DNA on the breast Swab of -- on the breast sample of Julie Kim is Joseph Henderson. (6/27/08 TTr. at p. 34).

A. The individual who contributed to the DNA mixture, the male profile in the vaginal Swab is Joseph Henderson. (6/27/08 TTr. at pg. 34).

These actions violated Petitioner's 6th and 14th Amendment rights under the U.S. Constitution to a fair trial.

PETITIONER'S RIGHT TO DUE PROCESS
WAS VIOLATED WHEN THE COURT DENIED
DEFENSE MOTION FOR MISTRIAL AFTER
THE TESTIMONY OF KIM MURGA

The State's Key Witness or Expert Witness, Kim Murga, was used to bolster the State's case as she testified to the veracity of and credibility of witnesses Welch and Guenther. Using this expert to vouch for the credibility of the State's other experts was improper. Murga's testimony was cumulative and highly prejudicial. Additionally, she referenced material evidence not timely disclosed to the defense. These actions

were violative of Petitioner's 6th and 14th
amendment rights under the U.S. Constitution.

Conclusion

For the reasons set forth in this
Petition, Petitioner prays this Court
will REVERSE his Conviction and remand
this matter back to the Prosecutor's
Office for further disposition.

Respectfully,

Joseph Henderson
Joseph A. Henderson

DATED: This 2nd day of January, 2011.

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 2nd day of the month of January, of the year 2011.

Joseph Henderson
Signature of petitioner

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

none
Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Joseph Henderson
Petitioner

none
Attorney for petitioner

UNIVERSITY MEDICAL CENTER
1800 West Charleston Boulevard
Las Vegas, Nevada 89102

Las Vegas Metro Event Number - 040903-0158

MODE OF ARRIVAL: Las Vegas Metro Police Department

TIME OF SERVICE: 3:28 on 09/03/2004

CHIEF COMPLAINT: Sexual assault.

- HISTORY OF PRESENT ILLNESS: The patient states that there was a knock at her door at about 11:30 last evening and that there was an Hispanic male who came to the door and he said that someone had thrown his keys into the backyard. The patient states that her boyfriend went into the garage to find a flashlight to assist him and then suddenly there were 2 black males that came into the home. The patient states she and her boyfriend were both tied with plastic bands and that she was sexually assaulted on the couch, in missionary position by a black male and then she was sexually assaulted on the bed with her in missionary position. She states that the male who sexually assaulted her also tied her ankles. She states that after the assailants were gone, she was able to get loose from the restraints and that is when law enforcement became involved with the case. The patient does state that there was penetration of the vagina with the penis of the assailant 2 times. There was also finger penetration. She denies any anal or oral penetration. The patient does state the suspect did masturbate her, she is unsure if he did ejaculate. She does say that he sucked on her nipples, areas of the nipples are swabbed and placed in the sexual assault kit for saliva. She states there was a black gun used and that she has not had consensual intercourse in the last 5 days. The patient is very upset and nervous but cooperative and very straight forward with her answers during her examination.

PHYSICAL EXAMINATION:

GENERAL: This is an alert, oriented 29-year-old Oriental female who is here for a sexual assault examination.

HEENT: There is blood noted over the bridge of the nose. The patient states this is from her boyfriend, who had a cut to his head and injury to his mouth. She had no complaints of injury in this area.

HEART: Regular rate and rhythm.

LUNGS: Respirations are even and unlabored.

ABDOMEN: Soft and nontender.

EXTREMITIES: The patient is able to move all extremities without difficulty. She does have blood on her left forearm, on her left hand and on her left knee. These areas are also swabbed. She does state that this is from her boyfriend, however.

PELVIC: Pelvic examination is done with the use of toluidine blue dye. There is a increased redness at the introitus of the patient's vagina. Please see anatomical drawing sheet for this. No adherence was made with the toluidine blue dye. The increased redness is at 6 o'clock on the introitus. Light staining microscope was negative for any sperm on slides prepared by this nurse. The slide is enclosed in the sexual assault kit for further review by the Las Vegas Metro Crime Lab.

Sexual assault panel is done on the patient. Pregnancy test is reported as negative. Urine toxicology screen is negative. ETOH is less than 10. Zithromax 1 gram is given p.o. prophylactically, Tequin 400 mg, p.o., Ovrall 2 tablets during her visit and 2 to take in 12-hours. The patient is also given Flagyl 2 grams p.o. She is given crackers to eat at this time and is encouraged to have breakfast as soon as she leaves. The patient is given instructions on sexually transmitted diseases, sexual assault instructions and sitz baths. She is to follow with the Rape Crisis Center. In 7 days

PATIENT: KIM, JULIE S

ACCOUNT#: 00075882522

MR#: 000-625-003

JOB #: 327018

ADM. DATE: 09/03/2004

Dictated by: Linda Ebbert, RN

Attending:

EMERGENCY ROOM NOTE

EXHIBIT-A

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Petition

For Writ of Habeas Corpus (Post-Conviction)
(Title of Document)

filed in District Court Case No. C212968

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-OR-

B. For the administration of a public program or
for an application for a federal or state grant.

Joseph Henderson
(Signature)

1/2/11
(Date)

Certificate of Service by Mail

I, Joseph A. Henderson, hereby certify that
on this 2ND day of January, 2011, I
mailed a true and correct copy of the
foregoing Petition For Writ OF HABEAS CORPUS,
addressed to:

Eldon K. McDaniel
Warden, ESP
P.O. BOX 1989
ELY, NV. 89301

David Roger
Clark County District Attorney
200 LEWIS AVENUE, 3rd Floor
Las Vegas, NV. 89155

Catherine Cortez Masto
Attorney General
100 North Carson Street
Carson City, NV. 89701-4717

Mr Joseph Henderson

Accepted

Case No. C212968

Dept. No. ~~14~~ 15

FILED

JAN 11 2011

John J. Blum
CLERK OF COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

JOSEPH A. HENDERSON
Petitioner,

v.

STATE OF NEVADA
Respondent.

**PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)**

INSTRUCTIONS:

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- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: ELY STATE PRISON WHITEPINE NEVADA

2. Name and location of court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT

3. Date of judgment of conviction: SEPTEMBER 24th 2008

4. Case number: C212968

5. (a) Length of sentence: 10 LIFE SENTENCES PLUS 40 years to 90 years

(b) If sentence is death, state any date upon which execution is scheduled: _____

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes _____ No X

If "yes", list crime, case number and sentence being served at this time: _____

7. Nature of offense involved in conviction being challenged: ROBBERY, KIDNAP, ASSAULT
SEXUAL ASSAULT, BURGLARY, CONSPIRACY:

8. What was your plea? (check one):

(a) Not guilty X (b) Guilty _____ (c) Nolo contendere _____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details: _____

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury X (b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No X

12. Did you appeal from the judgment of conviction? Yes X No _____

13. If you did appeal, answer the following:

(a) Name of Court: EIGHTH JUDICIAL DISTRICT COURT #16

(b) Case number or citation: C212968

(c) Result: FOUND GUILTY BY JURY

(d) Date of result: JUNE 26th 2008
(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: _____

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?
Yes X No _____

16. If your answer to No. 15 was "yes", give the following information:

(a)(1) Name of court: EIGHTH JUDICIAL DISTRICT COURT #16

(2) Nature of proceeding: MOTION TO DISMISS COUNSEL; MOTION FOR DISCOVERY;

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes _____ No X

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes _____ No _____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such a result: _____

----- (c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes _____ No _____
Citation or date of decision: _____

(2) Second petition, application or motion? Yes _____ No _____
Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes _____ No _____
Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) _____

(a) Which of the grounds is the same: NA

(b) The proceedings in which these grounds were raised: NA

NA

NA

NA

If yes, state what court and case number: _____

If yes, specify where and when it is to be served, if you know:

788

(a) Ground One: The State deprived Petitioner of his right to be confronted with the evidence and witnesses against him in violation of the 6th and 14th Amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(b) Ground Two: The State elicited perjured testimony from its expert witness Guenther and failed to correct the known perjury in violation of Petitioner's 6th and 14th Amendment rights to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(c) Ground Three: The State failed to meet its burden of proving Petitioner guilty of each element of each offense beyond a reasonable doubt in violation of Petitioner's rights under the 6th and 14th Amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(d) Ground Four: Petitioner suffered ineffective assistance of counsel at trial in violation of the 6th and 14th Amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(a) Ground Five: Petitioner was deprived of his right to Confrontation and Compulsory process in violation of his 6th and 14th Amendment rights under the U.S. Constitution

Supporting FACTS (Tell your story briefly without citing cases or law.):

(b) Ground Six: The trial Court's failure to dismiss the charges against Petitioner and failure to preclude evidence against Petitioner violated Petitioner's 6th and 14th Amendment rights to due process and a fair trial under U.S. Const.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(c) Ground Seven: The trial Court erred when it denied Petitioner's Motion inclining to preclude the State from presenting evidence or signing Petitioner's ID was assumed as a result of DNA testing in violation of the 6th and 14th Amendments to U.S. Const.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(d) Ground Eight: Petitioner's right to due process was violated when the Court denied defense Motion for a mistrial after the testimony of Kim Murch in violation of the 6th and 14th Amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

Background

On September 03, 2004, approximately thirty minutes past midnight, Eric Bernweig and his girlfriend Julie Kim were victims of a home invasion robbery. Three men, one white and two black, gained entry into the home ostensibly in search of money. During the course of the robbery one of the black males subjected Ms. Kim to multiple acts of sexual assault in various areas throughout the home. At some point Ms. Kim was taken upstairs and while tied up she was raped a second time. In her bedroom, on her bed, she was subjected to further restraints as her assailant then tied her legs.

While Ms. Kim was being raped, the other two men were beating Mr. Bernweig up and ransacking the home in search of a safe and more money. Mr. Bernweig gave the men approximately one thousand dollars in hundred dollar bills and asserted it was all he had. Mr. Bernweig was also restrained but managed to slip his restraints and was pistol whipped about the head and face when he was discovered.

Shortly thereafter, the assailants fled. Ms. Kim managed to free herself and went to the aid of her boyfriend who was lying in a pool of blood. The couple called 911 and police arrived but the assailants were gone. Mr. Bernweig drove to Summerlin for hospital attention from a colleague while Ms. Kim was transported to UMC where she is seen by Linda Ebbert, RN and Sexual Assault Nurse Examiner (SANE). Ebbert completes a rape kit, having interviewed, photographed and swabbed Julie Kim. Ms. Kim informed Ebbert that her assailant licked her nipples at one point. As a result of that information, swabs were taken of the nipples of Ms. Kim. In addition to blood being drawn and taking oral, vaginal, rectal and buccal swabs, Ebbert took swabs of blood from Ms. Kim's left forearm, left hand, and left knee. It was noted that there was also blood on the bridge of her nose. Ms. Kim asserted the blood was not her own but that of her boyfriend.

Nurse Ebbert conducted a pelvic examination with the use of toluidine blue dye and

reported that there was no adherence made with the blue dye and stated "Light Staining microscope was negative for any Sperm on Slides prepared by this nurse."

The rape kit was eventually turned over to LVMPD. Detective Michael Jeffries was assigned to the case which was assigned Event number 040903-0152. Jeffries requested the rape kit be examined by the LVMPD's DNA Lab. The examination was conducted by Criminalist David P. Welch of the LVMPD. Welch concluded his exam and findings on November 16, 2004. Welch reported that DNA was detected on the breast swabs of victim Julie Kim, DNA from an unknown male. The DNA profile from the unknown male was searched against the local DNA Index System. No matches were found. Petitioner's DNA was on file in both Nevada and California and the profile did not come back as a match to him. Further, Welch reported that Semen was detected on the

Vaginal Swabs of the Victim, "however, no Spermatozoa were observed. Therefore, no Significant DNA-STR typing results were obtained."

Once detective Jeffries learns that no suspect can be identified from the analysis, he submits the profile to Kathy M. Guenther, another Criminalist with the LVMPD, who submitted the profile to her contacts in the California Department of Justice on January 7, 2005 requesting that they "Please start the match Confirmation procedure." According to Guenther's preliminary testimony, officials in California "...went ahead and pulled their sample [DNA] and tested it again..." (prelim. Transcr. of 6/9/05 at p. 118 ln. 19-23). This was the "CODIS" hit purportedly by federal authorities (4/28/05 prelim. Tr. at pp. 138-139).

So, the profile generated from the breast swabs of Ms. Kim ~~was~~ sent to a comparison lab in California in hopes of discovering a match. On February 13, 2005, Guenther is allegedly notified by CDJ that the profile submitted matched their known DNA for Petitioner, Joseph Henderson.

(Note: Skipped 5e)

Guenther informed Jeffries of this information and with it, Detective Jeffries obtains a Search Warrant to take Buccal Swabs of Petitioner's mouth. The Swabs were given to Guenther for analysis and she generate a profile that was a match for Petitioner's DNA from the obtained buccal Swabs and the DNA obtained from the breast Swabs of the victim, Ms. Kim.

Petitioner at this point was effectively locked in as the prime suspect of the charged crimes.

THE STATE DEPRIVED PETITIONER
OF HIS RIGHT TO BE CONFRONTED WITH
THE EVIDENCE AND WITNESSES AGAINST HIM

This violation occurred when the State failed to provide Petitioner the evidence Guenther submitted to the comparison lab. Petitioner required that evidence for testing to insure that it was not unfairly and unreliably manufactured. It is apparent that

the DNA "profiles" are indeed manufactured as evinced by Guenther's trial testimony stating "The DNA goes through a lot of steps. I won't go through all the boring steps of the DNA process, but at the end we end up with a numeric profile generated from our genetic analyzer." (Trial Tr. of 6/27/08 at p. 111).

Petitioner was not afforded any discovery concerning this "genetic analyzer." Does this machine ingest biological specimens? Is it sterilized before and after each use? By whom? Who can verify that? Does it merely do math and scan markers? What software does it use? What hardware? How reliable is this soft or hardware?

Petitioner was never given opportunity to confront his actual accuser, the genetic analyzer.

Further, if the profile Guenther sent to federal authorities in California was indeed flawed, how reliable is the Codis match? What steps did CDOJ

Take to match Petitioner to the profile
Gwenther provided them? She asked them
to make a match and "Confirm" it and they
did. But, did they do so fairly? Was
Petitioner's Profile in California merely
Similar, Strikingly Similar, or Spot-on-Exact?
Did the federal authorities alter their
Calibrations to bring about the match or
increase the probability of a match? Could
their Conclusions be a matter of interpretation?
These are all questions Petitioner should have
been able to explore but he was deprive
of that right. Petitioner could not Confront
his accusers, Cross-examine them and Compel
Expert Testimony to Contradict them. This
was a Violation of Petitioner's 6th & 14th
Amendment rights to the U.S. Constitution

THE STATE ELICITED PERJURED TESTIMONY
FROM ITS EXPERT WITNESS - GUENTHER AND
FAILED TO CORRECT WHAT THEY KNEW TO BE
FALSE.

Guenther testified as follows:

A. ... I detected the presence of Semen on
two stains on ^{the} top bed sheet. I tested
those and obtained DNA profiles from those.

Q. From two independent stains?

A. Yes.

Q. Sufficient Spermatozoa for you to get a
profile?

A. Yes, Certainly.

Q. Did you document those findings as well?

A. Yes, I did.

Q. And again this was in July of 2005 when
you were looking at two more loci; is that
Correct?

A. That's Correct.

Q. Prior to the -- to Dave Welch's initial Crime Scene Screening and your initial Comparison of the known DNA of Joseph Henderson?

A. That's correct.

Here, the jury hears testimony from this expert that she detected semen, tested stains, obtained DNA profiles from them because there was sufficient spermatozoa to get a profile and she had all of this from the very outset, having obtained it prior to Dave Welch's initial Crime Scene Screening and her initial Comparison of the known DNA of Petitioner. It's a regular "gotcha" moment. The jury could reasonably infer that the State had Petitioner's sperm from the beginning and obtain a profile with it first.

We know this is completely untrue as Welch conducted his analysis in November of 2004. The perjury went uncorrected and

prejudiced Petitioner & that his conviction was wrongfully obtained with this perjured testimony.

THE STATE FAILED TO MEET ITS BURDEN OF PROVING PETITIONER GUILTY OF EACH ELEMENT OF EACH OFFENSE BEYOND A REASONABLE DOUBT.

Petitioner is alleged to have committed the crimes in this case with two co-conspirators, however there was no evidence presented by way of testimony of a co-conspirator or perpetrator that Petitioner was in any way party to these crimes. There was no testimony from the victims that Petitioner was one of their assailants; no eye-witness identification testimony presented; no fingerprints nor confession that puts Petitioner at the scene of these crimes.

In this case, the State was in a position where they merely had to prove the crimes took place in general. Then, the

State asserts that Petitioner's DNA was found at the scene and it is automatically presumed in the minds of the jury that the State has proven its case and the defendant is guilty. This is because of the almost mythic infallibility jurors routinely afford confident Scientific Experts as they attempt to explain their cutting-edge technology. Because the average person can hardly understand the scientific mumbo-jumbo, we bow to the assertion that it's correct and concede that we are not qualified to question it.

For this reason, it is imperative that the State not abuse its authority when using this science. When the State points its finger and asserts that it is the defendant's DNA that is found in a case such as this, that defendant will surely be convicted. Consequently, the process to get to that point,

must be pristine, virtually error free, before it can be presumed that the information is correct and the State has met its burden of proof. Otherwise the process would be fundamentally unfair. In this case, the victim, Ms. Kim knelt in a pool of her husband's blood (DNA) at the scene of the crime. When she arrived at UMC and was seen by SANE Nurse Ebbert, Ebbert noted that there was blood on Ms. Kim's face, hand, arm and knee. There can be no question that blood splatter, contaminate DNA, has come into contact with the victim before any swabs were taken. Ms. Kim went to check on her boyfriend and concerned for him she

Pressed her body to his and picked up foreign DNA all over her person, from head to knee. The State of the Evidence is that at that point, Ms. Kim was nearly nude, without panties or brassiere. It could reasonably be assumed that the contaminate DNA came into contact with Ms. Kim's breast and pelvis either directly or through contact soaked through her night gown. In any case, if Ms. Kim's person was contaminated by Eric Bernweig's DNA, how reliable is the profile generated from the swabs taken subsequent to the contamination? Not very!

In the instant case, Criminalists Welch and Guenther assert that the analysis they performed on the DNA was through PCR amplification. PCR is an acronym for "Polymerase Chain reaction." PCR tests are

Extremely sensitive to Contaminating DNA at the Crime Scene and within the test laboratory. During PCR, Contaminants may be amplified up to a billion times their original Concentration. Contamination can influence PCR results, Particularly in the absence of Proper handling techniques and Proper Controls for Contamination. Sensitivity is the main advantage of PCR tests. However, the increased Sensitivity also makes PCR Tests more vulnerable to trace Contaminants, i.e., DNA from unexpected Sources.

The State was Careful to avoid presenting Evidence of Julie Kim's Contamination as their Case hinged upon the interpretation of these Tests. The Evidence of the Contamination is irrefutable, see Exhibit "A" attached hereto. In light of this evidence, the profile generated from the Swabs of Julie Kim were presumptively Unreliable and the State failed to meet its burden of Proof.

PETITIONER SUFFERED THE
INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In this case, the State sought to prove Petitioner's guilt by showing his DNA was left on the person of the victim, Ms. Kim.

The only plausible defense available to Petitioner was to challenge the reliability of the experts findings. There was no "strategic" reasoning that could remotely justify abandoning this course of action.

Petitioner contends that Counsel was ineffective when:

A. Counsel failed to call into question and have tested the evidence of California authorities lab work matching Petitioner to Nevada's profile.

B. Counsel failed to move for the suppression of the State's profiles generated with or

"possibly" generated with Contaminated DNA.

C. Counsel failed to make the jury aware that the State failed to maintain the integrity of its evidence, conducting analysis with potentially Contaminated DNA.

D. Counsel failed to make the jury aware that Julie Kim's actions in pressing herself to Eric Bernweig's bloody body and kneeling in a pool of his blood may have effectively Contaminated herself so as to make all subsequent testing presumptively unreliable thus giving rise to reasonable doubt.

E. Counsel failed to impeach the credibility of Expert Guenther who claimed to have located sufficient Spermatazoa to obtain a genetic profile when Expert Welch and SANE Nurse Ekbert asserted there was virtually no Spermatazoa at all.

F. Counsel failed to make the jury aware that witness Linda Ebbert performed a blue dye test that revealed no spermatazoa.

G. Counsel failed to make the jury aware that expert witness Guenther committed perjury.

PETITIONER WAS DEPRIVED OF HIS
RIGHT TO CONFRONTATION AND COMPULSORY
PROCESS

State's Witness, Criminalist Welch consumed all of the evidence of the breast swabs of Julie Kim. Consequently, Petitioner was deprived the opportunity to test the swabs himself and compel expert testimony to refute the State's experts on the outcome of the breast swabs. Petitioner could not confront this evidence against him.

THE TRIAL COURT'S FAILURE TO
DISMISS THE CASE FOR FAILURE TO
PRESERVE EVIDENCE VIOLATED PETITIONER'S
RIGHT TO DUE PROCESS AND A FAIR
TRIAL

Trial Counsel filed a motion to dismiss due to Welch's failure to preserve some portion of the breast swab so the defense could test it. The Trial Court refused to dismiss and refused to provide an instruction that the mishandled DNA evidence prejudiced Petitioner. This action was violative of the 6th & 14th Amendments to the U.S. Constitution.

THE TRIAL COURT REFUSED TO
PRECLUDE THE STATE FROM ARGUING AND
PRESENTING EVIDENCE THAT PETITIONER'S
IDENTITY IS ASSUMED AS A RESULT OF
THE DNA TESTING

Petitioner's motion in Limine Challenged the nature and extent by which the State's experts could testify and the prosecutor could argue regarding conclusions of the DNA testing. The motion in limine asked the Court not to allow inaccurate and unreliable testimony concerning DNA evidence. The government should not have been able to present nor argue statistical evidence to suggest that the DNA evidence indicates the likelihood of the defendant's guilt rather than the odds of the evidence having him found in a randomly selective sample. The prosecution could elicit that the DNA match is one in whatever number of people randomly selected from the population would also match the DNA found. That is random match probability. However, giving a percentage that the DNA was found to be Petitioner was impermissible. That was/is Source Probability.

Additionally, an expert should be precluded from stating, and the prosecutor precluded from arguing identity is assumed.

In trial, the prosecutor asked its expert, Guenther, the following:

Q. To a reasonable degree of scientific certainty, what is your conclusion regarding the vaginal swab vis-a-vis the known profile of Joseph Henderson re-profiled in July 2005?

A. That the sperm DNA profile from the vaginal swab, male portion, matches the DNA profile from Joseph Henderson and Joseph Henderson is the source of that DNA. (6/26/08 TTr. at pg. 131)

This was impermissible source probability testimony asserting invariably (100%) that it was Petitioner. This violated Petitioner's right to a fair trial under the 6th Amendment, U.S. Constitution.

The violation occurred again when the State asked:

Q. Ma'am, in your professional opinion,

to a reasonable degree of scientific certainty, who was the Contributor?

A. The male Contributor is Joseph Henderson.

(6/27/08 TTr. at pg. 21).

Again, this was not random match probability testimony but rather Source probability and leaves the impression that it is 100% invariable.

The State elicited this same prejudicial testimony from its witness, Kim Murga, who also was presented as an Expert.

A. The individual who left the DNA on the breast Swab of -- on the breast sample of Julie Kim is Joseph Henderson. (6/27/08 TTr. at p. 34).

A. The individual who contributed to the DNA mixture, the male profile in the vaginal swab is Joseph Henderson. (6/27/08 TTr. at pg. 34).

These actions violated Petitioner's 6th and 14th Amendment rights under the U.S. Constitution to a fair trial.

PETITIONER'S RIGHT TO DUE PROCESS
WAS VIOLATED WHEN THE COURT DENIED
DEFENSE MOTION FOR MISTRIAL AFTER
THE TESTIMONY OF KIM MURGA

The State's Key Witness or Expert Witness, Kim Murga, was used to bolster the State's case as she testified to the veracity of and credibility of witnesses Welch and Guenther. Using this expert to vouch for the credibility of the State's other experts was improper. Murga's testimony was cumulative and highly prejudicial. Additionally, she referenced material evidence not timely disclosed to the defense. These actions

were violative of Petitioner's 6th and 14th
Amendment rights under the U.S. Constitution.

Conclusion

For the reasons set forth in this
Petition, Petitioner prays this Court
will REVERSE his Conviction and remand
this matter back to the Prosecutor's
Office for further disposition.

Respectfully,

Joseph Henderson
Joseph A. Henderson

DATED: This 2nd day of January, 2011.

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 2nd day of the month of January, of the year 2011.

Joseph Henderson
Signature of petitioner

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

None
Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Joseph Henderson
Petitioner

None
Attorney for petitioner

UNIVERSITY MEDICAL CENTER
1800 West Charleston Boulevard
Las Vegas, Nevada 89102

Las Vegas Metro. Event Number - 040903-0158

MODE OF ARRIVAL: Las Vegas Metro Police Department

TIME OF SERVICE: 3:28 on 09/03/2004

CHIEF COMPLAINT: Sexual assault.

- HISTORY OF PRESENT ILLNESS: The patient states that there was a knock at her door at about 11:30 last evening and that there was an Hispanic male who came to the door and he said that someone had thrown his keys into the backyard. The patient states that her boyfriend went into the garage to find a flashlight to assist him and then suddenly there were 2 black males that came into the home. The patient states she and her boyfriend were both tied with plastic bands and that she was sexually assaulted on the couch, pn missionary position by a black male and then she was sexually assaulted on the bed with her in missionary position. She states that the male who sexually assaulted her also tied her ankles. She states that after the assailants were gone, she was able to get loose from the restrains and that is when law enforcement became involved with the case. The patient does state that there was penetration of the vagina with the penis of the assailant 2 times. There was also finger penetration. She denies any anal or oral penetration. The patient does state the suspect did masturbate her, she is unsure if he did ejaculate. She does say that he sucked on her nipples, areas of the nipples are swabbed and placed in the sexual assault kit for saliva. She states there was a black gun used and that she has not had consensual intercourse in the last 5 days. The patient is very upset and nervous but cooperative and very straight forward with her answers during her examination.

PHYSICAL EXAMINATION:

GENERAL: This is an alert, oriented 29-year-old Oriental female who is here for a sexual assault examination.

HEENT: There is blood noted over the bridge of the nose. The patient states this is from her boyfriend, who had a cut to his head and injury to his mouth. She had no complaints of injury in this area.

HEART: Regular rate and rhythm.

LUNGS: Respirations are even and unlabored.

ABDOMEN: Soft and nontender.

EXTREMITIES: The patient is able to move all extremities without difficulty. She does have blood on her left forearm, on her left hand and on her left knee. These areas are also swabbed. She does state that this is from her boyfriend, however.

PELVIC: Pelvic examination is done with the use of toluidine blue dye. There is a increased redness at the introitus of the patient's vagina. Please see anatomical drawing sheet for this. No adherence was made with the toluidine blue dye. The increased redness is at 6 o'clock on the introitus. Light staining microscope was negative for any sperm on slides prepared by this nurse. The slide is enclosed in the sexual assault kit for further review by the Las Vegas Metro Crime Lab.

Sexual assault panel is done on the patient. Pregnancy test is reported as negative. Urine toxicology screen is negative. ETOH is less than 10. Zithromax 1 gram is given p.o. prophylactically, Tequin 400 mg, p.o., Ovrall 2 tablets during her visit and 2 to take in 12-hours. The patient is also given Flagyl 2 grams p.o. She is given crackers to eat at this time and is encouraged to have breakfast as soon as she leaves. The patient is given instructions on sexually transmitted diseases, sexual assault instructions and sitz baths. She is to follow with the Rape Crisis Center. In 7 days

PATIENT: KIM, JULIE S

MR#: 000-625-003

JOB #: 327018

ADM. DATE: 09/03/2004

ACCOUNT#: 00075882522

Dictated by: Linda Ebbert, RN
Attending:

EMERGENCY ROOM NOTE

EXHIBIT-A

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Petition

For Writ of Habeas Corpus (Post-Conviction)
(Title of Document)

filed in District Court Case No. C212968

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-OR-

B. For the administration of a public program or
for an application for a federal or state grant.

Joseph Henderson
(Signature)

1/2/11
(Date)

Certificate of Service by Mail

I, Joseph A. Henderson, hereby certify that
on this 2ND day of January, 2011, I
mailed a true and correct copy of the
foregoing Petition For Writ OF HABEAS CORPUS,
addressed to:

Eldon K. McDaniel
Warden, ESP
P.O. Box 1989
Ely, NV. 89301

David Roger
Clark County District Attorney
200 LEWIS AVENUE, 3rd Floor
Las Vegas, NV. 89155

Catherine Cortez Masto
Attorney General
100 North Carson Street
Carson City, NV. 89701-4717

Mr Joseph Henderson

FILED

MAR 01 2011

CLERK OF COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF CLARK

JOSEPH A. HENDERSON,)
Petitioner,)
)
)
v.)
)
)
STATE OF NEVADA,)
Respondant,)

Case No. C21298

AFFIDAVIT IN SUPPORT OF
MOTION FOR APPOINTMENT
OF COUNSEL

STATE OF NEVADA)
) ss
COUNTY OF WHITE PINE)

06C212968
AFFD
Affidavit in Support
1264082



AFFIDAVIT OF JOSEPH A. HENDERSON

COMES NOW, Petitioner, Joseph A. Henderson, herein after, affiant, and
deposes and saya:

1. Affiant is over the age of eighteen and fully competent to attest to the matters herein,
2. Affiant's case deals with the complex science of DNA evidence.
3. Affiant has no education beyond high school and possesses no degree or knowledge of biology, genetics or DNA science.
4. Affiant's case deals with DNA testing whose results can be affected and produce false results due to "Contamination."
5. Evidence in affiant's case demonstrates DNA contamination on the "Source" of DNA samples provided prior to DNA testing.
6. Affiant requires an attorney knowledgable in the science of DNA, specifically in the area of "Contamination".
7. Conversely, Affiant seeks the appointment of any competent counsel who can obtain the information on the complex subject matter to intelligently present it to the court.

Further Affiant Sayeth Naught.

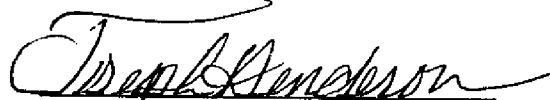
Dated this 14~~th~~ day of FEBRUARY 2011.


JOSEPH A. HENDERSON #67224

Affiant hereby swears, under the penalty of perjury that the information provided herein is true and correct.

Dated thi 14~~th~~ day of FEBRUARY 2011.

Respectfully Submitted


JOSEPH A. HENDERSON #67224
ELY STATE PRISON (ESP)
P.O. BOX 1989
ELY, NV 89301

Petitioner in Pro-se...

56

FILED

MAR 01 2011

DISTRICT COURT
CLARK COUNTY, NEVADA

JOSEPH HENDERSON,
Petitioner,

v.

STATE OF NEVADA,
Respondent,

John L. ...
CLERK OF COURT

Case No: 212968
Dept No: 15

MOTION FOR THE APPOINTMENT
OF COUNSEL; REQUEST FOR
EVIDENTIARY HEARING

MOTION FOR APPOINTMENT OF COUNSEL
REQUEST FOR EVIDENTIARY HEARING


3/15/11

COMES NOW, Joseph A. Henderson, the Petitioner, Pro-Se, and respectfully moves this Honorable Court to appoint Counsel for the purpose of representing petitioner in this Post-Conviction proceeding, the hearing this court has scheduled for March 31st, 2011, in this matter and any evidentiary hearing this court my grant.

MEMORANDUM

It is purly within the descretion of the court to appoint counsel in Post-Conviction proceedings and petitioner respectfully urges the court to do so in this case as the issues are of a highly complex nature, regarding DNA testing contamination questioning of expert witnesses and lawyers and technical issues of law.

PCR testing was conducted in this case and a single DNA molecule can contaminate (INFECT) a PCR and become a significant problem. The ability of small amounts of DNA to produce false and misleading results is well known within the research community.

05C212968
MAPA
Motion for Appointment of Attorney
1262322


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MAR 01 2011
CLERK OF THE COURT

PCR tests are extremely sensitive to contaminating DNA at the crime scene and within the test laboratory. During PCR, contaminants may be amplified up to a billion times their original concentration. Contamination can influence PCR results, particularly in the absence of proper handling techniques and proper controls for contamination. In this case, prior to providing DNA Swab specimens the victim was covered in contaminant DNA (BLOOD).

For these reasons, petitioner requests an evidentiary hearing and appointment of counsel to intelligently represent this matter, in the interest of justice. This motion is made pursuant to these facts, the issues presented within the petition and petitioner's Affidavit in support of motion for appointment of counsel.

Petitioner is unaware of any authority that supports this request.

Dated this 12th day of February 2011.

Respectfully Submitted



Joseph A. Henderson # 67224

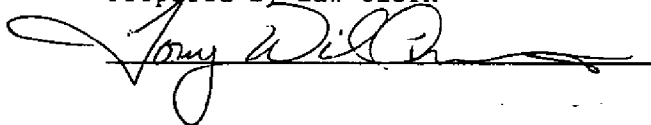
ELY STATE PRISON (ESP)

P.O. Box 1989

Ely, Nevada 89301

Petitioner in Pro-se...

Prepared By Law Clerk



Mr Charles Anderson 67234
P.O. Box 1989
Eliz Nevada 89301

"Legal Mail"



Mr Steven D. Anderson
"Clunk of the Court"
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STATE PRISON

FEB 24 2011

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CLERK OF THE COURT

RSPN
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
	)	CASE NO: C212968
Plaintiff,)	
	)	DEPT NO: XV
-vs-)	
)	
JOSEPH HENDERSON,)	
#1502730)	
)	
Defendant.)	

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

DATE OF HEARING: MARCH 31, 2011
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's 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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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On July 11, 2005, Joseph Henderson, hereinafter "Defendant," was charged by way of
4 Information with Count 1 - Conspiracy to Commit Burglary, Count 2- Burglary While in
5 Possession of a Firearm, Count 3 - Conspiracy to Commit First Degree Kidnapping, Counts
6 4 and 5 - First Degree Kidnapping With Use of a Deadly Weapon, Count 6 - Conspiracy to
7 Commit Sexual Assault, Counts 7, 8, and 9 - Sexual Assault With Use of a Deadly Weapon,
8 Count 10 - Conspiracy to Commit Robbery, Counts 11 and 12 - Robbery With Use of a
9 Deadly Weapon, Count 13 - Open or Gross Lewdness, and Count 14 - Battery With Use of a
10 Deadly Weapon Resulting in Substantial Bodily Harm. On June 27, 2008, Defendant was
11 found guilty by a jury of all counts.

12 On August 28, 2008, Defendant was sentenced as follows: As to Count 1 – to Twelve
13 (12) Months in the Clark County Detention Center; As to Count 2 – to a Maximum of One
14 Hundred Fifty-Six (156) Months with a Minimum Parole Eligibility of Sixty-Two (62)
15 Months, to run Concurrent with Count 1; As to Count 3 – to a Maximum of Sixty (60)
16 Months with a Minimum Parole Eligibility of Twenty-Four (24) Months, to run Consecutive
17 to Count 2; As to Count 4 – to Life with a Minimum Parole Eligibility after Sixty (60)
18 Months, plus an Equal and Consecutive term of Life with a Minimum Parole Eligibility after
19 Sixty (60) Months for the Use of a Deadly Weapon, to run Consecutive to Count 3; As to
20 Count 5 – to Life with a Minimum Parole Eligibility after Sixty (60) Months, plus an Equal
21 and Consecutive term of Life with a Minimum Parole Eligibility after Sixty (60) Months for
22 the Use of a Deadly Weapon, to run Consecutive to Count 4; As to Count 6 – to a Maximum
23 of Sixty (60) Months with a Minimum Parole Eligibility of Twenty-Four (24) Months, to run
24 Consecutive to Count 5; As to Count 7 - to Life with a Minimum Parole Eligibility of One
25 Hundred Twenty (120) Months, plus an Equal and Consecutive term of Life with a
26 Minimum Parole Eligibility of One Hundred Twenty (120) Months for the Use of a Deadly
27 Weapon, to run Concurrent with Count 6; As to Count 8 - to Life with a Minimum Parole
28 Eligibility of One Hundred Twenty (120) Months, plus an Equal and Consecutive term of

1 Life with a Minimum Parole Eligibility of One Hundred Twenty (120) Months for the Use of
2 a Deadly Weapon, to run Consecutive to Count 7; As to Count 9 – to Life with a Minimum
3 Parole Eligibility of One Hundred Twenty (120) Months, plus an Equal and Consecutive
4 term of Life with a Minimum Parole Eligibility of One Hundred Twenty (120) Months for
5 the Use of a Deadly Weapon, to run Consecutive to Count 8; As to Count 10 – to a
6 Maximum of Sixty (60) Months with a Minimum Parole Eligibility of Twenty-Four (24)
7 Months, to run Consecutive to Count 9; As to Count 11 – a Maximum of One Hundred
8 Eighty (180) Months with a Minimum Parole Eligibility of Seventy-Two (72) Months, plus
9 an Equal and Consecutive term of Maximum of One Hundred Eighty (180) Months with a
10 Minimum Parole Eligibility of Seventy-Two (72) Months for the Use of a Deadly Weapon,
11 to run Concurrent with Count 10; As to Count 12 – to a Maximum of One Hundred Eighty
12 (180) Months with a Minimum Parole Eligibility of Seventy-Two (72) Months, plus an
13 Equal and Consecutive term of Maximum of One Hundred Eighty (180) Months with a
14 Minimum Parole Eligibility of Seventy-Two (72) Months for the Use of a Deadly Weapon,
15 to run Consecutive to Count 11; As to Count 13 – to Twelve (12) Months in the Clark
16 County Detention Center, to run Concurrent with Count 12; As to Count 14 – a Maximum of
17 One Hundred Fifty-Six (156) Months with a Minimum Parole Eligibility of Sixty-Two (62)
18 Months, to run Consecutive to Count 13; with One Two Hundred Fifty-One (1,251) Days
19 credit for time served. Further Ordered, a Special Sentence of Lifetime Supervision is
20 imposed to commence upon release from any term of imprisonment, probation or parole.

21 Defendant's Judgment of Conviction (Jury Trial) was filed on September 24, 2008.
22 Defendant filed a Notice of Appeal on October 9, 2008. The Nevada Supreme Court
23 affirmed Defendant's conviction on February 3, 2010. Remittitur issued on March 2, 2010.
24 Defendant filed the instant petition on January 11, 2011. The State's response is as follows.

25 //

26 //

27 //

28 //

ARGUMENT

**I. GROUND 1, 5, 6, 7, AND 8 OF DEFENDANT’S PETITION ARE
BARRED BY THE DOCTRINE OF LAW OF THE CASE**

Defendant’s claims in grounds 1, and 5-8 were raised and rejected on direct appeal. As such, they are barred by the doctrine of law of the case. “The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same.” Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). “The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings.” Hall, 91 Nev. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (citing McNelson v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)).

In Grounds 1, 5, and 6 of Defendant’s petition he claims that (1) the State deprived him of his confrontation rights when it “failed to provide [him] the evidence submitted to the [DNA lab], (2) the State consumed all available material for DNA testing, and (3) the district court erred in failing to dismiss the information due to the State’s alleged consumption of all available DNA material. Defendant raised claims regarding the State’s handling of the DNA evidence and the district court’s denial of his motion to dismiss on direct appeal. The Nevada Supreme Court held, “Because [Defendant’s] claim that the State did not preserve DNA material from each sample for defense retesting is belied by the record, we conclude that the district court did not abuse its discretion.” Exhibit 1, p. 1. Thus, these claims are barred from consideration.

In Ground 7 Defendant argues that the State should have been prevented from identifying him as the perpetrator through the use of the DNA evidence. Defendant claimed on direct appeal that the district court had erred by denying a pretrial motion to preclude the improper use of DNA evidence. The Nevada Supreme Court found this claim to be without merit. Exhibit 1, p. 2. This claim is therefore also barred from consideration.

1 Finally, in Ground 8 Defendant claims the district court erred in denying his motion
2 for a mistrial. Defendant also raised this same claim in his direct appeal. The Nevada
3 Supreme Court found that “the district court did not clearly abuse its discretion when it
4 denied the motion....” Exhibit 1, p. 2. As such, this claim is barred as the law of the case.

5 **II. GROUNDS 2 AND 3 OF DEFENDANT’S PETITION SHOULD HAVE**
6 **BEEN RAISED ON DIRECT APPEAL AND ARE THEREFORE**
7 **WAIVED**

8 Defendant’s claims in Grounds 2 and 3 that the State elicited perjured testimony and
9 that it did not prove each element of the crime beyond a reasonable doubt are waived
10 because they were not raised on direct appeal. NRS 34.810 states in relevant part:

11 1. The court shall dismiss a petition if the court determines that:

12 ...

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

15 ...

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

18 These claims should therefore be dismissed.

19 **III. DEFENDANT’S TRIAL COUNSEL PROVIDED EFFECTIVE**
20 **ASSISTANCE**

21 In order to assert a claim for ineffective assistance of counsel a defendant must prove
22 that he was denied “reasonably effective assistance” of counsel by satisfying the two-prong
23 test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). See
24 also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the
25 Defendant must show first that his counsel's representation fell below an objective standard
26 of reasonableness, and second, that but for counsel's errors, there is a reasonable probability
27 that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88,
28 694, 104 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432,
683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada). “Effective counsel
does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
competence demanded of attorneys in criminal cases.’” Jackson v. Warden, Nevada State

1 Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397
2 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

3 In considering whether trial counsel has met this standard, the court should first
4 determine whether counsel made a “sufficient inquiry into the information that is pertinent to
5 his client's case.” Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing
6 Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once such a reasonable inquiry has been
7 made by counsel, the court should consider whether counsel made “a reasonable strategy
8 decision on how to proceed with his client's case.” Doleman, 112 Nev. at 846, 921 P.2d at
9 280, citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy
10 decision is a “tactical” decision and will be “virtually unchallengeable absent extraordinary
11 circumstances.” Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713,
12 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

13 Based on the above law, the court begins with the presumption of effectiveness and
14 then must determine whether or not the petitioner has proved disputed factual allegations
15 underlying his ineffective-assistance claim by a preponderance of the evidence. Means v.
16 State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). The role of a court in considering
17 allegations of ineffective assistance of counsel is “not to pass upon the merits of the action
18 not taken but to determine whether, under the particular facts and circumstances of the case,
19 trial counsel failed to render reasonably effective assistance.” Donovan v. State, 94 Nev.
20 671, 675, 584 P.2d 708, 711 (1978), citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th
21 Cir. 1977).

22 This analysis does not mean that the court “should second guess reasoned choices
23 between trial tactics nor does it mean that defense counsel, to protect himself against
24 allegations of inadequacy, must make every conceivable motion no matter how remote the
25 possibilities are of success.” Donovan, 94 Nev. at 675, 584 P.2d at 711. In essence, the court
26 must “judge the reasonableness of counsel's challenged conduct on the facts of the particular
27 case, viewed as of the time of counsel's conduct.” Strickland, 466 U.S. at 690, 104 S.Ct. at
28 2066.

1 “There are countless ways to provide effective assistance in any given case. Even the
2 best criminal defense attorneys would not defend a particular client in the same way.”
3 Strickland, 466 U.S. at 689, 104 S.Ct. at 689. “Strategic choices made by counsel after
4 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
5 108 Nev. 112, 117, 825 P.2d 593, 596 (1992), citing Strickland, 466 U.S. at 690, 104 S. Ct.
6 at 2066; see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

7 Even if a defendant can demonstrate that his counsel's representation fell below an
8 objective standard of reasonableness, he must still demonstrate prejudice and show a
9 reasonable probability that, but for counsel's errors, the result would have been different.
10 McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), citing Strickland, 466
11 U.S. at 687. “A reasonable probability is a probability sufficient to undermine confidence in
12 the outcome.” Id., citing Strickland, 466 U.S. at 687-89, 694.

13 Defendant claims his attorney was ineffective for failing to “call into question and
14 have tested the evidence of California authorities’ lab work matching petitioner to Nevada’s
15 profile.” Defendant appears to be discussing the fact that he was identified as a suspect by
16 witness Kathy Gunther who matched the unknown DNA profile to Defendant with the
17 assistance of outside agencies. 6/26/08 TT p. 109. Defendant seems to claim that his attorney
18 should have challenged the DNA profile generated by the outside agency which identified
19 him as the unknown perpetrator. However, such an action by trial counsel would have been
20 useless since Ms. Gunther matched the DNA profile of the unknown perpetrator to a buccal
21 swab obtained from Defendant in a confirmatory match. Id. As such, Defendant cannot
22 demonstrate that counsel was ineffective or that he was prejudiced, since counsel cannot be
23 deemed ineffective for failing to make futile objections or motions. Ennis v. State, 122 Nev.
24 694, 137 P.3d 1095 (2006).

25 Defendant also alleges that the victim pressed herself onto her injured fiancé’s bloody
26 body and knelt in a pool of his blood, and this may have contaminated the DNA evidence.
27 Claims asserted in a petition for post-conviction relief must be supported with specific
28 factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100

1 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked” allegations are not sufficient,
2 nor are those belied and repelled by the record. Id.

3 Moreover, there is no evidence in the record that supports his contention that she
4 “pressed herself” on to Mr. Bernzweig’s body or “kneeled” in the pool of blood. See 6/24/08
5 TT p. 149-150; 6/25/08 TT p. 35. Moreover, Defendant fails to explain how coming into
6 contact with Mr. Bernzweig’s blood in any way makes the DNA test results identifying him
7 as the perpetrator unreliable. Defendant’s DNA is not rendered undetectable, and DNA
8 profiles of individuals can be discerned from mixed profiles. As such, Defendant has failed
9 to demonstrate that counsel was deficient or that he was prejudiced.

10 Finally, Defendant also argues that his counsel was ineffective for failing to challenge
11 Ms. Gunther’s testimony that she detected spermatozoa sufficient to obtain a genetic profile.
12 Defendant has failed to demonstrate that such an attempt by counsel would have achieved
13 favorable testimony. Moreover, Defendant’s DNA was also detected on the breast swab
14 taken from the victim. 6/26/08 TT 115. As such, Defendant cannot demonstrate prejudice.

15 CONCLUSION

16 Based on the foregoing arguments, Defendant’s petition should be denied.

17 DATED this 29th day of March, 2011.

18 Respectfully submitted,

19 DAVID ROGER
20 Clark County District Attorney
Nevada Bar #002781

21
22 BY /s/ JAMES R. SWEETIN
23 JAMES R. SWEETIN
24 Chief Deputy District Attorney
Nevada Bar #005144

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 29th day of March, 2011, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JOSEPH HENDERSON, BAC#67224
ELY STATE PRISON
P.O. BOX 1989
ELY, NV 89301

/s/ HOWARD CONRAD
Secretary for the District Attorney's Office

hjc/SVU

EXHIBIT “1”

FILED

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAR 05 2010

Tracie Lindeman
CLERK OF COURT

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 52573

District Court Case No. C212968

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of conviction AFFIRMED."

Judgment, as quoted above, entered this 3rd day of February, 2010.

IN WITNESS WHEREOF, I have subscribed my name and affixed
the seal of the Supreme Court at my Office in Carson City,
Nevada, this 2nd day of March, 2010.

Tracie Lindeman, Supreme Court Clerk

By: _____
Deputy Clerk

A. Ingersoll



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MAR 04 2010

CLERK OF THE COURT

10-2969

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52573

FILED

FEB 03 2010

ORDER OF AFFIRMANCE

TRACE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit burglary, burglary with the use of a firearm, conspiracy to commit first-degree kidnapping, two counts of first-degree kidnapping with the use of a deadly weapon, conspiracy to commit sexual assault, three counts of sexual assault with the use of a deadly weapon, conspiracy to commit robbery, two counts of robbery with the use of a deadly weapon, open or gross lewdness, and battery with a deadly weapon resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. Appellant Joseph Henderson raises four claims of error.

First, Henderson claims that the district court erred by denying his motion to dismiss the information and alternative motion to preclude the State's DNA evidence based on the State's alleged consumption of all of the available DNA material. Because Henderson's claim that the State did not preserve DNA material from each sample for defense retesting is belied by the record, we conclude that the district court did not abuse its discretion. See Hill v. State, 124 Nev. ___, ___, 188 P.3d 51, 54 (2008).

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MAR 04 2010

CLERK OF THE COURT

10-02969

SUPREME COURT
OF
NEVADA

(7) 1047A

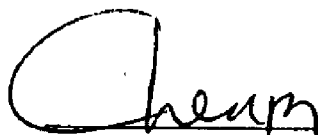
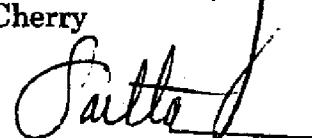
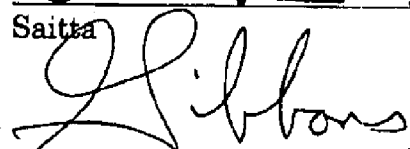
Second, Henderson claims that the district court erred by denying his pretrial motion to preclude the improper use of DNA evidence. Henderson does not allege that any improper DNA evidence or argument was presented to the jury, and therefore we conclude that this claim is wholly without merit.

Third, Henderson claims that the district court erred by denying a motion for mistrial and an alternative motion to strike the testimony of expert witness Kim Murga. Henderson's motion was based on three grounds: (1) Murga was noticed as a witness one day late, (2) her notes were not disclosed to the defense prior to her testimony, and (3) she improperly vouched for another witness. We conclude that the district court did not clearly abuse its discretion when it denied the motion and determined that (1) the State had good cause for its one-day delay in noticing Murga as a witness, (2) the State was not required to disclose Murga's personal summary of official reports already provided to the defense, and (3) Murga's testimony that another expert followed proper procedures in performing his DNA analysis was not improper. See Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001); Hernandez v. State, 124 Nev. ___, ___, 188 P.3d 1126, 1131 (2008).

Finally, Henderson claims that the district court erred when it required him to voice his peremptory challenges in open court. Although we have previously stated "our strong preference that . . . peremptory challenges during jury selection [be] exercised and considered outside the presence of the jury," Foster v. State, 121 Nev. 165, 174, 111 P.3d 1083, 1089 (2005), we have never mandated such procedures. And because Henderson fails to show prejudice, we deny relief on this claim.

Having considered Henderson's claims and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

 J.
Cherry
 J.
Saitta
 J.
Gibbons

cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

CERTIFIED COPY

This document is a full, true and correct copy of
the original on file and of record in my office.

DATE: MARCH 2, 2010

Supreme Court Clerk, State of Nevada

A. Ingersoll Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent

Supreme Court No. 52573

District Court Case No. C212968

REMITTITUR

TO: Steven D. Grierson, Clark District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: March 2, 2010

Tracie Lindeman, Clerk of Court

By: A. Ingerson
Deputy Clerk

cc (without enclosures):

Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on MAR 05 2010

Heather

HEATHER LOFQUIST

District Court Clerk

RECEIVED

MAR 04 2010

CLERK OF THE COURT

10-04356



**CLARK COUNTY COURTS
EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT**



REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3rd FL.
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554
FAX (702) 474-2434

Edward A. Friedland
Clerk of the Court

Steven D. Grierson
Assistant Clerk of the Court

KICE STEPHANIE

Date: April 12, 2011
Case No: C212968

Attached are pleadings received by the Office of the District Court Clerk on:

April 12, 2011

Pleadings: MOTION FOR EXTENSION OF TIME TO SUBMIT REBUTTAL TO STATE
ANSWER FOR PETITIONERS WRIT OF HABEAS CORPUS (POST
CONVICTION).

Rule 3.70. Papers which May Not be Filed

Except as may be required by the provisions of NRS34.730 to 34.830, inclusive, all motions, petitions, pleadings or other papers delivered to the clerk of the court by a defendant who has counsel of record will not be filed but must be marked with the date received and a copy forwarded to the attorney for such consideration as counsel deems appropriate. This rule does not apply to applications made pursuant to Rule 7.40(b)(2)(ii).

Deputy Clerk of the Court

#DC

05C212968
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6

In the Eight Judicial
District County of Clark -

Joseph Henderson
Petitioner,

vs
State of Nevada
Respondent

Case no. C212968
Dept XV

Motion for extension of
time to submit rebuttal to
states answer for petitioners
writ of habeas Corpus
(post-conviction)

Come now, Joseph A Henderson,
petitioner in the above entitled
matter and requests this Honorable
court hold in abeyance any decision
in this matter until petitioner is
given opportunity to respond to the
states contentions set forth in
their answer to petitioners post-
conviction petition.

~~CONFIDENTIAL~~

This motion is based upon the attached affidavit in support and Petitioner respectfully request that he be given until May 10, 2011 to submit his rebuttal.

Date: April 3, 2011

Joseph Henderson
JOSEPH A HENDERSON

Affidavit of Joseph Henderson

State of Nevada - SS.
County of White Pine

I, Joseph A Henderson, Affiant
hereinafter, do hereby swear under -
the penalty of perjury that the following
is true and correct and that affiant is
over the age of eighteen and competent
to attest to the matters herein and that
there are no social security numbers
included in this document.

Affiant says:

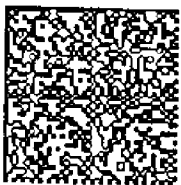
1. The petition was filed on January 11, 2011
2. The court ordered the state answer within 45 days
which would have been on or about March 3, 2011
3. Affiant received the answer on April 6, 2011
4. A hearing was set for March 31, 2011.
5. Petitioner was not afforded opportunity to -
be present for the hearing and rebut any
contention from the state, pursuant to
"GEBERS"
6. The state failed to mail their answer
until March 29, 2011, two days before the
scheduled hearing...
7. Affiant has a rebuttal he wishes
the court to consider.

Joseph Henderson
Date: April 3RD 2011

Further Affiant saith Naught.

I, Joseph Henderson do hereby swear that the
foregoing is true and correct to the best of my knowledge.
I swear this under perjury and the penalty

Mr. Steven Remick
P.O. Box 1989
Edy, Nevada
89301



UNITED STATES POSTAGE
02 1M
000 4259541
MAILED FROM ZIP CODE 89301
\$ 00.440
APR 07 2011
PETER BOWES

Mr. Steven B. Remick
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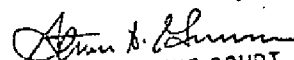
Quality Park Item #90019
Treated with an Anti-Microbial Agent to guard against
the growth of bacteria, mold, mildew, fungus and odors
Licensed by Silverco

MTN
STEPHANIE B. KICE
Nevada Bar No. 10105
THE KICE LAW GROUP, LLC.
616 S. Eighth St.
Las Vegas, NV 89101
(702) 401-9115 [phone]
(702) 973-9450 [fax]
Attorney for Defendant
Joseph Henderson

 ORIGINAL

FILED

AUG 1 11 18 AM '11


CLERK OF THE COURT

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

05C212968
MOT
Morton
1553404



THE STATE OF NEVADA,

Plaintiff,

vs.

JOSEPH HENDERSON,

Defendant,

Case No.: C212968
Dept: No.: XV

MOTION TO PLACE ON CALENDAR TO SET HEARING DATE

This Motion is made and based on the Declaration of Stephanie B. Kice, Esq., attached hereto, and the pleadings and papers on file herein.

DATED: July 29, 2011.

THE KICE LAW GROUP, LLC.

By: 

STEPHANIE B. KICE, ESQ.
Nevada Bar No. 10105
616 S. Eighth St.
Las Vegas, NV 89101
Attorney for Defendant
Joseph Henderson

RECEIVED
AUG 01 2011
CLERK OF THE COURT

1
2
3 **NOTICE OF MOTION**

4 TO: STATE OF NEVADA

5 TO: OFFICE OF THE DISTRICT ATTORNEY

6 **PLEASE TAKE NOTICE** that the undersigned will bring the foregoing MOTION TO
7 PLACE ON CALENDAR TO SET HEARING DATE on the 11 day of Aug.
8 2011, at the hour of 9:00 a.m./p.m. in Department No. XV of the above Court, or as
9 soon as thereafter as counsel may be heard.

10 DATED: July 29, 2011

11 Respectfully submitted:

12 **THE KICE LAW GROUP, LLC.**

13 By: 

14 STEPHANIE B. KICE, ESQ.

15 Nevada Bar No. 10105

16 616 S. Eighth St.

17 Las Vegas, NV 89101

18 Attorney for Defendant

19 *Joseph Henderson*

RECEIPT OF COPY

RECEIPT OF COPY of the above and forgoing MOTION TO PLACE ON CALENDAR
TO SET HEARING DATE is hereby received and acknowledged this ____ day of _____,
2011.

OFFICE OF THE DISTRICT ATTORNEY

By: _____

EXHIBIT

1

Department XV

District Court

MEMORANDUM

Date: Wednesday, June 29, 2011

To: Stephanie Kice

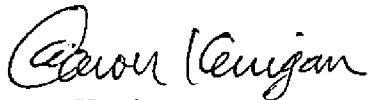
Re: C212968 State v. Henderson

Dear Ms. Kice,

The Court is inclined to grant this Order. However, the Court prefers not to vacate pending matters without setting a future hearing date immediately. Because this Order does not replace the vacated September 29, 2011 hearing, there arises a possibility that no party will timely put this matter on calendar for decision. This could happen if before the end of the briefing period defense counsel were to withdraw, become incapacitated, etc. Accordingly, at a minimum the Order should set a status check date after the briefing period has concluded. You may leave a blank for the Court to fill in the date, or you may choose any Tuesday or Thursday at 9:00 A.M.

Thank you.

Sincerely,



Aaron Kerrigan
Law Clerk, Dept. XV
702-671-4409
dept15lc@clarkcountycourts.us

1 **SAO**
Stephanie B. Kice, Esq.
2 **THE KICE LAW GROUP, LLC.**
Nevada State Bar No. 10105
3 616 South 8th Street
Las Vegas, Nevada 89101
4 (702) 401-9115 [phone]
5 (702) 973-9450 [fax]
Attorney for Defendant
6 *Joseph Henderson*

 **ORIGINAL**

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

9 * * *

10 THE STATE OF NEVADA,

11 Plaintiff,

12 vs.

13 JOSEPH HENDERSON,
14 ID # 67224

15 Defendant.

Case No. C212968
Dept. No. XV

16
17 **STIPULATION AND ORDER FOR EXTENSION OF TIME TO FILE**
18 **WRIT OF HABEAS CORPUS**

19 IT IS HEREBY STIPULATED AND AGREED by and between STEPHANIE B. KICE,
20 ESQ., attorney for Defendant, JOSEPH HENDERSON, and H. LEON SIMON, attorney for
21 Plaintiff, that the Defendant has requested an extension of time within which to file his Writ of
22 Habeas Corpus, up to and including Monday, August 29, 2011.

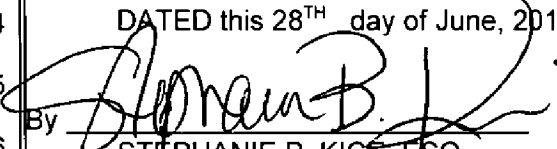
23 IT IS FURTHER STIPULATED AN AGREED by and between the parties herein that
24 counsel for the PLAINTIFF shall have up to and including Friday, October 28, 2011 (60 days) to
25 file a responsive pleading. Counsel for the DEFENDANT will have until Monday, November 14,
26 2011 to file a reply brief.


27
28 ///

JUN 28 2011

1 IT IS FURTHER STIPULATED AND AGREED that after the completion of briefing,
2 counsel for MR. HENDERSON will complete a Motion to Place this Matter on the Court's
3 Calendar.

4 DATED this 28TH day of June, 2011.

5 By 
6 STEPHANIE B. KICE, ESQ.
7 Nevada State Bar No. 10105
8 616 South 8th Street
9 Las Vegas, Nevada 89101

By 
H. LEON SIMON
Nevada State Bar No. 000411
200 Lewis Ave.
Las Vegas, NV 89155

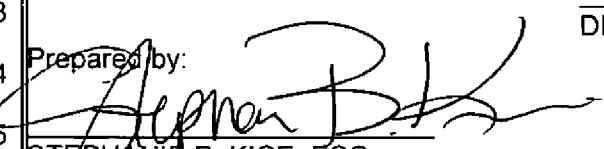
10 **ORDER FOR EXTENSION OF TIME TO FILE**
11 **WRIT OF HABEAS CORPUS**

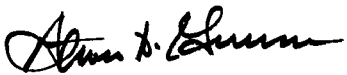
12 Based upon the above stipulation of both parties, it is hereby ordered that the Defendant,
13 Joseph Henderson, is hereby granted an extension of time to file his Writ of Habeas Corpus up
14 to and including Monday, August 29, 2011; counsel for the PLAINTIFF shall have up to and
15 including Friday, October 28, 2011 (60 days) to file a responsive pleading; and counsel for the
16 DEFENDANT will have until Monday, November 14, 2011 to file a reply brief.

17 Upon completion of briefing, Counsel for MR. HENDERSON WILL COMPLETE A
18 MOTION TO PLACE THIS MATTER ON THE Court's Calendar for argument.

19 Currently, argument is set for this matter on September 29, 2011. This order vacates that
20 date.

21 IT IS SO ORDERED this 28 day of _____, 2011.

22
23 _____
24 Prepared by: DISTRICT COURT JUDGE
25 
26 STEPHANIE B. KICE, ESQ.
27 Nevada State Bar No. 10105
28 616 South 8th Street
Las Vegas, Nevada 89101
Attorney for Defendant
Joseph Henderson



CLERK OF THE COURT

1 **WRIT**
2 STEPHANIE B. KICE
3 Nevada Bar No. 10105
4 **THE KICE LAW GROUP, LLC.**
5 4532 W. Charleston Blvd.
6 Las Vegas, NV 89102
7 (702) 401-9115 [phone]
8 (702) 973-9450 [fax]
9 Attorney for Petitioner
10 *Joseph Henderson*

8 **EIGHTH JUDICIAL DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 JOSEPH HENDERSON,

11 Petitioner,

12 v.

14 RENEE BAKER, Warden
15 Ely State Prison, et al.,

16 Respondent.

Case No. C212968
Dept. No. XV

Date of Hearing: December 1, 2011
Time of Hearing: 9:00 a.m.

(Not a Death Penalty Case)

17 **PETITION FOR WRIT OF HABEAS CORPUS**
18 **(POST-CONVICTION)**

19 1. Name of institution and county in which you are presently imprisoned or where and
20 how you are presently restrained of your liberty: Ely State Prison, P.O. Box 1989, Ely, NV 89301

21 2. Name and location of court which entered the judgment of conviction under attack:
22 Eighth Judicial District, Las Vegas, Nevada, Clark County

23 3. Date of judgment of conviction: September 24, 2008

24 4. Case Number: C212968

25 5. (a) Length of sentence: Life with Possibility of Parole

26 6. Are you presently serving a sentence for a conviction other than the conviction under
27 attack in this motion? Yes X No

28 If "yes", list crime, case number and sentence being served at this time: Possession of a

1 Controlled Substance Case No.: C213960 Maximum term of 36 months.

2 7. Nature of offense involved in conviction being challenged: Count 1 (Conspiracy to
3 Commit Burglary) -12 months in CCDC; Count 2 (Burglary While in Possession of a
4 Firearm)-a maximum of 156 months minimum parole eligibility af 62 months in NDOC to run
5 concurrent with Count 1; Count 3 (Conspiracy to Commit First Degree Kidnapping)-a
6 maximum of 60 months with a minimum parole eligibility of 24 months in NDOC to run
7 consecutive with Count 2; Count 4 (First Degree Kidnapping with Use of a Deadly Weapon)-to
8 LIFE with a minimum parole eligibility after 60 months plus and equal and consecutive term
9 of LIFE with a minimum parole eligibility after 60 months to run consecutive to Count 3;
10 Count 5 (First Degree Kidnapping with Use of a Deadly Weapon)-to LIFE with a minimum
11 parole eligibility after 60 months plus and equal and consecutive term of Life with a minimum
12 parole eligibility after 60 months plus and equal and consecutive term of LIFE with a
13 minimum parole eligibility after 60 months for the use of a deadly weapon, to run consecutive
14 to Count 4; Count 6 (conspiracy to Commit Sexual Assault)-a maximum of 60 months with
15 a minimum parole eligibility of 24 months in NDOC to run consecutive with Count 5; Count
16 7 (Sexual Assault with Use of a Deadly Weapon)-to LIFE with a minimum parole eligibility
17 after 120 months plus and equal and consecutive term of LIFE with a minimum parole
18 eligibility after 120 months for the use of a deadly weapon, to run concurrent to Count 6;
19 Count 8 (Sexual Assault with Use of a Deadly Weapon)-to LIFE with a minimum parole
20 eligibility after 120 months plus and equal and consecutive term of LIFE with a minimum
21 parole eligibility after 120 months for the use of a deadly weapon, to run consecutive to Count
22 7; Count 9 (Sexual Assault with Use of a Deadly Weapon)-to LIFE with a minimum parole
23 eligibility after 120 months plus and equal and consecutive term of LIFE with a minimum
24 parole eligibility after 120 months for the use of a deadly weapon, to run consecutive to Count
25 8; Count 10 (Conspiracy to Commit Robbery)-a maximum of 60 months with a minimum
26 parole eligibility of 24 months in NDOC, to run consecutive with Count 9; Count 11 (Robbery
27 with use of a Deadly Weapon)-a maximum of 180 months with a minimum of parole eligibility
28 of 72 months in the NDOC plus and equal and consecutive term of 180 months with a

minimum parole eligibility after 72 months in the NDOC for the use of a deadly weapon to run concurrent to Count 10; Count 12 (Robbery with Use of a Deadly Weapon)– a maximum of 180 months with a minimum parole eligibility of 72 months in the NDOC plus and equal and consecutive term of 180 months with a minimum parole eligibility after 72 months for the use of a deadly weapon to run consecutive to Count 11; Count 13 (Open and Gross Lewdness)–12 months in CCDC to run concurrent to Count 12; Count 14 (Battery with use of a Deadly Weapon Resulting in Substantial Bodily Harm)–a maximum of 156 months with a minimum parole eligibility of 62 months in NDOC to run consecutive with Count 13.

8. What was your plea? (check one)

(a) Not guilty X (c) Guilty but mentally ill ____

(b) Guilty ____ (d) Nolo contendere ____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury X

(b) Judge without a jury ____

11. Did you testify at the trial? Yes ____ No ____

12. Did you appeal from the judgment of conviction?

Yes X No ____

13. If you did appeal, answer the following:

(a) Name of court: Nevada Supreme Court

(b) Case number or citation: 52573

(c) Result: Denied Without Argument

(d) Date of result: March 11, 2010 (Remittitur Issued)

14. If you did not appeal, explain briefly why you did not:

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court,

1 state or federal? Yes___ No X

2 16. If your answer to No. 15 was "yes," give the following information:

3 (a) As to any first petition, application or motion, give the same information:

4 (1) Name of court:

5 (2) Nature of proceeding:

6 (3) Grounds raised:

7 (4) Did you receive an evidentiary hearing on your petition,
8 application or motion? Yes ___ No ___

9 (5) Result:

10 (6) Date of result:

11 (7) If known, citations of any written opinion or date of orders entered
12 pursuant to such result:

13 (b) As to any second petition, application or motion, give the same
14 information:

15 (1) Name of court:

16 (2) Nature of proceeding:

17 (3) Grounds raised:

18 (4) Did you receive an evidentiary hearing on your petition,
19 application or motion? Yes ___ No ___

20 (5) Result:

21 (6) Date of result:

22 (7) If known, citations of any written opinion or date of orders entered
23 pursuant to such result:

24 (c) As to any third or subsequent additional applications or motions, give the
25 same information as above, list them on a separate sheet and attach. **N/A**

26 (d) Did you appeal to the highest state or federal court having jurisdiction, the
27 result or action taken on any petition, application or motion? No.

28 (1) First petition, application or motion?

Yes ___ No ___

(2) Second petition, application or motion?

1 Yes ___ No ___

2 (3) Third or subsequent petitions, applications or motions?

3 Yes ___ No ___

4 Citation or date of decision.

5 (c) If you did not appeal from the adverse action on any petition, application
6 or motion, explain briefly why you did not. (You must relate specific facts in response to this
7 question. Your response may be included on paper which is 8 ½ by 11 inches attached to the
8 petition. Your response may not exceed five handwritten or typewritten pages in length) N/A

9 _____
10 _____
11 17. Has any ground being raised in this petition been previously presented to this or
12 any other court by way of petition for habeas corpus, motion, application or any other post-
13 conviction proceeding? If so, identify: N/A

14 (a) Which of the grounds is the same:

15 (b) The proceedings in which these grounds were raised:

16 (c) Briefly explain why you are again raising these grounds. (You must relate
17 specific facts in response to this question. Your response may be included on paper which is 8 ½
18 by 11 inches attached to the petition. Your response may not exceed five handwritten or
19 typewritten pages in length.)

20 18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any
21 additional pages you have attached, were not previously presented in any other court, state or
22 federal, list briefly what grounds were not so presented, and give your reasons for not presenting
23 them. (You must relate specific facts in response to this question. Your response may be
24 included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not
25 exceed five handwritten or typewritten pages in length.) N/A

26 19. Are you filing this petition more than 1 year following the filing of the judgment
27 of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the
28 delay. (You must relate specific facts in response to this question. Your response may be

1 included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not
2 exceed five handwritten or typewritten pages in length.)

3 20. Do you have any petition or appeal now pending in any court, either state or
4 federal, as to the judgment under attack? Yes___ No X

5 If yes, state what court and the case number:

6 21. Give the name of each attorney who represented you in the proceeding resulting in
7 your conviction and on direct appeal:

8 James Ruggeroli
Nevada Bar No.: 7891

9 Lynn Avants
Nevada Bar No.: 6208

10 Violet Radosta
Nevada Bar No.: 5747

11 Norm Reed
Nevada Bar No.: 3795

12 Kedric Bassett
Nevada Bar No.: 4214

13 Howard Brooks
Nevada Bar No.: 3374

14 Clark County Public Defender's Office
15 309 S. Third St., Suite 226
16 Las Vegas, NV 89155

17 22. Do you have any future sentences to serve after you complete the sentence
18 imposed by the judgment under attack:

19 Yes___ No X

20 23. State concisely every ground on which you claim that you are being held
21 unlawfully. Summarize briefly the facts supporting each ground. Each claim is presented below.

22 **INTRODUCTION:**

23 Eric Bernweig and his fiancée, Julie Kim, were in bed in the early morning hours of
24 September 3, 2004 when their doorbell rang. Mr. Bernweig went downstairs to answer the door. The
25 man at the door—who the victims described as both “Hispanic” or “Middle Eastern” at varying
26 times—told Mr. Bernweig that his child had thrown his keys into Mr. Bernweig’s backyard. This was
27 a ruse to get access to the residence. Both victims described assailants entering the residents with
28 guns equipped with laser sights. Upon entry, the men made repeated demands to get into the safe.

1 Two of the assailants took Mr. Bernweig upstairs and the third man, who had on a mask, tied up Ms.
2 Kim. This man began touching Ms. Kim's breast(s) and buttocks.

3 This masked assailant digitally penetrated Ms. Kim and eventually placed his penis in her
4 vagina without her consent. A noise startled the assailant and the sexual assault momentarily ceased.
5 The assailant then took Ms. Kim upstairs where he again sexually assaulted her. After all of the
6 assailants left, Ms. Kim freed herself and Mr. Bernweig and they called 9-1-1.

7 Ms. Kim went to University Medical Center (UMC) where a SANE nurse conducted a sexual
8 assault exam. DNA samples of an unknown person were collected from Ms. Kim's vagina, breast,
9 and bed sheet. This DNA was uploaded into the National DNA Index system (CODIS) for
10 comparison. A CODIS hit came back from California and the DNA was linked to Joseph Henderson.
11 Based upon this "hit" authorities secured a warrant to obtain a buccal swab from Mr. Henderson. The
12 METRO crime lab analyzed the sample and based upon those findings, they charged Mr. Henderson
13 with fourteen (14) criminal counts. A jury found Mr. Henderson guilty and he is currently serving
14 multiple life sentences.

15 GROUND ONE

16 **MR. HENDERSON'S CONVICTION AND SENTENCE ARE INVALID UNDER THE 1st,
17 6th, AND 14th FEDERAL CONSTITUTIONAL AMENDMENT GUARANTEES OF DUE
18 PROCESS AND EQUAL PROTECTION UNDER THE LAW AND ARTICLE 1 OF THE
19 NEVADA CONSTITUTION BECAUSE COUNSEL'S PERFORMANCE FELL BELOW AN
OBJECTIVE STANDARD OF REASONABLENESS AS IS MANDATED BY Strickland v.
Washington, 466 U.S. 668 (1984)**

20 Legal Authority Relevant to All Claims of Ineffective Assistance of Counsel

21 The Sixth Amendment of the United States Constitution guarantees that an accused person
22 shall "have the Assistance of Counsel for his defense." The United States Supreme Court has clearly
23 defined when the assistance of counsel becomes ineffective and an accused person is denied this
24 right. In Strickland v. Washington, 466 U.S. 668 (1984), the Court established a two-prong test for
25 determining ineffective assistance of counsel at trial. See also Porter v. McCollum, 130 S. Ct. 447,
26 175 L. Ed. 2d 398 (2009). To prevail under Strickland, a defendant must demonstrate both that his
27 "counsel's performance was deficient" and "that the deficient performance prejudiced the defense."
28 Id. at 687. To satisfy the second prong of Strickland, a defendant must show that his trial counsel's

1 performance prejudiced his defense such that he suffered actual prejudice and that “there is a
2 reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding
3 would have been different. A reasonable probability is a probability sufficient to undermine
4 confidence in the outcome.” Strickland, 466 U.S. at 694. This test has also been adopted in Nevada.
5 See Hurd v. State, 114 Nev. 182, 953 P.2d 270 (1998). Further, trial counsel’s actions must be based
6 on reasonable strategic decisions. Strickland, 466 U.S. at 691.

7 In this case, Mr. Henderson’s appointed counsel made a series of errors that so undermined
8 the proper functioning of the adversarial process that the outcome of Mr. Henderson’s proceedings
9 cannot be relied upon as have produced a just result.

10 **A. Prior Counsel Failed to Hire a Forensic DNA Expert to Either Re-Test or Make and**
11 **Independent Evaluation of the DNA Report Generated by METRO.**

12 There are a number of reasons why there can be false-positives in DNA testing. Some of
13 these include: the quantity of DNA tested; how the samples are smeared; how often the lab
14 implements quality assurance measures and when and if the lab is accredited; mislabeling and
15 mishandling the DNA; carry over or contamination issues; lab errors, issues of kinship, and
16 coincidence, and the failure to isolate certain subgroups in a population. Again, without a thorough
17 examination of the State’s evidence, grave concerns exist about the DNA collection, testing, and
18 results.¹

19 Even though the court declared Mr. Henderson indigent and was represented by the public
20 defender’s office, he was still entitled to the assistance of experts. Ake v. Oklahoma, 470 U.S. 68
21 (1985). Because counsel failed to secure expert assistance, Mr. Henderson was significantly
22 prejudiced and effectively deprived of counsel in a critical stage of the proceeding in violation of his
23 Constitutional rights and due process of law. U.S. v. Cronie, 466 U.S. 648 (1984).

24 The trial in this case was continued a number of times. As such, ample time existed for Mr.
25

26 ¹ Mr. Henderson asks this Court to take judicial notice of the recent news regarding
27 problems at the METRO lab that led to the firing of one chemist and the “retirement” of another.
28 Mr. Henderson believes and therefore alleges that it was METRO’s errors or errors by the lab in
California that led to him even being connected to this case at all.

1 Henderson's prior counsel to either send the remaining samples out in order to re-test the DNA or
2 to hire a forensic DNA specialist to review the METRO report and generate an independent review
3 of the methods used.²

4 These actions were critical in this case. Neither victim can identify Mr. Henderson. In fact,
5 Ms. Kim's descriptions of her assailant **do not match** the physical description of Mr. Henderson.
6 During the preliminary hearing Ms. Kim testified that the person who raped her was "approximately
7 five-eight, middle built (sic)". (PH 4/28/05 page 15 line 9). According to the Nevada Department
8 of Corrections web-page, Mr. Henderson is 6'0" tall and weighs 230 pounds and he is listed as
9 having a large build. The only thing that "links" Mr. Henderson to the crime is the DNA.

10 Counsel had no tactical or strategic justification within the range of reasonable competence
11 for their failure to hire expert witnesses in this case. Counsel's failure to gather the necessary expert
12 opinions prevented a jury from hearing any potential problems with the DNA collection and/or
13 processing in both California and Nevada. But for counsel's failure to perform at a reasonable level
14 of competence, the jury relied upon evidence that was not fully explored. The decision to proceed
15 to trial should be accepted by this court as valid strategy when that decision is made in the absence
16 of the consultation of experts.

17 **B. Prior Counsel Failed to Challenge the Validity of the Search Warrant**

18 The search warrant to obtain Mr. Henderson's buccal swab was based upon the
19 representations of one chemist to another that there had been a "hit" on the CODIS database. Despite
20 being made aware of this issue at the preliminary hearing, prior counsel did not challenge the validity
21 of the search warrant. The Supreme Court of the United States has held time and again that a search
22 warrant issued based upon an affidavit containing materially false statements violates the Fourth
23 Amendment. Consequently, such a Constitutionally infirm search warrant may render the resulting
24 search invalid. Franks v. Delaware, 438 U.S. 154 (1978).

25 A defendant is entitled to an evidentiary hearing to examine the validity of an alleged Fourth
26

27 ² Counsel should have obtained reports that verified the chain of custody from
28 California when Mr. Henderson's DNA was taken and the reports from the lab that developed the
DNA profile and put that profile in the CODIS database.

1 Amendment violation provided he makes "a preliminary showing substantiating [his] claim that in
2 issuing the warrant [the Judge] was misled by the alleged material falsehoods in the affidavit."
3 Garrettson v. State, 967 P.2d 428, 430 (Nev. 1998); see also Weber v. State, 119 P.3d 107, 128 (Nev.
4 2005); also Franks, 438 U.S. at 171 (holding that allegations "of reckless disregard for the truth"
5 must be "accompanied by an offer of proof" to entitle defendant to an evidentiary hearing).

6 The 9th Circuit Court of Appeals has held that whether "the alleged judicial deception was
7 brought about by material false statements or material omissions is not of consequence", Liston v.
8 County of Riverside, 120 F.3d 965, 973 (9th Cir. 1997). See also, U.S. v. Gonzalez, 412 F.3d 1102,
9 1110 (9th Cir. 2005), amended by, 437 F.3d 854 (9th Cir. 2006). A Fourth Amendment violation
10 also "occurs where the affiant intentionally or recklessly omitted facts required to prevent technically
11 true statements from being misleading." Liston, 120 F.3d at 973.

12 Because there is no affidavit in the file, present counsel can only assume that prior counsel
13 did not have this material. By not challenging the search warrant, the State was able to use evidence
14 against Mr. Henderson that very well may have been suppressed. Mr. Henderson believes and
15 therefore alleges that had the DNA sample been suppressed, the outcome of the jury trial would have
16 been different because there is absolutely no evidence to link Mr. Henderson to this crime. .

17 **C. Trial Counsel Failed to Allow Mr. Henderson the Ability to Review and Correct**
18 **Errors in the Pre-Sentence Report**

19 Mr. Henderson believes and therefore alleges that because he was not allowed the
20 opportunity to review his Pre-Sentence Investigation Report (PSI) that the document contains errors.
21 These errors will serve to prejudice Mr. Henderson as he moves through the Department of
22 Corrections and could affect his eligibility and access to programs and present a cascading effect that
23 could push back his first appearance before the parole board and possibly keep him from getting
24 parole at all.

25 The Nevada Supreme Court recently decided that when a defendant fails to raise problems
26 or issues with the PSI before the district court and on direct appeal, the defendant has waived his
27 opportunity to have any and all alleged inaccuracies corrected. Stockmeier v. State, 127 Nev. Adv.
28 Rep. 19, 255 P.3d 209 (Nev. 2011). Because prior counsel failed to allow Mr. Henderson the

1 opportunity to correct errors, he is now foreclosed from having these errors corrected. Counsel's
2 performance fell below a reasonable standard and their deficient performance will continue to harm
3 Mr. Henderson as long as he is in prison.

4 **D. Trial Counsel Failed to Properly Secure an Adequate Record for Appeal and Post-**
5 **Conviction By Not Having the Bench Conferences Recorded**

6 Throughout the proceedings against Mr. Henderson, prior counsel failed to secure an
7 adequate record by failing to have a record of the bench conferences.³ Mr. Henderson believes, and
8 therefore alleges, that during this unrecorded conference, the trial judge took material, substantial
9 actions, ranging from everything including ruling on evidentiary matters and establishing courtroom
10 procedure and scheduling. Such proceedings are integral parts of a criminal case in general, and of
11 Mr. Henderson's case in particular.

12 There can be no strategic or tactical reason for allowing potential claims to be foreclosed
13 because of an inadequate record. The fact that there is not an adequate record of these proceedings
14 violates Mr. Henderson's constitutional rights, as well as those of the public to free and open
15 proceedings. The failure to secure an adequate record also violates Mr. Henderson's rights under
16 international law, which guarantees every person a fair and public hearing by a competent,
17 independent, and impartial tribunal.⁴

18 These constitutional violations were prejudicial per se; no showing of specific prejudice is
19 required in order to obtain relief for a violation of the public trial guarantee. Counsel's failure to
20 secure a complete record substantially and adversely affected Mr. Henderson's constitutional rights.
21 Prosecutors' cannot show, beyond a reasonable doubt, that the courtroom closures did not ultimately
22 affect and prejudice Mr. Henderson's conviction and sentence.

23 **E. Prior Counsel Failed to Keep Necessary Notes, Conduct Research or Properly**
24 **Document the File**

25 ³ The trial judge additionally failed to take any other measures to effectuate the
26 public interest in observation and comment on these judicial proceedings. These unrecorded
27 bench conferences are too large in number to list individually; however, they occur multiple
times during the preliminary hearing and the trial.

28 ⁴ International Covenant on Civil and Political Rights, Article XIV.

1 Post-conviction counsel requested all of prior counsel's files. Missing from the items
2 delivered were: any emails from the District Attorney's office⁵; handwritten notes; legal research;
3 memorandums from the investigator; memorandums to the file marking the case's progress; phone
4 logs; notes from interviews with the client, or other witnesses. If these items exist and prior counsel
5 has failed to turn over this information to post-conviction counsel, post-conviction counsel is
6 handicapped in performing their duties.

7 Supreme Court Rule 156(3)(b) provides that a waiver of privilege occurs when it becomes
8 necessary for counsel "to respond to allegations in any proceeding concerning the lawyer's
9 representation of the client." Additionally, the Legislature has instructed petitioners for writs of
10 post-conviction habeas corpus that, if a writ petition contains a claim of ineffective assistance of
11 counsel, the claim acts as a waiver of the attorney-client privilege. It follows by analogy and policy
12 that a defendant requesting withdrawal of his guilty plea for the same reason, but using NRS 176.165
13 as the statutory basis for relief, also waives the privilege in such proceedings. As such, prior counsel
14 should have turned over all notes and work product prior to the evidentiary hearing. *Molina v. State*,
15 120 Nev. 185, 87 P.3d 533 (2004).

16 Failing to turn over this information over falls below the professional standard for attorneys. See
17 N.R.P.C. 1.1, 1.3, and 1.4.

18 The acts and omissions by trial counsel were either not the result of tactic or strategy, and
19 were instead the result of lack of knowledge, lack of investigation or misunderstanding about the law
20 and/or the facts of the case. To the extent that trial counsel's actions were the result of tactic and
21 strategy, those decisions were unreasonable. Each instance of ineffective assistance of counsel set
22 forth above warrants a reversal of the judgment of conviction.

23 ///

24
25 s
26 There is a list of proposed questions in the file labeled "Henderson cross" this document references
27 an e-mail dated 6/15/05 where the chemist "offers to go back and try to get a complete STR match
28 on the vag (sic) swab" and an email from Investigator Gorski colloquially referred to as the "good
news e-mail" where Gorski expressed her "personal gratitude" and suggested that they couldn't do
their investigations "without your help". (Exhibit 1).

GROUND TWO

MR. HENDERSON'S CONVICTION AND SENTENCE ARE INVALID UNDER THE 6TH AND 14TH FEDERAL CONSTITUTIONAL AMENDMENT GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW AND ARTICLE 1 OF THE NEVADA CONSTITUTION BECAUSE OF THE STATE'S FAILURE TO TURN OVER EVIDENCE UNDER Brady v. Maryland, 373 U.S. 83 (1963).

A. Mr. Henderson Could Not Properly Challenge the DNA Information

There is no information in the file as to the manner in which the DNA sample that caused the "hit" in the CODIS database. There is no indication from the record or the documents in Mr. Henderson's file that the State made any attempt to verify the chain of custody in California or the procedures used by the California lab that placed the sample allegedly belonging to Mr. Henderson into the federal database.

Mr. Henderson believes and therefore alleges that the State of Nevada has in its possession information. The suppression of evidence favorable to the accused violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. See Brady v. Maryland, 373 U.S. 83 (1963), Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555 (1995). The Nevada Supreme Court is in accord, "it is a violation of due process for the prosecutor to withhold exculpatory evidence, and his motive for doing so is immaterial." Jimenez v. State, 112 Nev. 610, 618 (1996).

Brady sets forth a three prong test to determine if a Brady violation has occurred: "the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). The State never turned over this evidence. The motivation behind this failure is irrelevant. Mr. Henderson has been prejudiced by this failure because he was unable to impeach the chemists at either the preliminary hearing or the trial.

CONCLUSION

Mr. Henderson's conviction is unconstitutional under the federal and state constitutions for each of the reasons herein. His judgment of conviction must therefore be vacated.

Wherefore, Petitioner prays that the Court grant petitioner an evidentiary hearing so that these issues can be explored.

Executed at Las Vegas, Clark County, Nevada on the 26th day of August, 2011.

/s/ Stephanie B. Kice
Stephanie B. Kice
Nevada Bar No. 10105
THE KICE LAW GROUP, L.L.C.
616 S. Eighth St.
Las Vegas, NV 89101
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VERIFICATION

Pursuant to N.R.S. 34.730(1) I, Stephanie B. Kice, swear under penalty of perjury that the pleading is true except as to those matters stated on information and belief and as to such matters, counsel believes them to be true.

I am the counsel of record for Joseph Henderson and have his personal authorization to commence this action.

/s/ Stephanie B. Kice
Stephanie B. Kice
Nevada Bar No. 10105
THE KICE LAW GROUP, LLC.
616 S. Eighth St.
Las Vegas, NV 89101
(702) 401-9115 [phone]
(702) 973-9450 [fax]

1 **CERTIFICATE OF FACSIMILE TRANSMISSION**

2 I hereby certify that service of the WRIT OF HABEAS CORPUS, was made this 26th day of
3 August, 2011 by facsimile transmission to:

4
5 H. Leon Simon
6 FAX #: 702-382-5815

7 /s/ Stephanie B. Kice
8 Stephanie B. Kice
9 Nevada Bar No. 10105

EXHIBIT 1

Henderson cross

1. Both the vaginal swab sample (KMG 2, item F) and the bed sheet samples (KMG 4, top sheet A, top sheet B) were mixtures of at least 2 people, were they not?
2. You didn't mention in your report that they were mixtures, did you?
3. Isn't that an incomplete representation of the information?
4. There were actually 2 top sheet samples, correct?
5. You represented them in your report as one sample, didn't you?
6. Isn't that an incomplete representation of the information?
7. You also represented that there was a single "STR DNA case profile" detected in this case, didn't you?
8. Isn't that an incomplete representation of the information?
9. In fact, in the vaginal swab sample, the major profile was from a female, was it not?
10. And the male profile was only a minor profile, correct?
11. Did you mention any of this in the body of your report?
12. And in fact, it is not possible to deduce a complete single source male profile solely from the vaginal swab sample, is it?
13. Yet that is exactly what you represent in our chart on page 3 of the report, isn't it?
14. It is possible that profiles other than that of Mr. Henderson could account for the minor male component in the vaginal swab sample, isn't it?
15. Joseph Henderson is not the sole possible contributor, is he?
16. Yet you don't document or take into account that possibility, in your report, do you?
17. You used a single source statistic for the minor male profile on the vaginal swab, didn't you?
18. Shouldn't you have used a mixture statistic for this sample?
19. If you had used a mixture statistic, such as a Combined probability of inclusion (CPI) wouldn't your statistic have been much less compelling?
20. Isn't it true that you decided that only a single profile could account for the minor male contributor in the vaginal swab sample only after seeing the reference sample of Joseph Henderson?
21. Did you list, anywhere, the other possible male profiles that could account for the minor male profile in the vaginal swab?
22. Didn't you use information from Henderson's reference sample to help interpret the vaginal swab sample?
23. Referring to your e-mail of 6/15/05, you offer to "go back and try to get a complete STR match on the vag swab," correct?
24. Referring to the "good news" e-mail from Investigator Gorksi, she expresses her "personal gratitude" and suggest that they couldn't do their investigations "without your help."
25. Did you already assume that Henderson was the sole possible contributor at that point?
26. Does the same e-mail mention that they will be executing a search warrant for Henderson's DNA?
27. So at that point, when you all assumed the perpetrator was Mr. Henderson, you did not even have a confirmatory sample of his DNA to compare, did you?
28. Were samples taken from any other potential suspects to compare to the vaginal swab in this case?



Stephanie B. Kice <skice@kicelaw.com>

Successful transmission to 17023825815. Re: Joseph Henderson Case No.: C212968

1 message

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To: skice@kicelaw.com

Fri, Aug 26, 2011 at 5:06 AM



Dear Stephanie Kice,

Re: Joseph Henderson Case No.: C212968

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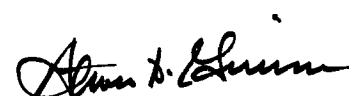


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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JOSEPH HENDERSON,
#1502730

Defendant.

CASE NO: **C-05-212968-1**

DEPT NO: **XV**

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

DATE OF HEARING: DECEMBER 1, 2011
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in 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.

//

//

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On July 11, 2005, Joseph Henderson, hereinafter "Defendant," was charged by way of
4 Information with Count 1 - Conspiracy to Commit Burglary, Count 2- Burglary While in
5 Possession of a Firearm, Count 3 - Conspiracy to Commit First Degree Kidnapping, Counts
6 4 and 5 - First Degree Kidnapping With Use of a Deadly Weapon, Count 6 - Conspiracy to
7 Commit Sexual Assault, Counts 7, 8, and 9 - Sexual Assault With Use of a Deadly Weapon,
8 Count 10 - Conspiracy to Commit Robbery, Counts 11 and 12 - Robbery With Use of a
9 Deadly Weapon, Count 13 - Open or Gross Lewdness, and Count 14 - Battery With Use of a
10 Deadly Weapon Resulting in Substantial Bodily Harm. On June 27, 2008, Defendant was
11 found guilty by a jury of all counts.

12 On August 28, 2008, Defendant was sentenced as follows: As to Count 1 – to Twelve
13 (12) Months in the Clark County Detention Center; As to Count 2 – to a Maximum of One
14 Hundred Fifty-Six (156) Months with a Minimum Parole Eligibility of Sixty-Two (62)
15 Months, to run Concurrent with Count 1; As to Count 3 – to a Maximum of Sixty (60)
16 Months with a Minimum Parole Eligibility of Twenty-Four (24) Months, to run Consecutive
17 to Count 2; As to Count 4 – to Life with a Minimum Parole Eligibility after Sixty (60)
18 Months, plus an Equal and Consecutive term of Life with a Minimum Parole Eligibility after
19 Sixty (60) Months for the Use of a Deadly Weapon, to run Consecutive to Count 3; As to
20 Count 5 – to Life with a Minimum Parole Eligibility after Sixty (60) Months, plus an Equal
21 and Consecutive term of Life with a Minimum Parole Eligibility after Sixty (60) Months for
22 the Use of a Deadly Weapon, to run Consecutive to Count 4; As to Count 6 – to a Maximum
23 of Sixty (60) Months with a Minimum Parole Eligibility of Twenty-Four (24) Months, to run
24 Consecutive to Count 5; As to Count 7 - to Life with a Minimum Parole Eligibility of One
25 Hundred Twenty (120) Months, plus an Equal and Consecutive term of Life with a
26 Minimum Parole Eligibility of One Hundred Twenty (120) Months for the Use of a Deadly
27 Weapon, to run Concurrent with Count 6; As to Count 8 - to Life with a Minimum Parole
28 Eligibility of One Hundred Twenty (120) Months, plus an Equal and Consecutive term of

1 Life with a Minimum Parole Eligibility of One Hundred Twenty (120) Months for the Use of
2 a Deadly Weapon, to run Consecutive to Count 7; As to Count 9 – to Life with a Minimum
3 Parole Eligibility of One Hundred Twenty (120) Months, plus an Equal and Consecutive
4 term of Life with a Minimum Parole Eligibility of One Hundred Twenty (120) Months for
5 the Use of a Deadly Weapon, to run Consecutive to Count 8; As to Count 10 – to a
6 Maximum of Sixty (60) Months with a Minimum Parole Eligibility of Twenty-Four (24)
7 Months, to run Consecutive to Count 9; As to Count 11 – a Maximum of One Hundred
8 Eighty (180) Months with a Minimum Parole Eligibility of Seventy-Two (72) Months, plus
9 an Equal and Consecutive term of Maximum of One Hundred Eighty (180) Months with a
10 Minimum Parole Eligibility of Seventy-Two (72) Months for the Use of a Deadly Weapon,
11 to run Concurrent with Count 10; As to Count 12 – to a Maximum of One Hundred Eighty
12 (180) Months with a Minimum Parole Eligibility of Seventy-Two (72) Months, plus an
13 Equal and Consecutive term of Maximum of One Hundred Eighty (180) Months with a
14 Minimum Parole Eligibility of Seventy-Two (72) Months for the Use of a Deadly Weapon,
15 to run Consecutive to Count 11; As to Count 13 – to Twelve (12) Months in the Clark
16 County Detention Center, to run Concurrent with Count 12; As to Count 14 – a Maximum of
17 One Hundred Fifty-Six (156) Months with a Minimum Parole Eligibility of Sixty-Two (62)
18 Months, to run Consecutive to Count 13; with One Two Hundred Fifty-One (1,251) Days
19 credit for time served. Further Ordered, a Special Sentence of Lifetime Supervision is
20 imposed to commence upon release from any term of imprisonment, probation or parole.

21 Defendant's Judgment of Conviction (Jury Trial) was filed on September 24, 2008.
22 Defendant filed a Notice of Appeal on October 9, 2008. The Nevada Supreme Court
23 affirmed Defendant's conviction on February 3, 2010. Remittitur issued on March 2, 2010.

24 Defendant filed his pro per Petition for Writ of Habeas Corpus (Post-Conviction) on
25 January 11, 2011. The State's response was filed on March 29, 2011, which the State hereby
26 incorporates by reference. Defendant's court-appointed counsel filed the instant
27 supplemental petition on August 26, 2011. The State's response to Defendant's supplemental
28 claims is as follows.

ARGUMENT

I. DEFENDANT’S TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE.

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), established the standards for a court to determine when counsel’s assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. Strickland laid out a two-pronged test to determine the merits of a defendant’s claim of ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687, 2064. The Nevada Supreme Court has held that “claims of ineffective assistance of counsel must be reviewed under the ‘reasonably effective assistance’ standard articulated by the U.S. Supreme Court in Strickland, requiring a defendant to show that counsel’s assistance was ‘deficient’ and that the deficiency prejudiced the defense.” Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

With respect to the first prong, a defendant is not entitled to errorless counsel. Rather, “‘Deficient’ assistance of counsel is representation that falls below an objective standard of reasonableness.” Kirksey, 112 Nev. at 987, 923 P.2d at 1107 (1997) citing to Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992), cert. denied, 507 U.S. 921, 113 S.Ct. 1286 (1993). What appears by hindsight to be a wrong or poorly advised decision of tactics or strategy is not sufficient to meet the defendant’s heavy burden of proving ineffective counsel. “Judicial review of a lawyer’s representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound

1 strategy.” State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998) (quoting from
2 Strickland, 466 U.S. at 689, 104 S.Ct at 2052 (1984)). An attorney cannot be deemed
3 ineffective for failing to make futile motions or objections. Ennis v. State, 122 Nev. 694, 137
4 P.3d 1095 (2006).

5 In order to meet the second “prejudice” prong of the test, “the defendant must show a
6 reasonable probability that, but for counsel’s errors, the result of the trial would have been
7 different.” Kirksey, 112 Nev. at 988, 825 P.2d at 1107 (citing Strickland, 466 U.S. at 694,
8 104 S.Ct. at 2068). The Court may consider both prongs in any order and need not consider
9 them both when a defendant’s showing on either prong is insufficient. Kirksey v. State, 112
10 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

11 Strategy or decisions regarding the conduct of defendant’s case are “virtually
12 unchallengeable absent extraordinary circumstances.” Doleman v. State, 112 Nev. 843, 848,
13 921 P.2d 278, 280 (1996), quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180
14 (1990). There is a “*strong presumption* that counsel’s conduct falls within the wide range of
15 reasonable professional assistance.” Strickland, *supra* at 689, 2065, emphasis added.

16 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the
17 disputed factual allegations underlying his ineffective-assistance claim by a preponderance
18 of the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). In sum, the
19 framework for analysis is as follows:

20 Therefore, when a petitioner alleges ineffective assistance of
21 counsel, he must establish the factual allegations which form the
22 basis for his claim of ineffective assistance by a preponderance
23 of the evidence. Next, as stated in Strickland, the petitioner
24 must establish that those facts show counsel’s performance fell
below a standard of objective reasonableness, and finally the
petition must establish prejudice by showing a reasonable
probability that, but for counsel’s deficient performance, the
outcome would have been different.

25 Means, *supra* at 1013, 33.

26 In one of its most recent decisions on ineffective assistance of counsel, the United
27 State Supreme Court plainly pointed out that “[s]urmounting Strickland’s high bar is never
28 ... easy.” Harrington v. Richter, 562 U.S. ___, 131 S.Ct. 770, 788 (2011). “The question is

1 whether an attorney's representation amounted to incompetence under prevailing
2 professional norms, not whether it deviated from best practices or most common custom."
3 Id. Moreover, "[r]are are the situations in which the latitude counsel enjoys will be limited to
4 any one technique or approach...Counsel is entitled to balance limited resources in accord
5 with effective trial tactics and strategies." Id. at 789.

6 "A fair assessment of attorney performance requires that every effort be made to
7 eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's
8 challenged conduct, and to evaluate the conduct from counsel's perspective at the time."
9 Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (citing Strickland, 466 U.S. at
10 689. "The role of a court presented with allegations of ineffective counsel 'is not to pass
11 upon the merits of the action not taken but to determine whether, under the particular facts
12 and circumstances of the case, trial counsel failed to render reasonably effective
13 assistance..." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), (citing
14 Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)). "*[R]elying on 'the harsh light
15 of hindsight' to cast doubt on a trial" that took place many years ago "is precisely what
16 Strickland and AEDPA seek to prevent."* Harrington, 131 S.Ct. at 789 (citing Bell v. Cone,
17 535 U.S. 685, 122 S.Ct. 1843 (2002))(emphasis added).

18 Moreover, "an attorney may not be faulted for a reasonable miscalculation or lack of
19 foresight or for failing to prepare for remote possibilities." Harrington, 131 S.Ct. at 789. In
20 light of this very high standard of proof "...it is difficult to establish ineffective assistance
21 where counsel's overall performance reflects active and capable advocacy." Id. In order to
22 meet Strickland's prejudice prong, the United State Supreme Court has made clear that
23 "[t]here must be a substantial likelihood of a different result." Id.

24 **A. Counsel's Failure to Retain a DNA Expert.**

25 Defendant claims his attorney was ineffective for failing to retain his own DNA
26 expert to either retest or make an independent evaluation of the DNA report. The mere
27 failure to retain an expert does not render counsel per se ineffective. Harrington, 131 S.Ct. at
28 788. Occasionally, "Criminal cases will arise where the only reasonable and available

1 defense strategy requires consultation with experts or introduction of expert evidence,
2 whether pretrial, at trial, or both. There are, however, countless ways to provide effective
3 assistance in any given case. Even the best criminal defense attorneys would not defend a
4 particular client in the same way. Rare are the situations in which the wide latitude counsel
5 must have in making tactical decisions will be limited to any one technique or approach.” Id.
6 at 788 -789 (internal citations and quotations omitted).

7 Moreover, even if counsel was ineffective for failing to hire such an expert,
8 Defendant is still required to demonstrate that he was prejudiced.¹ Bare allegations that
9 mistakes “may have been made” during testing are insufficient. Defendant’s arguments are
10 no more than an attempt at engaging in an endless task of speculation of possibilities. Claims
11 asserted in a petition for post-conviction relief must be supported with specific factual
12 allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev.
13 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked” allegations are not sufficient, nor
14 are those belied and repelled by the record. Id.

15 **B. Counsel’s Failure to Challenge Validity of the Search Warrant.**

16 Defendant argues his counsel should have challenged the validity of the search
17 warrant. First, Defendant has again only set forth bare allegations that the search warrant
18 “may” have been based upon false statements. As noted above, bare and naked allegations
19 are insufficient for relief. Hargrove, *supra*. Defendant has also failed to demonstrate
20 prejudice even if his counsel fell below and objective standard of reasonableness. Simply
21 stating the evidence “may very well have been suppressed” does not show a reasonable
22 probability the outcome would have been different. Even if counsel challenged the warrant
23 the evidence “may very well have” not been suppressed as well. Counsel cannot be deemed
24 ineffective for making futile motions. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

26
27 ¹ Defendant’s claim that the Metro lab’s errors in an unrelated case can be attributed to the
28 DNA match in the instant case is a bare allegation insufficient for relief. Hargrove v. State,
100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Moreover, the DNA match in this case
involves two labs.

1 **C. Counsel's Alleged Failure to Allow Defendant the Opportunity to Review His**
2 **PSI.**

3 Defendant claims that he was not allowed to review his presentence investigation
4 report, and his counsel was ineffective for failing to allow him to do so. However, Defendant
5 has failed to specifically state what errors his PSI allegedly contains. NRS 34.735(6) states,
6 in pertinent part:

7 [Petitioner] must allege specific facts supporting the claims in
8 the petition [he] file[s] seeking relief from any conviction or
9 sentence. Failure to raise specific facts rather than just
conclusions may cause [the] petition to be dismissed.

10 See also Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that
11 bare or naked allegations are insufficient to entitle a defendant to post-conviction relief). As
12 such, even if counsel was remiss Defendant has failed to demonstrate prejudice, and he is not
13 entitled to relief under Strickland.

14 **D. Counsel's Failure to Have Bench Conferences Recorded.**

15 Defendant has simply pointed to unrecorded bench conferences and has failed to
16 explain which judicial actions should have been preserved, how such actions did or did not
17 have merit, or a reasonable probability that their preservation would have alter the outcome
18 of his trial or appeal.² A proper petition for post-conviction relief must set forth specific
19 factual allegations. NRS 34.735(6); see also Hargrove v. State, 100 Nev. 498, 502-03, 686
20 P.2d 222, 225 (1984). Defendant's claims are too vague per Hargrove and NRS 34.735(6).

21 **E. Counsel's Alleged Failure to Keep Notes and/or Document the File.**

22 Defendant has failed to cite a single case holding an attorney ineffective for allegedly
23 failing to "keep necessary notes, failing to conduct research, or properly document the file."
24 Post-conviction counsel's opinion that trial counsel's note taking abilities are inadequate
25 does not render him incompetent or ineffective. Trial counsel does not need to take every
26 conceivable action in order to protect himself against allegations of inadequacy. Donovan,

27 _____
28 ² It should also be noted that due process does not require every sidebar conference to be
recorded. See Daniel v. State, 119 Nev. 498, 78 P.3d 890 (2003)

94 Nev. at 675, 584 P.2d at 711. By the same token, counsel is not required to document every step during litigation in his personal file for the purpose of making post-conviction counsel's attempt at alleging him ineffective easier. Moreover, this is simply a bare allegation insufficient for relief per Hargrove, and Defendant has failed to demonstrate how the outcome of his trial would have been different had counsel done a better job at taking notes. He is therefore not entitled to relief under Strickland.

II. DEFENDANT'S CLAIM OF A BRADY VIOLATION IS WAIVED

Defendant's claim in Grounds 2 that the State committed a violation of Brady v. Maryland, 373 U.S. 83 (1963) is waived because it was not raised on direct appeal. NRS 34.810 states in relevant part:

1. The court shall dismiss a petition if the court determines that:

...

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

...

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

This claim should therefore be dismissed.

III. AN EVIDENTIARY HEARING IS UNWARRANTED.

Defendant has not set forth any claims sufficient to warrant an evidentiary hearing. The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; See also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at

1 1230 (2002). Defendant's claims can be resolved without expanding the record so no further
2 hearing is needed. Therefore, this court should deny Defendant's request for an evidentiary
3 hearing.

4 **CONCLUSION**

5 Based on the foregoing arguments, Defendant's petition should be denied.

6 DATED this 30th day of September, 2011.

7 Respectfully submitted,

8 DAVID ROGER
9 Clark County District Attorney
Nevada Bar #002781

10
11 BY /s/ JAMES R. SWEETIN
12 JAMES R. SWEETIN
13 Chief Deputy District Attorney
14 Nevada Bar #005144

15
16
17
18
19 **CERTIFICATE OF ELECTRONIC FILING**

20 I hereby certify that service of the above and foregoing, was made this 30th day of
21 September, 2011, by Electronic Filing to:

22 STEPHANIE KICE, ESQ.
23 Email: skice@kicelaw.com

24 /s/ HOWARD CONRAD
25 Secretary for the District Attorney's Office

26
27
28 hjc/SVU

ORIGINAL

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FILED

Dec 8 2 05 PM '11

Adam L. Johnson
CLERK OF THE COURT

OPI
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144
200 Lewis Avenue
Las Vegas, Nevada, 89155-2211
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

05C212968
OPI
Order for Production of Inmate
1714414


THE STATE OF NEVADA,
Plaintiff,
-vs-
JOSEPH ALEXANDER HENDERSON,
#1502730
Defendant.

Case No. C-05-212968-1
Dept No. XV

ORDER FOR PRODUCTION OF INMATE

JOSEPH ALEXANDER HENDERSON, BAC # 67224

DATE OF HEARING: JANUARY 9, 2012
TIME OF HEARING: 1:00 P.M.

TO: RENEE BAKER, WARDEN, ELY STATE PRISON

TO: DOUGLAS C. GILLESPIE, Sheriff of Clark County, Nevada

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by DAVID ROGER, District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that RENEE BAKER, WARDEN of ELY STATE PRISON shall be, and is, hereby directed to produce JOSEPH ALEXANDER HENDERSON, Defendant in Case No. C-05-212968-1, on a charge of CONSPIRACY BURGLARY, BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON, CONSPIRACY TO COMMIT KIDNAPPING IN THE FIRST DEGREE, 1ST DEGREE

CLERK OF THE COURT

RECEIVED
DEC 08 2011

1 KIDNAPPING WITH THE USE OF A DEADLY WEAPON, CONSPIRACY TO
2 COMMIT SEXUAL ASSAULT, SEXUAL ASSAULT WITH THE USE OF A DEADLY
3 WEAPON, CONSPIRACY TO COMMIT ROBBERY, ROBBERY WITH THE USE OF A
4 DEADLY WEAPON, OPEN OR GROSS LEWDNESS wherein THE STATE OF
5 NEVADA is the Plaintiff, inasmuch as the said Defendant is currently incarcerated in the
6 ELY STATE PRISON located in Ely, Nevada, and his presence will be required in Las
7 Vegas, Nevada, commencing on JANUARY 9, 2012, at the hour of 1:00 o'clock p.m. and
8 continuing until completion of the prosecution's case against the said Defendant.

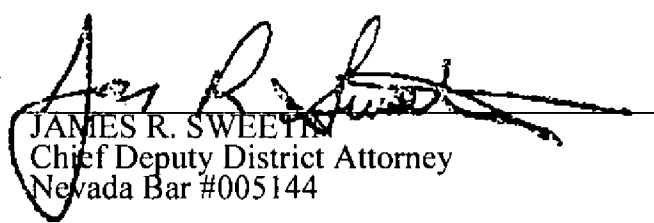
9 **IT IS FURTHER ORDERED** that DOUGLAS C. GILLESPIE, Sheriff of Clark
10 County, Nevada, shall accept and retain custody of the said Defendant in the Clark County
11 Detention Center, Las Vegas, Nevada, pending completion of said matter in Clark County,
12 or until the further Order of this Court; or in the alternative shall make all arrangements for
13 the transportation of the said Defendant to and from the Nevada Department of Corrections
14 facility which are necessary to insure the Defendant's appearance in Clark County pending
15 completion of said matter, or until further Order of this Court.

16 DATED this 8th day of December, 2011.

17 
18 DISTRICT JUDGE Abbi Silver

19
20 DAVID ROGER
21 Clark County District Attorney
22 Nevada Bar #002781

23 BY

24 
25 JAMES R. SWEETIN
26 Chief Deputy District Attorney
27 Nevada Bar #005144

28 hjc/SVU

ORIGINAL

FILED

FEB 3 10 28 AM '12

Ann D. Quinn
CLERK OF THE COURT

OPI
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
ROBERT TURNER
Chief Deputy District Attorney
Nevada Bar #006526
200 Lewis Avenue
Las Vegas, Nevada, 89155-2211
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

05C212968
OPI
Order for Production of Inmate
1763818



THE STATE OF NEVADA,
Plaintiff,
-vs-
JOSEPH ALEXANDER HENDERSON,

Defendant.

Case No. C212968
Dept No. XV

ORDER FOR PRODUCTION OF INMATE
JOSEPH ALEXANDER HENDERSON, BAC # 67224

DATE OF HEARING: 03/12/2012
TIME OF HEARING: 1:00 PM

TO: Dwight W. Neven, Warden, High Desert State Prison

TO: DOUGLAS C. GILLESPIE, Sheriff of Clark County, Nevada

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by DAVID ROGER, District Attorney, through ROBERT TURNER, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that Dwight W. Neven, Warden of High Desert State Prison shall be, and is, hereby directed to produce JOSEPH ALEXANDER HENDERSON, Defendant in Case No. C212968, wherein THE STATE OF NEVADA is the Plaintiff,

1 inasmuch as the said Defendant is currently incarcerated in the High Desert State Prison
2 located in Indian Springs, Nevada, and his presence will be required in Las Vegas, Nevada,
3 commencing on 03/12/2012, at the hour of 1:00 o'clock PM and continuing until completion
4 of the prosecution's case against the said Defendant.

5 IT IS FURTHER ORDERED that DOUGLAS C. GILLESPIE, Sheriff of Clark
6 County, Nevada, shall accept and retain custody of the said Defendant in the Clark County
7 Detention Center, Las Vegas, Nevada, pending completion of said matter in Clark County,
8 or until the further Order of this Court; or in the alternative shall make all arrangements for
9 the transportation of the said Defendant to and from the Nevada Department of Corrections
10 facility which are necessary to insure the Defendant's appearance in Clark County pending
11 completion of said matter, or until further Order of this Court.

12 DATED this 2 day of ^{Feb} January, 2012.

13 
14 DISTRICT JUDGE Abbi Silver

15
16 DAVID ROGER
17 Clark County District Attorney
18 Nevada Bar #002781

19 BY  for

20 ROBERT TURNER
21 Chief Deputy District Attorney
22 Nevada Bar #006526
23
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28

1 ORDR

2 FILED

3 AUG 28 2012

4 *Alvin L. Williams*
CLERK OF COURT

5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 STATE OF NEVADA,)

8 Plaintiff(s),)

9 v.)

10 JOSEPH ALEXANDER HENDERSON,)

11 Defendant(s).)

CASE NO. C212968-1
DEPT NO. XV

05C212968
OPI
Order for Production of Inmate
1946246



13 **ORDER FOR PRODUCTION OF INMATE**

14 **JOSEPH ALEXANDER HENDERSON, BAC#67224**

15 DATE OF HEARING: 10/18/12

16 TIME OF HEARING: 9:00 a.m.

17 TO: DWIGHT NEVEN, Warden, High Desert State Prison

18 TO: DOUGLAS C. GILLESPIE, Sheriff of Clark County, Nevada

19 **IT IS HEREBY ORDERED**, that DWIGHT NEVEN, Warden of High
20 Desert State Prison, is hereby directed to produce JOSEPH ALEXANDER
21 HENDERSON, Defendant in Case No. C212968-1, on a charge of CONSPIRACY
22 BURGLARY, BURGLARY WHILE IN POSSESSION OF A DEADLY
23 WEAPON, CONSPIRACY TO COMMIT KIDNAPPING IN THE FIRST
24 DEGREE, 1ST DEGREE KIDNAPPING WITH THE USE OF A DEADLY
25 WEAPON, CONSPIRACY TO COMIT SEXUAL ASSAULT, SEXUAL
26 ASSAULT WITH THE USE OF A DEADLY WEAPON, CONSPIRACY TO
27
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CLERK OF THE COURT

AUG 28 2012

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ABBI SILVER
DISTRICT JUDGE

DEPARTMENT FIFTEEN
LAS VEGAS NV 89155

1 COMMIT ROBBERY, ROBBERY WITH THE USE OF A DEADLY WEAPON,
2 OPEN OR GROSS LEWDNESS wherein the STATE OF NEVADA is the Plaintiff.

3 The Defendant is currently incarcerated in the HIGH DESERT STATE
4 PRISON located in Indian Springs, Nevada, and his presence will be required in
5 Las Vegas, Nevada, commencing on **OCTOBER 18, 2012**, at the hour of **9:00 a.m.**
6 in District Court Dept XV, Courtroom 11D, Regional Justice Center.
7

8 DATED this 28 day of August, 2012.

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12 JUDGE ABBI SILVER
13 DISTRICT COURT JUDGE
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ABBI SILVER
DISTRICT JUDGE

DEPARTMENT FIFTEEN
LAS VEGAS NV 89155

1 ORDR
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4 DISTRICT COURT,
CLARK COUNTY, NEVADA

5 STATE OF NEVADA,)

CASE NO. C212968

6) DEPT NO. XV

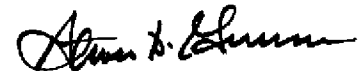
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7) Plaintiffs,)

8) v.)

9 JOSEPH ALEXANDER
HENDERSON,)

10) Defendant(s).)
11



CLERK OF THE COURT

12 ORDER FOR TRANSCRIPT

13 Good cause appearing, it is hereby

14 ORDERED, that JOANN MELENDEZ, Court Reporter, prepare the transcript at
15 State's expense for the court proceeding held on October 22, 2012 at 1:00 p.m.
16

17 IT IS FURTHER ORDERED, that the transcripts be efiled and copies sent to the
18 District Attorney's Office, and Stephanie B. Kice, Esq.

19 DATED this 23 day of October, 2012.
20

21 
22 ABBI SILVER
23 DISTRICT COURT JUDGE
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OCT 25 2012

ABBI SILVER
DISTRICT JUDGE

DEPARTMENT FIFTEEN
LAS VEGAS NV 89155

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ORIGINAL

CASE NO. C212968

DEPT. NO. XV

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
vs.
JOSEPH ALEXANDER
HENDERSON,
Defendant.

Reporter's Transcript
of
Evidentiary Hearing

BEFORE THE HON. ABBI SILVER, DISTRICT COURT JUDGE

MONDAY, OCTOBER 22, 2012

1:00 P.M.

APPEARANCES:

For the Plaintiff: Shannon Clowers, Esq.
Deputy District Attorney

For the Defendant: Stephanie B. Kice, Esq.

Reported by: JoAnn Melendez, CCR No. 370

JO ANN MELENDEZ - (702) 283-2151

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1:00 P.M.

-000-

CLERK OF THE COURT

PROCEEDINGS

THE COURT: Okay. So we are now on the
record on State of Nevada versus Joseph Henderson.
Case No. C212968.

And let the record reflect that Mr.
Henderson is present, the Defendant, he's present,
represented by his attorney Ms. Kice. And for the
State, Ms. Clowers.

This is the time set for the
evidentiary hearing on the Defendant's petition for
writ of habeas corpus post-conviction relief. This
is the first post conviction.

MS. KICE: That's correct, Your Honor.

THE COURT: So at this time, I've read
the points and authorities, we're gonna have an
evidentiary hearing with their two attorneys.

We have Mr. Reed sitting here as
well as Ms. Radosta who were the trial attorneys in
the defendant's underlying case in front of Judge
Mosley.

All right. So at this time,

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I N D E X

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VIOLET RADOSTA

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E X H I B I T S

STATE'S EXHIBIT MARKED OFFERED ADMITTED

None

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defense.

MS. KICE: Could we have Norm Reed,
please?

THE COURT: Sure. Does either side want
a motion to exclude or care to exclude?

MS. CLOWERS: (Negative nod of the head.)
No.

MS. KICE: I think that out of an
abundance of caution I have an obligation to invoke
the exclusionary rule.

THE COURT: What I'm gonna do, now
there's been a motion to exclude, so we'll excuse
Ms. Radosta.

I don't know, who's the last lady
that just came into court? Can I get your name,
ma'am?

MS. KIM: I'm the victim.

THE COURT: What?

MS. KIM: I'm the victim.

THE CLERK: The victim.

THE COURT: Okay. Can you state your
name for the record?

MS. KIM: Julie Kim. Julie Kim.

THE COURT: Julie Kim?

MS. KIM: Uh-huh.

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1 THE COURT: Okay. And she's not gonna be
2 testifying, right? She's just observing, correct?
3 MS. CLOWERS: Correct.
4 THE COURT: Okay. All right, thank you.
5 Go ahead.
6 (Whereupon, Norman Reed was duly sworn to
7 tell the truth, the whole truth and
8 nothing but the truth.)
9 THE CLERK: Please be seated and state
10 your name for the record.
11 The witness: Norman Joseph Reed.
12 THE COURT: And we just had another
13 gentleman come in. Could I get your name for the
14 record, please?
15 MR. BERNZWEIG: Eric Bernzweig.
16 THE COURT: Okay.
17 MS. KICE: He's the other victim in this
18 case, Your Honor.
19 THE COURT: He's what?
20 MS. KICE: He's the male victim in this
21 case of the home invasion.
22 THE COURT: Okay. So he's also a victim
23 in this case, correct?
24 MS. KICE: That's correct.
25 THE COURT: So he won't be testifying, I
JO ANN MELENDEZ - (702) 283-2151

1 won't need to exclude either one of them?
2 MS. KICE: No.
3 THE COURT: Okay, thank you.
4 MS. KICE: Your Honor, do you want me to
5 stand for this or is it okay if I sit?
6 THE COURT: You can go ahead and sit if
7 you feel comfortable.
8 MS. KICE: Okay.
9 DIRECT EXAMINATION
10 BY MS. KICE:
11 Q. Mr. Reed, thank you. I know this has
12 been set and reset several times. Just some
13 preliminary questions.
14 How long have you been an attorney?
15 A. Since 1989.
16 Q. How many jurisdictions are you licensed?
17 A. Just Nevada.
18 Q. Have you ever had any discipline issues?
19 A. Yes.
20 Q. Would you describe those for the court,
21 please?
22 A. I submitted to a voluntary disbarment and
23 was reinstated in 2003.
24 Q. What was that related to?
25 A. A conviction in federal court.
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1 Q. How many times prior to being licensed
2 did you take the bar exam?
3 A. Twice.
4 Q. How many trials have you done
5 approximately? I know you're not gonna know off the
6 top of your head.
7 A. I lost count at about 80 felony jury
8 trials.
9 Q. 80 felony jury trials. How many trials
10 have you won?
11 A. What do you mean by win?
12 Q. How many times did you get not guilty
13 verdicts on some or all charges?
14 A. Seven, maybe eight times at least.
15 Q. Okay. How many trials have you done that
16 revolved around DNA evidence?
17 A. Dozens.
18 Q. Dozens. Do you consider yourself to be
19 fairly competent when it comes to issues of DNA?
20 A. Depends on what you mean by fairly
21 competent. I don't know how to answer that
22 question.
23 Q. That's, that's a fair answer. Have you
24 attended any CLEs or extra training on DNA evidence?
25 A. Yes.
JO ANN MELENDEZ - (702) 283-2151

1 Q. How many?
2 A. Two.
3 Q. How many hours total do you have in DNA,
4 forensic testing of DNA CLEs?
5 A. Oh, CLEs alone?
6 Q. Yeah.
7 A. About 15 or 16 hours.
8 Q. Okay. By the way you answered, it seemed
9 like there might be some additional classes that
10 you've taken.
11 Have you taken additional classes
12 beyond CLEs?
13 A. I have read up on this topic, I have
14 attended the conferences like I mentioned, we do a
15 lot of in-house training. And more importantly,
16 I've --
17 THE COURT: Hold on.
18 THE WITNESS: -- spoke --
19 THE COURT: Ms. Clowers, you can't text
20 as we're sitting here.
21 MS. CLOWERS: May we approach?
22 THE COURT: Yeah.
23 (Whereupon, the following proceedings
24 were had in open court outside the
25 presence of the jury panel.)
JO ANN MELENDEZ - (702) 283-2151

1 MS. CLOWERS: I'm sorry. I swear I'm not
2 texting. I'm trying to get an advocate to come here
3 because I've dealt with these two victims here
4 before and they're still very emotional, just so you
5 know.

6 THE COURT: Okay. Go ahead and finish,
7 but otherwise this -- I don't expect either counsel
8 to be texting at table.

9 MS. KICE: I won't.

10 MS. CLOWERS: Thanks, judge.

11 THE COURT: Okay.

12 (Whereupon, the bench conference ended.)

13 THE COURT: All right. Just a moment.

14 MS. CLOWERS: Thank you, judge. Should
15 be good.

16 THE COURT: All right, thank you. Go
17 ahead and proceed.

18 THE WITNESS: Should I finish my answer,
19 Your Honor?

20 THE COURT: Please.

21 THE WITNESS: I've spoken to a number of
22 forensic DNA experts over the years and have learned
23 from them in actual cases that I've been assigned
24 to.

25 BY MS. KICE:

JO ANN MELENDEZ - (702) 283-2151

1 Q. When did you come into this case? Were
2 you with Mr. Henderson from the moment he was
3 arrested until trial?

4 A. No.

5 Q. Okay. Do you recall when you first came
6 on the case?

7 A. Time wise or procedurally?

8 Q. Procedurally.

9 A. It was shortly before the trial started.

10 Q. Shortly?

11 A. In terms of maybe months.

12 Q. Okay. Less than three, more than six?

13 A. I would -- Ms. Radosta could probably
14 answer that better, but I would estimate probably
15 two-to-three months before trial.

16 Q. What were your responsibilities? Were
17 you lead counsel on this or were you co-chair?

18 A. I was second chair in this case.

19 Q. Second chair. So what were your
20 responsibilities as second chair?

21 A. To examine, interpret and attack the DNA
22 evidence.

23 Q. What were Ms. Radosta's responsibilities?

24 A. Everything else.

25 Q. Everything else. Okay. Who was your

JO ANN MELENDEZ - (702) 283-2151

1 investigator from your office on this case?

2 A. I don't remember.

3 Q. Do you remember if there was one?

4 A. There is one assigned in every case. I
5 just wouldn't know who that is off the top of my
6 head.

7 Q. Okay. Do you recall reviewing, since
8 your primary responsibility was to examine,
9 interpret and attack DNA evidence, was -- would you,
10 would you recall ever reading any reports from an
11 investigator in this case?

12 A. I don't remember off the top of my head
13 that would have been related to DNA.

14 Q. Okay. Or related to anything?

15 A. Well, I read lots of reports, but not
16 from an investigator. And I would have only looked
17 at the ones that would have pertained to DNA. I
18 don't recall that happening.

19 Q. Okay. Since you read the case, you knew
20 there were potential co-defendants in this case?

21 A. Yes, but I didn't really know much about
22 that, but yes, I did know that there was potential
23 co-defendants.

24 Q. In your conversations with Mr. Henderson,
25 did he always maintain his innocence?

JO ANN MELENDEZ - (702) 283-2151

1 THE COURT: Well, maybe this is a good
2 time that the defendant states on the record he's
3 waiving his attorney/client privilege.

4 You are for purposes of this
5 hearing; is that correct?

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: All right.

8 THE WITNESS: Again, Ms. Radosta would be
9 probably best to answer this question. I would say
10 the simple, the simple end of that question is no,
11 he really didn't maintain his innocence throughout
12 all of our conversations.

13 BY MS. KICE:

14 Q. And how did he not maintain his innocence
15 throughout your conversations?

16 A. There were some admissions that were made
17 prior to trial concerning him being present, but not
18 necessarily participating in the sexual assault.

19 Q. And when did he make those
20 representations?

21 A. It had to be right near calendar call or
22 thereabouts.

23 Q. Did you memorialize those?

24 A. I did not memorialize those myself, no.

25 Q. When you, you may or may not recall this,

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1 the physical description that's initially given of
2 the assailant of the sexual assault differs greatly
3 from Mr. Henderson.

4 Do you recall that?

5 A. Yes. As I recall, there wasn't, there
6 wasn't any real positive identification from either
7 of the victims of the assailants.

8 Q. Of two of the assailants --

9 A. That's correct.

10 Q. But one was, one came to the door
11 unmasked and two masked individuals came in the
12 house?

13 A. That's correct.

14 Q. Is that your recollection?

15 A. That sounds correct, yes.

16 Q. So the victims could in fact identify one
17 of the assailants?

18 A. Yes.

19 Q. But not all three?

20 A. Yes.

21 Q. Okay.

22 A. That's correct.

23 Q. And the initial police reports listed
24 directly after the incident that the female victim
25 described her assailant as being five foot, eight

JO ANN MELENDEZ - (702) 283-2151

1 and medium built.

2 Do you recall that?

3 A. I don't remember the specifics, but I
4 take your word for it if that's in the discovery.

5 Q. Okay. And because Mr. Henderson is
6 approximately six feet tall and about 230 pounds,
7 there's a big discrepancy in the original
8 description versus his physical characteristics?

9 A. Yes.

10 Q. So essentially this case came down to
11 DNA?

12 A. Yes.

13 Q. Mr. Henderson had a number of previous
14 convictions which are both in Nevada and California.

15 They were all -- do you recall what
16 they were for?

17 A. No, I don't. I just know he had
18 convictions.

19 Q. Okay. They were all for midlevel to low
20 level drug related activity. In your experience,
21 since you are so well versed in DNA, I assume that
22 you do a lot of sexual assault cases?

23 A. No, I do murder cases.

24 Q. Murder cases?

25 A. Yes. At this point, yes.

JO ANN MELENDEZ - (702) 283-2151

1 Q. In your experience in dealing with
2 defending individuals, is it unusual for someone to
3 commit a sexual assault with sort of no lead up in
4 their 30s?

5 A. Yes, that is unusual.

6 Q. Okay.

7 MS. CLOWERS: And, judge, just for the
8 record, his priors don't just include drugs.
9 There's gun charges as well. So I don't want to
10 just put out there that some person who just deals
11 in drugs never --

12 THE COURT: You'll have time to
13 cross-examine and you can certainly follow-up.

14 MS. CLOWERS: Okay.

15 THE COURT: He said he didn't remember
16 what the convictions were for and then she just
17 asked him were some of them for X, Y and Z.

18 So your objection will be -- I don't
19 even know if it's an objection.

20 MS. KICE: I'll clarify, Your Honor, for
21 the record.

22 THE COURT: I think she's saying the
23 objection will be like a misrepresentation of the
24 facts.

25 MS. KICE: And I'm not. That not
JO ANN MELENDEZ - (702) 283-2151

1 necessarily is not true.

2 THE COURT: So what I'll do is just since
3 I was not the trial judge and I don't know what his
4 convictions are, I will overrule that objection and
5 I'll just allow both sides to more completely
6 question regarding the priors.

7 MS. CLOWERS: Thank you, judge.

8 THE COURT: Thanks.

9 BY MS. KICE:

10 Q. Do you recall him having priors for
11 sexual assault?

12 A. That I was certain he did not have, yes.

13 Q. Okay, thank you. And I apologize if I
14 may not have stated it correctly. It certainly
15 wasn't my intention to be dishonest.

16 Since it was your responsibility to
17 examine, interpret and attack the DNA, if there were
18 any alibi witnesses that Mr. Henderson would have
19 had, that wouldn't have been within your purview for
20 the trial?

21 A. That's correct. I would have talked to
22 Ms. Radosta about it, but that would have been up to
23 her to examine and decide whether that was worthy of
24 presentation.

25 Q. Okay. In the box of material that I

JO ANN MELENDEZ - (702) 283-2151

1 received from the PD's office, there were a lot of
2 documents related to investigation against one of
3 the dentists in the practice of the male half of the
4 victims in this case.

5 Do you recall what that was related
6 to?

7 A. No, I don't. I don't know off the top of
8 my head.

9 Q. And that might be a better question for
10 Ms. Radosta?

11 A. Yes. I'm certain that that was her, her
12 job to look into that.

13 Q. Okay. Since the DNA was your specific
14 area, there were -- do you recall that there were
15 two crime scenes associated with this case?

16 A. I didn't remember that off the top of my
17 head. Oh, you mean within the residence is what
18 you're talking about?

19 Q. No. I mean there were two crime scenes.
20 One was in the house and then after the male victim
21 went to his dental office.

22 A. I don't remember the second --

23 THE COURT: Hold on.

24 THE WITNESS: -- location.

25 THE COURT: I'm sorry, sir. You can't
JO ANN MELENDEZ - (702) 283-2151

1 raise your hand, you can't shake your head. And I
2 apologize. And I know that it's difficult, I'm
3 sure, to listen to any testimony in any proceeding,
4 but it's disruptive to the witness that's up here
5 and it's disruptive to the Court. So --

6 MR. BERNZWEIG: Even if the information
7 isn't correct?

8 THE COURT: This is a post-conviction
9 relief hearing for ineffective assistance of
10 counsel. And so there are certain things that the
11 Court is looking at as far as whether or not these
12 people have been ineffective. So what you think may
13 be important as far as facts may be absolutely
14 irrelevant to these proceedings.

15 Have you spoken to anybody from the
16 district attorney's office prior to this proceeding?

17 MR. BERNZWEIG: Meaning?

18 THE COURT: About what this proceeding
19 involves?

20 MR. BERNZWEIG: No. Let's just move on.
21 I'm sorry.

22 THE COURT: Okay. What will happen is I
23 know Ms. Clowers called, that's what she was doing
24 when she was texting. She was texting for a victim
25 advocate, although I'm not sure they understand what

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1 this is involved, but at the next break, I'm sure
2 Ms. Clowers can talk to you what this hearing
3 actually entails.

4 And it's not reliving the facts of
5 the case necessarily. It's whether or not the trial
6 counsel during the proceedings at trial were
7 ineffective to where the district court must grant a
8 new trial. That's what this evidentiary hearing is
9 about. And she can go into that more with you
10 later.

11 MR. BERNZWEIG: Okay.

12 THE COURT: So thank you. Thank you. Go
13 ahead.

14 THE WITNESS: I believe I answered the
15 question. If I didn't, would you just please repeat
16 it.

17 BY MS. KICE:

18 Q. I don't recall what your answer was.
19 Sorry.

20 A. Could you repeat the question?

21 Q. Do you know that there were, there were
22 two event numbers associated with this case?

23 A. I wouldn't know that off the top of my
24 head.

25 Q. There's 040903-152 and 040903-0158.
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1 There was evidence collected at the residence and
2 then there was evidence collected at the male
3 victim's dental office.

4 A. I don't remember that second part.

5 Q. Eventually those two event numbers are
6 evidence collected from one scene and the other
7 scene are mixed together.

8 Do you recall that at all?

9 A. No, not specifically. I can only testify
10 as to what the normal practice is. Each time that
11 there's a call out to Las Vegas Metro, there would
12 be a new event number placed, but that when we go to
13 obtain discovery the search would cover multiple
14 event numbers and discovery would be produced based
15 on multiple event numbers.

16 Q. Certainly. Is it customary that evidence
17 from two different locations would be mixed
18 together?

19 A. I don't know what you mean by mixed
20 together. Like in our file, in discovery?

21 Q. In a file, in discovery, in the evidence
22 vault.

23 A. I'm not even sure how to answer that.
24 Every lawyer organizes their file in different ways.
25 I mean, I have some people's files look like they,

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1 they've never been looked at at all, but yet the
2 lawyer knows where everything is. I don't even know
3 how to answer that question.

4 Q. Okay, fair enough. Did you at any -- any
5 of the evidence that you were in charge of, for a
6 better, lack of a better word, did you challenge the
7 admission of any of the evidence that was going to
8 be admitted against Mr. Henderson?

9 A. In terms of like a search warrant?

10 Q. Like chain of custody.

11 A. No.

12 Q. Search warrant, anything like that?

13 A. No. The only thing that was challenged
14 that I recall, because this was my responsibility,
15 is there was a rebuttal expert witness that we
16 objected to, asked for time to, on DNA that we asked
17 for time to consult with our expert on. And that
18 was denied. But that was the only evidentiary
19 challenge that I recall to the DNA part of the case.

20 Q. Okay.

21 THE COURT: Let me expand on that because
22 I wasn't the trial judge. When you say that
23 there's -- you had asked a rebuttal expert witness
24 testify in the proceedings --

25 THE WITNESS: Right.

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1 THE COURT: -- at trial?

2 THE WITNESS: Let me explain, judge.

3 What happened is that the original forensic examiner
4 from Metro testified, we cross-examined that.

5 THE COURT: Who was that?

6 THE WITNESS: I don't recall the name off
7 the top of my head.

8 THE COURT: So their DNA expert
9 testified?

10 THE WITNESS: Yes. And we challenged
11 them through cross. And part of our challenge was
12 interpretation of the data.

13 And as the Court is well aware, they
14 use a peer review system. So the examiner
15 themselves has another person who basically double
16 checks their work. They put that person who checked
17 the supervisor on the stand over our objection. We
18 said it was prejudicial, that we didn't have an
19 opportunity to get any notes, reports or anything
20 from that person, nor did the trial judge give a
21 continuance to consult with our expert to see if we
22 could challenge that rebuttal expert.

23 So because we had challenged the DNA
24 expert, they put on the rebuttal to basically be
25 able to say, you know, two examiners looked at this

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1 data and both of them came up with the same result.

2 THE COURT: Was that other person who had
3 secondarily followed up, was that person also
4 endorsed as a witness?

5 THE WITNESS: I do not recall if they
6 were endorsed off the top of my head. This was
7 right along the time that the case law was coming
8 out about endorsing rebuttal witnesses.

9 There's a Nevada case that says now
10 they have to endorse. It was probably right around
11 that time. But we made that objection either,
12 either way that we didn't have notice to be able to
13 prepare to cross, but I don't know if they were
14 listed. It was before that case that discusses that
15 issue.

16 THE COURT: Okay.

17 THE WITNESS: So I hope that answered the
18 Court's question.

19 THE COURT: Yeah, it did. Thank you.

20 BY MS. KICE:

21 Q. There are a number of forensic reports
22 involved in this case. Specifically what you just
23 addressed, do you remember which report that dealt
24 with?

25 A. No, I don't. I know that the focus was

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1 on, on the DNA result of the alleged, of the alleged
2 sexual assault. I believe that's where they put on
3 the second examiner, but the record would speak for
4 itself. There's a trial transcript that would be
5 able to answer that question for you.

6 Q. When the initial SANE exam was done, the
7 SANE nurse doesn't find any sperm with a blue dye
8 test.

9 Do you recall that?

10 A. Yes.

11 Q. Okay. And then eventually there is semen
12 that is found in this case. Do you recall where
13 that came from?

14 A. Not off the top of my head. I'd have to
15 look at the file again to see.

16 Q. In the initial police reports, do you
17 recall that the victim claimed that that person who
18 assaulted her did not ejaculate?

19 A. That sounds correct. I don't -- like I
20 said, it's been many, many years and I've had a lot
21 of trials since. So I'll take your word for it if
22 it's in the reports.

23 Q. And that was at both sites according to
24 the initial report?

25 A. Both sites in terms of --

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1 Q. There's, there's two --

2 A. -- the dental office?

3 Q. There's two sexual assaults that take
4 place in the home.

5 A. That's correct.

6 Q. One is downstairs and then one is
7 upstairs.

8 A. In the bedroom, yes, that's correct.

9 Q. Do you recall in the initial police
10 report that there is no allegations of ejaculate at
11 either location?

12 A. I'll take your word for it. I don't
13 remember if it was in both sites. So I'll take your
14 word for that.

15 Q. Eventually Ms. Guenther testifies that
16 she has Mr. Henderson's semen on file.

17 Do you recall that?

18 A. Has it on file. I think she had a DNA
19 profile. I don't believe -- I don't know if she had
20 semen on file.

21 My understanding is she had a buccal
22 swab which would have been taken by rubbing the
23 mouth with a Q-Tip and that that was the
24 standardized sample from your client.

25 Q. There is a profile mixture of that
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1 obtained from a bed sheet.

2 Do you recall that?

3 A. Yes. That's correct.

4 Q. Did you -- how did you challenge the
5 mixture issue on that?

6 A. How we challenged the mixture issue?

7 Q. Yes.

8 A. Well, I'd have to speak more generally in
9 terms of all of the DNA.

10 Q. Okay.

11 A. But it's our practice, and the reason why
12 I was called into this case was I had a little bit
13 of experience with this, this topic, and we needed
14 to have someone look at the DNA.

15 So our first step was to make sure
16 we subpoenaed all of the forensic lab's records for
17 the DNA testing that was done by the Las Vegas
18 Metropolitan Police Department.

19 There was also a CODIS hit that came
20 up. And that was investigated as well.

21 So all the data was sent to Norah
22 Rudin who is a forensic DNA consultant that we
23 hired. Norah's worked with us many times in many
24 cases. She's very competent, very good at what she
25 does. And very good at explaining things to us.

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1 So her first order of business was
2 to examine all of those materials and determine was
3 the process -- was the scene processed correctly,
4 was the DNA collected properly, and was it examined
5 properly.

6 If there's any issues regarding
7 retesting, she would let us know, you know, and then
8 we would consult with her at that point and then
9 take it from there.

10 So once she received all the
11 materials, it was a matter of just consulting with
12 her and then making some decisions from there about
13 what to do next.

14 Should I continue?

15 Q. Please.

16 A. So she started with going through all the
17 records, including the items that we spoke of and
18 said that the best avenue --

19 THE COURT: Hold on for a second. Sorry.
20 This is not -- this is the whole issue, okay.

21 MS. CLOWERS: I understand, Your Honor.

22 THE COURT: So this is probably not the
23 best time for you to be talking to a victim
24 advocate. Because as I furiously type, both sides
25 are gonna be making orders, and this is the issue on
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1 post-conviction right here so.

2 MS. CLOWERS: I apologize. I had this
3 conversation with Mr. Reed.

4 THE COURT: Why don't we have you start
5 with after --

6 MS. KICE: Your Honor, just to make this
7 easier for everyone, is it okay if we take a break,
8 let Ms. Clowers speak to the victim advocate?

9 THE COURT: No, it's not.

10 MS. KICE: Okay.

11 THE COURT: This is the time set for
12 hearing. With all due respect to Ms. Clowers, I'm
13 looking at a motion for post-conviction relief, and
14 it's clearly based on DNA and he's talking about DNA
15 and I got a prosecutor walking over.

16 I need to have everybody listen
17 because there's gonna be an order by either side and
18 it's gonna be done by both sides. So this is the
19 crux of it.

20 Mr. Reed, slow down for me because
21 I'm taking as much as I can as far as the notes that
22 I need to take right now.

23 So why don't you go after Ms. Rudin
24 examines it and looks at the reports and you consult
25 with her.

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1 THE WITNESS: Yes.
 2 THE COURT: Tell me what happens then.
 3 THE WITNESS: Okay, judge. Just to make
 4 sure we're clear, what Ms. Rudin receives is
 5 actually the entire forensic file.

6 And so a lot of times, and in this
 7 case we'll get a copy of it, but the lab at that
 8 time was sending, Metro's lab was sending it
 9 directly to our expert consultant.

10 And so basically it allows her,
 11 absent the actual physical testing, to be able to
 12 input all the data, to basically look at exactly all
 13 the data that Metro's forensic lab had, and to be
 14 able to then do her own interpretation of it.

15 And that is where the consulting
 16 really becomes more interesting in this case.
 17 Because her job is to, you know, first to decide was
 18 the testing procedures done correctly. And in this
 19 case she found that they were; was the
 20 interpretation of the data correct.

21 And this is where it is a little
 22 complicated because the shortest way to answer that
 23 part of it is the ultimate conclusion that was
 24 reached by the Metro examiner she agreed with.
 25 There were, however, in terms of analyzing

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1 particular parts of the data, there were some areas
 2 we could challenge.

3 The way I would understand it as a
 4 lay person is both experts got to the end of the
 5 same road she, meaning Ms. Rudin, probably would
 6 have made a couple of different turns, but ended up
 7 in the same -- at the, the same location at the end.
 8 That was the area we could focus on in terms of
 9 being able to cross-examine their forensic experts.

10 There is, there is -- as the Court
 11 probably is aware, in the DNA there's some
 12 subjectivity to it in terms of if there is
 13 particular alleles, that is the presence of possible
 14 DNA, below the RFU which is a threshold that's
 15 established by the lab, our expert can dig into
 16 those and say these peaks might be the existence of
 17 another mixture or another person possible source.
 18 And so that was the primary area where we could
 19 focus.

20 However, like I said in the end, it
 21 would, there would have been no way to put Ms. Rudin
 22 on the stand because she would have had to say,
 23 while I disagree with some of the interpretation, I
 24 agree with the overall results, including that
 25 portion on the bed sheet.

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1 THE COURT: So she agreed with the DNA
 2 conclusion?

3 THE WITNESS: Yes.

4 BY MS. KICE:

5 Q. And if I remember correctly, we've spoken
 6 about this before and that's why you ultimately
 7 chose for Ms. Rudin not to come in and testify,
 8 correct?

9 A. Yes. So her role was for us to
 10 cross-examine the State's experts. We didn't bring
 11 her physically to the courtroom to do that, but
 12 spoke to her on the phone multiple times, exchanged
 13 information. We had a pretty well thought out cross
 14 for what we could cross on.

15 Q. And she actually provided you with a list
 16 of cross-examination questions; is that correct?

17 A. She did.

18 Q. Okay. Now, you said that there were
 19 several areas not, maybe settled is not an accurate
 20 representation of what you said, there were some
 21 areas that you could challenge?

22 A. That is correct. And one of them you
 23 identified is any time there's not a single source,
 24 and I believe, if I recall, there were some single
 25 source samples here and there were some mixtures,

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1 which are dealing with generally with DNA is in a
 2 single source, it's usually if there's enough DNA
 3 data, they could mix very strong conclusions about
 4 the DNA. Typically that it is eight or nine or even
 5 10 times the world's population in terms of their
 6 certainty of that single source being that
 7 individual.

8 When you get into mixtures, the
 9 numbers are, are a lot less and a lot more
 10 unpredictable because there's several different
 11 people that could or could not be in the source and
 12 so the numbers mathematically aren't as strong.

13 And then you have the third variable
 14 which is where you have a mixture, but you have a
 15 major and a minor contributor. That is the expert
 16 is able to pull out and say this particular portion
 17 of that sample is this person or is likely this
 18 person and then make conclusions about the minor
 19 contributor or contributors. And so when you have a
 20 mixture sample like you have here, it is a good area
 21 to attack and that's where the cross-examine
 22 focused.

23 THE COURT: This was a major and a minor
 24 mixture you're saying?

25 THE WITNESS: I believe there was, there

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1 was both. There was some where there was mixtures,
2 just a mixture, and there was some where there was a
3 major, minor contributor.

4 And I know, if I recall correctly,
5 there were single sources too because there was a
6 lot of different DNA, but the report I'm sure speaks
7 for itself.

8 BY MS. KICE:

9 Q. Okay. When you said that you sent Ms.
10 Rudin the complete forensic file -- let me just
11 backtrack a little bit.

12 Mr. Henderson was not identified
13 initially through Nevada?

14 A. That's correct. It was a CODIS hit out
15 of California.

16 Q. Okay. What information did you receive
17 from CODIS as to how he was matched?

18 A. There -- my understanding of the way it
19 was matched is -- well, let me back up. The Court
20 knows what CODIS is. So we -- a CODIS hit could
21 come from any jurisdiction.

22 It was unusual that the CODIS hit
23 did not come from Nevada because Mr. Henderson's
24 DNA, because he has a conviction in Nevada, should
25 have been present in the system from reporting from
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1 Nevada, but the CODIS hit came from California.

2 And the policy is that when you get
3 a CODIS hit, the CODIS hit then notifies the lab in
4 which the source came from.

5 So in this case Nevada would have
6 been notified. At that point, it's Nevada's
7 responsibility to do an independent exam, an
8 independent examination of the evidence a manual
9 comparison and then go from there.

10 So in other words, the CODIS is only
11 a probable cause determination. It is not a
12 conclusive determination.

13 Does that answer your question?

14 Q. And was that done?

15 A. That was done. And we did have a review
16 and discussion with our expert concerning the CODIS
17 hit. And that also became an issue at trial as
18 well.

19 Q. Okay. What do you recall about that at
20 trial?

21 A. I recall that the -- when we approached
22 the prosecutor, obviously the prejudice would be,
23 you know, two-fold. We have a CODIS hit from an
24 independent lab that the prosecution didn't want to
25 call and you'd have to identify Mr. Henderson as

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1 being a felon in order to establish the CODIS hit.

2 So the prosecution, with our
3 request, agreed we'd eliminate any discussion of
4 CODIS at all and we would only focus on the manual
5 comparison done here in Nevada.

6 Q. So did you do any sort of independent
7 review or attempt to find out about the lab in
8 California that processed this sample?

9 A. The only thing I do recall is discussing
10 it with Norah Rudin. And her discussion with us was
11 what they did in California is -- was inaccurately
12 done and obviously you'd have two labs then
13 basically coming to the same conclusion.

14 Q. Okay. And what did she base that upon?

15 A. Whatever information was provided to her.
16 I don't recall exactly what it was, but she was
17 aware of the California CODIS hit.

18 Q. Okay. Was she specifically aware of
19 their testing procedures, their, the manner in which
20 the DNA was collected? What information was given
21 to Ms. Rudin about the California?

22 A. I don't recall exactly. I would presume
23 that she had -- well, I know that she -- just
24 generally speaking, she told taught us about the
25 procedure in CODIS, but also she may have had the

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1 independent data, too. I just, I wouldn't be able
2 to say off the top of my head if she did or didn't.

3 Q. So to save a jury from hearing that Mr.
4 Henderson had been convicted of a prior felony,
5 which was not of a sexual nature, the CODIS people
6 weren't brought in to testify; is that correct?

7 A. That's not completely accurate.

8 Q. Okay.

9 A. That's only partially accurate.

10 Q. Can you clear it up for me? Because I'm
11 confused.

12 A. That part's true, but it's more than just
13 that. It's the fact that now you'd have two labs
14 that conclusively place Mr. Henderson at the crime
15 scene rather than one to attack.

16 Q. Okay. I understand what you're saying
17 now. Sorry. I lost my place on my --

18 THE COURT: And just so the record's
19 clear, Norah Rudin did in fact review the CODIS DNA
20 information from California?

21 THE WITNESS: Yes. And what counsel was
22 asking --

23 THE COURT: Right.

24 THE WITNESS: -- is whether she had all
25 the specifics.

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1 THE COURT: Right.

2 THE WITNESS: I don't know exactly what

3 she had, but we were aware of the CODIS hit from

4 California. We did --

5 THE COURT: Did she have any of the

6 reports from the CODIS hit?

7 THE WITNESS: I'm pretty sure she did

8 because we had at least the general reports. But I

9 don't know if she got the, you know, the peak height

10 ratios and the specific data itself, but she had the

11 report and all the related information from that.

12 THE COURT: And the conclusion was it was

13 the defendant?

14 THE WITNESS: Yes.

15 THE COURT: All right.

16 BY MS. KICE:

17 Q. Was -- let me back -- we went through a

18 lot of my questions on my notes. So I apologize.

19 A. That's okay.

20 Q. Do you recall what is started to be

21 referred to as the good news e-mail in this case?

22 A. No. I'm not sure what you're talking

23 about.

24 Q. Okay. There's initial testing done on

25 the buccal -- buccal, buccal?

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1 A. Buccal.

2 Q. Buccal swab for Mr. Henderson, and it

3 talks about minor peaks. This is an e-mail from the

4 lab to the district attorney's office.

5 A. The lab, the Las Vegas Metro lab?

6 Q. Las Vegas Metropolitan lab.

7 A. Okay.

8 Q. And it talks about there being minor

9 peaks in the identification. And then the material

10 is tested yet again and the Las Vegas Metropolitan

11 Police Department lab was able to match him to one

12 in 600 billion people.

13 Do you recall that?

14 A. Not off the top of my head. If you maybe

15 showed me the e-mail or whatever you had, but I

16 know, I do recall that there was some issues

17 regarding minor peaks, but it'd be better if I can

18 review it if you want me to answer that specific

19 question.

20 Q. Okay. Hold on just a second. Okay. I'm

21 trying to pull it up on my computer. I apologize.

22 Okay. I can't, I can't find it right now. Let me

23 just -- let me move on and we'll come back that.

24 Is it your recollection that there

25 were a number of tests done on the forensic material

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1 in this case?

2 A. When you say a number, I do recall there

3 was more than one, but I wouldn't be able to say

4 there was like three or four or five.

5 Q. Okay. How many do you recall?

6 A. At least two.

7 Q. At least two?

8 A. Yeah.

9 Q. Okay. And at some point in time there

10 was a motion made to retest the DNA. Do you recall

11 that?

12 A. I do.

13 Q. And what was the result of that?

14 THE COURT: Wait. Hold on. Let me ask,

15 who's motion was it? The defenses?

16 THE WITNESS: It was the defense's

17 motion. It was filed by Violet before she consulted

18 with me on this case.

19 BY MS. KICE:

20 Q. Okay. Well, do you know what the result

21 of that was?

22 A. We never did the retesting. And we did

23 everything we could to make sure that somehow people

24 forgot about that motion because there was no basis

25 to retest because our expert said don't retest.

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1 Q. Okay. But was that done before Norah's

2 conclusions were --

3 A. That's correct.

4 Q. -- or Dr. Rudin's conclusions?

5 A. And Ms. Radosta can speak of that more

6 specifically about what the court was asking of her

7 and why she filed that motion, but I can tell you

8 that there was no retesting done because our expert

9 advised against it.

10 Q. Okay.

11 THE COURT: Let me follow-up. If there

12 had been a retest done, you would have had to turn

13 that over to the State, correct?

14 THE WITNESS: If we intended on using it

15 in trial, that's correct, Your Honor. If we

16 didn't -- you know, we retest things all the time as

17 the Court knows. And if the evidence were to be,

18 you know, not favorable to the defense, we wouldn't

19 turn it over, but the statute does require if we're

20 gonna introduce it in our case-in-chief, we have to

21 turn it over.

22 THE COURT: Was that part of the

23 consideration as to why you didn't want to retest

24 it?

25 THE WITNESS: Absolutely.

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1 THE COURT: All right.

2 BY MS. KICE:

3 Q. Okay. Do you know whether or not there's
4 still forensic material in this case to be tested?

5 A. I wouldn't know that off the top of my
6 head, but I can tell you the procedure with the lab
7 for these types of cases is that they will actually
8 maintain additional swabs for retesting. It's their
9 standard protocol. I don't know the condition of
10 the samples, but I'm sure you can check with the lab
11 and find out.

12 Q. Do you know if extractions can be
13 retested?

14 A. Extractions can be retested, but
15 typically what the lab will do, and like I said,
16 this is getting a little beyond my area of expertise
17 but we talked about this with Morah, they're better
18 off taking the original sample and doing the
19 extractions again rather than using a preserved
20 extraction because of aging.

21 Q. Correct.

22 A. So typically they'll use the original
23 sample, if it's properly preserved, re-extract and
24 then retest.

25 Q. And the reason is over time there's some
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1 denigration of the genetic material, is that why
2 it's preferred to use the original over the
3 extractions?

4 A. Potentially there's denigration, yes.
5 Not exclusively, but potentially there is, yes.

6 Q. Okay. At some point in time there was a
7 plea offer on the table in this case.

8 Do you remember when that was given
9 to you?

10 A. I remember when it was given, but I don't
11 remember the exact details of the deal. But what --
12 the reason why it stuck in my mind is because this
13 was like right before we were getting ready to start
14 trial. I think the jury was getting ready to come
15 in, it was -- I tell you it's awful for Mr.
16 Henderson that the deal came in when it did because
17 it's very, very difficult as a defense lawyer to be
18 talking about someone's life on the line when the
19 jury's standing in the hallway. So I remember it
20 was at the very, very last minute.

21 Q. Okay. And do you recall how much time
22 you were able to spend with him discussing the
23 possibility of multiple life sentences to be run
24 consecutively versus a 10 on the bottom deal?

25 A. Not that much. I mean, it was, it wasn't
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1 enough time. I don't think there -- 30 minutes, an
2 hour maybe, I don't know. It wasn't enough time
3 let's put it that way.

4 Q. And you don't recall specifically the
5 plea negotiation?

6 A. I do not recall the specifics. Ms.
7 Radosta probably even had that in writing I presume,
8 but I know she'll recall it because it bothered us
9 that we had to basically deal a potential life
10 sentence case at the last minute.

11 And if I recall, the offer was a
12 pretty good one for what we were looking at.

13 Q. Right.

14 A. But, you know, it's very difficult to --
15 and I understand Mr. Henderson's predicament if I
16 was in the situation at the last minute.

17 And again, it's -- I don't know if
18 it's any fault to anyone, but the fact of the matter
19 is that that was troublesome that that offer came in
20 at the last minute.

21 Q. Did you ask the judge, and I know it was
22 Judge Mosley, but did you ask him for more time
23 to --

24 A. Yes.

25 Q. And was that granted?

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1 A. No.

2 Q. In light of Missouri versus Fry and
3 Lafler (phonetic) versus Cooper, do you feel that
4 your performance meets the requirements of
5 Strickland, given the time constraints and given the
6 severity of the penalties, the time you were allowed
7 to discuss with him?

8 A. It certainly would have been nice to have
9 more time. I don't know. I'm not the one to make
10 the decision about whether I did something wrong or
11 not, but I certainly did not feel comfortable about
12 the amount of time that we had.

13 It's extremely difficult to get a
14 deal down for that kind of time with, you know, a
15 half an hour or an hour.

16 Q. Okay. So over the course of our careers
17 and everything that sticks with us, does it still
18 stick with you that you didn't have enough -- that
19 you don't feel that you had adequate time to discuss
20 the potential plea negotiation with him?

21 A. Yes. And especially in light of the rest
22 of my testimony which is I think that the DNA was
23 conclusive and his chances of winning this case were
24 almost nonexistent.

25 Negotiating this case was his best
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1 option. It's too bad we only had the last minute to
2 do it.

3 Q. And you did ask Judge Mosley for more
4 time and he didn't give you more time?

5 A. Yes. And, you know, when I say ask, I
6 don't know, we probably didn't put it on the record.

7 Q. Right.

8 A. It was probably through the bailiff
9 saying can you just give us some more time and the
10 judge jumping on the bench and saying we're going
11 now or never.

12 Q. And, Mr. Reed, I appreciate all the time
13 that you've --

14 A. Sure.

15 Q. -- to this today. I just have a few more
16 questions.

17 A. Sure.

18 Q. Were you aware of an individual named
19 Ahud Chaziza or Abdul Chaziza at any point in time
20 during this?

21 A. It doesn't ring a bell.

22 Q. Okay. Mr. Chaziza was arrested and
23 through a confidential informant at the DAs office
24 became aware of him and he was identified by both
25 victims as the individual who came to the door.

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1 You don't recall ever knowing
2 anything about him?

3 A. No. You should ask Ms. Radosta about
4 that. I don't recall that we had that information
5 at the time.

6 Q. Okay.

7 A. But she would know for sure.

8 Q. Okay. Can I ask for the Court's
9 indulgence for just a moment.

10 THE COURT: Yes.

11 BY MS. KICE:

12 Q. By the time that the motion to retest the
13 DNA had come before Judge Mosley, were you on the
14 case at that point in time?

15 A. Yes.

16 Q. Okay. And do you recall that Judge
17 Mosley was willing -- if there weren't original
18 samples to test, that Judge Mosley was willing to
19 dismiss this case? Do you recall that?

20 A. I don't recall that he said it in exactly
21 those words, but certainly we raised issues
22 concerning preservation of samples.

23 The problem that you have in this
24 case is that there were extractions and the physical
25 evidence at the time was available for retesting.

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1 Q. Okay. Do you recall having a
2 conversation with Mr. Henderson where you told him
3 that they couldn't retest extractions?

4 A. Couldn't retest extractions? I hope I
5 didn't tell him that because that'd be wrong.

6 MS. KICE: Okay. I don't have any
7 further questions, Your Honor.

8 THE COURT: Cross-examination.

9 MS. CLOWERS: Thank you, judge.

CROSS-EXAMINATION

11 BY MS. CLOWERS:

12 Q. I didn't try this case with you; is that
13 correct?

14 A. That's correct.

15 Q. And you tried this case in August of 2008
16 about four years ago?

17 A. I'll take your word for it. It's been
18 awhile.

19 Q. So some of your memory might not be as
20 fresh; is that fair to say?

21 A. That's true.

22 Q. And then just based upon your experience
23 in the office at the Public Defenders Office, you've
24 recently had two very successful cases; is that
25 correct?

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1 A. That's true.

2 Q. And you're relied upon at your office for
3 your experience and your knowledge in regards to DNA
4 cases?

5 A. Yes.

6 Q. And so you were brought into this case
7 for the very specific reason of your knowledge
8 regarding DNA?

9 A. Yes.

10 Q. So the other stuff surrounding the case
11 you might not have been as familiar with as the DNA?

12 A. That's correct.

13 Q. So whether or not somebody by the name of
14 Ahud Chaziza was currently charged and pending trial
15 while this case was, you might not remember that?

16 A. Yeah, I don't remember that.

17 Q. I just want to talk about that
18 negotiation real quick. And when it was offered,
19 did Mr. Henderson want to take it?

20 A. He rejected the offer.

21 Q. Okay. And as to the facts that you
22 remember them, if you remember them, and I apologize
23 if you don't, but the one person who was ID'd being
24 Mr. Chaziza was not wearing a mask, and I don't know
25 if you recall that, but your client, do you remember

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1 he was wearing a mask during the incident?

2 A. That's correct. That's one of the
3 reasons why the victims were unable to identify him.

4 Q. And when the preparation of this writ of
5 habeas corpus came forward, were you ever asked for
6 your file, your personal file, your notes or
7 anything of that nature?

8 A. Yes. We -- it's our normal policy to
9 give over everything to the new attorney in the
10 case. With respect to new defense counsel, I think
11 initially, usually they'll come to us and say, you
12 know, someone's here for the file, do you want to go
13 through it and give them what's appropriate.
14 Because I don't think she had all of our file
15 initially.

16 And so that's, that's just not -- I
17 apologize, but typically we make sure that the new
18 attorney gets everything and there were some things
19 we had worked on that were not provided.

20 Q. Do you remember during the pendency of
21 Mr. Henderson's case that he also had an open and
22 gross lewdness pending?

23 A. I did not remember that.

24 Q. And your experience with more than 80
25 jury trials, which means you've probably done

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1 thousands of preliminary hearings or just dealt with
2 thousands and thousands of cases?

3 A. Yeah, I've lost count. I don't know how
4 many. It's got to be somewhere in that
5 neighborhood.

6 Q. I don't know if that's a good or bad
7 thing, but let me ask you this: Often times the
8 victims will describe one person multiple ways;
9 taller, shorter, small or fatter, or even racial
10 tones can be different, is that fair to say?

11 A. Absolutely. Especially someone in a
12 stressful situation like a sexual assault.

13 Q. And so it's common in the cases that you
14 see that victims might not describe people as they
15 end up being?

16 A. That's very true.

17 Q. Now, you said you challenged the
18 admission of some of the evidence. You didn't
19 challenge any of the chain of custody; is that
20 correct?

21 A. No.

22 Q. If you recall?

23 A. I don't believe we challenged any of the
24 chain of custody.

25 Q. Would you have if you thought there was

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1 an issue?

2 A. Absolutely.

3 Q. When it comes to a CODIS hit, and I'm
4 gonna sound like I don't really know what I'm
5 talking about right now, but the lab here in Nevada
6 will actually get the information from California
7 and test it here; is that correct?

8 A. Kind of. The --

9 Q. Compare it?

10 A. The procedure is, is -- I already
11 answered this part of it, is, you know, CODIS hits,
12 it has the DNA of millions of individuals.

13 And then what happened here is the
14 initial testing came up with an unknown source. So
15 they did not -- Nevada put it into CODIS as an
16 unknown source. The hit came actually out of
17 California which like I said was an oddity because
18 his DNA should have been here.

19 Once the CODIS hit happens, they
20 notify the institution that requested. So it comes
21 back to Nevada, back to Metro saying we've got a
22 CODIS hit on Mr. Henderson.

23 At that point it's our -- it's
24 Metro's duty then to do a manual comparison. So a
25 buccal swab's taken, the source samples are tested

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1 directly to Mr. Henderson.

2 Q. And that's what happened to the best of
3 your memory in this case?

4 A. Yeah. I'm certain that part happened,
5 yes.

6 Q. And again, one of the reasons that you
7 didn't bring up the CODIS is one, the jury would
8 have found out perhaps that he was a felon?

9 A. That would be one of the main reasons,
10 yes.

11 Q. And the second you would have helped the
12 State's case by showing two experts had determined
13 it was his DNA; is that correct?

14 A. Exactly. And the risk we ran too is if
15 we bring in the CODIS people, it would also be -- we
16 don't know how their interpretation of the data
17 would necessarily be, other than we have two sources
18 with the same conclusion and we thought the better
19 strategy would be to have one examiner be attacked
20 with results that we knew rather than the unknown
21 and have two positive conclusions for the
22 prosecution.

23 Q. And then did Ms. Rudin -- that's her
24 name; is that correct?

25 A. Yes.

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1 Q. She's well-known in the area of DNA; is
2 that fair to say?

3 A. She's one of the nation's leading
4 experts.

5 Q. Your office used her quite a bit?

6 A. Still use her to this day.

7 Q. Okay. So you have a comfortability level
8 with her?

9 A. Absolutely.

10 Q. When she was reviewing all this
11 information for this trial, did she ever ask you for
12 more information that had yet to be provided by
13 either yourself or Metro?

14 A. Initially she did ask for information
15 because that happens a lot. We may not have the --
16 all the data. I think she asked for the CODIS
17 information, you know, that kind of thing, but when
18 we started the trial, I don't believe there was
19 anything that she asked for that we didn't provide.

20 Q. So she had been given everything she
21 needed to make the determination?

22 A. Yes.

23 Q. And she agreed with the conclusion,
24 although the road she took to get there was a bit
25 different than the DNA analyst here in Nevada?

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1 A. Yes.

2 Q. And based upon your experience, is it
3 unusual that there will be two sources of DNA in a
4 swab or something that's taken or collected?

5 A. You mean like a mixture?

6 Q. Sure.

7 A. It's not unusual at all to find mixtures,
8 no.

9 Q. And it's not unusual for there to be a
10 major contributor and a minor contributor; is that
11 correct?

12 A. No, no. On many of the cases that I've
13 seen, that will come up.

14 Q. Do you remember the exact results of the
15 DNA in this case?

16 A. I do not.

17 Q. Would it refresh your memory if I told
18 you -- do you remember that the facts are that she
19 was touched downstairs in the house and then taken
20 upstairs? You remember that, sir?

21 A. Yes.

22 Q. And downstairs she was touched on her
23 breasts, do you recall that?

24 A. Yes, I do.

25 Q. When she was taken upstairs, she was

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1 sexually assaulted on a bed. Do you recall that?

2 A. That was her testimony, yes.

3 Q. Okay. And do you recall that DNA was
4 taken from the sheets that were upstairs?

5 A. Yes.

6 Q. As well as during the SANE exam there was
7 DNA swabs collected as well?

8 A. Correct.

9 Q. Do you remember that the sheets, the
10 determination by the Metro lab was that the sheets
11 upstairs identity assumed 100 -- one in 600 billion
12 was the results that the DNA belonged to Mr.
13 Henderson?

14 A. Right. That was the single source I was
15 talking about.

16 Q. And do you remember the same for the swab
17 during the SANE exam belonged to him as well?

18 A. Yes.

19 Q. And then just talking quickly about the
20 breast.

21 THE COURT: Wait, wait. Hold on one
22 second. The sheets were the single source, and on
23 the sexual assault kit, was it -- where was it taken
24 from? Do you remember what part of her body it was
25 taken from?

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1 MS. CLOWERS: It was vaginally, Your
2 Honor.

3 THE COURT: It was the vaginal area?

4 THE WITNESS: Yes.

5 THE COURT: What was the mixture then?

6 THE WITNESS: Well, theirs you'd expect

7 it to be a mixture, but what they'll do is
8 genatome -- genome, genome, excuse me, testing.

9 And now I'm trying do the science
10 part, but basically what it is is they can, they can
11 eliminate male, female. So they can only do the
12 testing as to a male contributor and they can
13 eliminate the female part of it to an attempt to
14 separate out because obviously the victim's DNA
15 would be in her vaginal cavity. You know, that
16 would be unusual. So that's how they then separate
17 with the genome. They can identify only a male
18 source and get a more accurate source.

19 So basically it's a mixture, but
20 it's a single source when they genome test it
21 because they are eliminating any female DNA.

22 THE COURT: So that single male source
23 was also the defendant?

24 THE WITNESS: That's correct.

25 THE COURT: Okay.

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1 BY MS. CLOWERS:

2 Q. And that was also one in 600 billion; is
3 that correct?

4 A. Yes. Which is like seven or eight times
5 the world population identity assumed.

6 Q. And then as for the breast area, it was
7 also his identity assumed that one in 600 billion as
8 well?

9 A. That's correct. And it's the same thing
10 there in terms of separating out the DNA from the
11 female source and the male source.

12 THE COURT: And so there was DNA also
13 taken from her breast as well?

14 THE WITNESS: Yes, presumably. And I, I
15 think that the victim might have mentioned that the
16 assailant had licked her or -- in the chest area.

17 BY MS. CLOWERS:

18 Q. And that's your memory of that; is that
19 correct?

20 A. Yes. Which would then lead, you know,
21 saliva's a great source of skin, especially the
22 tongue running across surface is a great source or
23 epithelial cells which are skin cells.

24 MS. CLOWERS: I have no further
25 questions, Your Honor.

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1 THE COURT: Redirect.

2 REDIRECT EXAMINATION

3 BY MS. KICE:

4 Q. There was a question I had about the
5 CODIS. You said there was a representation made
6 that you didn't want the information from the
7 California lab to come in because it had
8 conclusively matched Mr. Henderson to the crime,
9 correct?

10 A. Right.

11 Q. Then you said something about some
12 information about CODIS or the procedures that you
13 could have done but you didn't do?

14 A. I did?

15 Q. At least that's what I recall.

16 A. I would hope that that wasn't the case.
17 That's not what I meant if that's what I said.

18 Q. Okay.

19 A. Do you want me to repeat my answer on
20 that? The CODIS hit was conclusive in this way:
21 CODIS says this is Mr. Henderson's DNA; however,
22 they always -- the caveat at the bottom is this is
23 done for probable cause purposes, the lab has to do
24 its own independent testing. The presumption is
25 CODIS doesn't want to be the conclusive

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1 determination by a court of law.

2 Q. Okay.

3 A. And so we had that data and then we had
4 the manual comparisons. And so the result in the
5 CODIS hit, if we were to allow it in, has a two-fold
6 problem; felony conviction as being the source of
7 the CODIS that he provided, and secondarily that it
8 would be another lab that made a conclusive decision
9 as to his identity. So that was the two.

10 Q. Okay. And I believe that is exactly
11 where I was going with that was CODIS could have
12 done more perhaps?

13 A. No. That's not, that's not how it works.
14 CODIS, CODIS only does what I just described for
15 you.

16 Q. Exactly what they did in this case?

17 A. That's it. You can't go back to CODIS
18 and say can you retest this or check your data or --
19 it doesn't work that way. If they get the hit, they
20 send it to the lab and they wash their hands of it.
21 They're done.

22 Q. Okay. And did you ever receive a
23 satisfactory answer as to why Mr. Henderson wasn't
24 in the Nevada database?

25 A. No, I didn't.

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1 Q. Okay. Did that call into question this
2 entire procedure?

3 A. No. Because we raised that with Norah.
4 We saw it and said is this a problem, why wouldn't
5 they have hit it. And the -- basically her answer
6 was I don't know, I don't know why they didn't catch
7 it, but all I know is California got it right.

8 Why Nevada didn't catch it, I don't
9 know, but it really, it kind of didn't matter in her
10 mind because the conclusion that California coupled
11 with Metro's retesting basically sealed her opinion.

12 Q. Okay. And just because I'm annoying,
13 why, why didn't you press to find out why he didn't
14 match in Nevada?

15 Because either Metro didn't take his
16 DNA correctly when they did the swab when he was
17 taken into prison or it wasn't uploaded right or
18 there's some problem with the database or there's
19 something wrong with how things are collected,
20 stored, maintained, matched, height, et cetera, et
21 cetera.

22 Why didn't you pursue that?

23 A. Because it wouldn't have mattered
24 according to our expert. California got it right
25 and then Metro got it right with the manual test.

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1 So we were -- it was much ado about nothing as to
2 why that was the case.
3 The focus of the cross was better on
4 the interpretation of the data. And what was found
5 in those minor peaks and below the RFU where there
6 could be another source or challenging the fact that
7 that's identity assumed by saying these particular
8 alleles are not interpreted correctly. And that's,
9 that's all we really had. It was a difficult cross.

10 MS. KICE: Okay, thank you.

11 MS. CLOWERS: May I just ask a couple
12 follow-up?

13 THE COURT: Sure.

14 CROSS-EXAMINATION

15 BY MS. CLOWERS:

16 Q. Didn't -- and I can't remember where I
17 learned this information. Didn't his DNA show up in
18 CODIS in Nevada after the fact?

19 A. It may have. I'm not certain of that. I
20 know that, that we talked to the examiner about this
21 because it seemed kind of odd. And she wasn't
22 familiar with how, you know, Nevada was uploading
23 information into CODIS. And we didn't ask the, the
24 Metro expert because it was, it was gonna be not an
25 issue because they manually came to the results.

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1 Q. So it wouldn't have changed the result of
2 the trial?

3 A. Not according to our expert.

4 Q. And is it possible that his DNA just
5 hadn't been entered into CODIS in Nevada yet?

6 A. That is possible.

7 Q. Is it, with your experience or if you
8 have knowledge that the Nevada DNA system,
9 especially in the metro jurisdiction, has or was
10 behind for very many years with entering DNA?

11 A. No system is foolproof about entering
12 DNA. So that's true.

13 MS. CLOWERS: Okay. I have nothing
14 further, judge.

15 EXAMINATION

16 BY THE COURT:

17 Q. Just a couple followup. How long have --
18 you stated you practiced law about 25 years.

19 How long have you been practicing
20 criminal defense work?

21 A. That whole time.

22 Q. 25 years?

23 A. Yes.

24 Q. And how long have you been at the Public
25 Defenders Office?

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1 A. 10 years.

2 Q. All right. And what unit are you
3 currently on?

4 A. On the homicide team currently.

5 Q. How long have you been on the homicide
6 team?

7 A. Eight years.

8 Q. So you're on the homicide team during the
9 time period by which this case was tried?

10 A. Yes, I was.

11 Q. And you just assisted as far as being the
12 co-chair with Ms. Radosta and helping in this DNA
13 area?

14 A. Yes. Because at that time especially
15 there was a lot more homicides that had DNA cases
16 than just a routine track case.

17 Q. This would be a sexual assault case,
18 right, SVU case?

19 A. At the time, our SVU unit didn't take
20 adult sexual assaults. That has since changed, but
21 I don't believe in 2008 they were -- it had to be a
22 child for that special unit to take it. Although
23 Ms. Radosta's on that team --

24 Q. Yeah.

25 A. -- now so she would probably know the

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1 answer to that. But my recollection was Ms. Radosta
2 was on the track at the time and that's how she got
3 assigned this case.

4 Q. About how many murder cases and sexual --
5 and/or sexual -- well, how many murder cases do you
6 think you've handled? Not just trial, but handled
7 in the time that you've been in your entire career.

8 A. Oh, hundreds.

9 Q. All right. And how many sexual assault
10 cases, even within the murder cases or just
11 otherwise, have you handled?

12 A. Primarily within the murder cases, I'd
13 say probably half of that.

14 Q. And Norah Rudin is the one, she's the DNA
15 expert that both your SVU and your homicide team
16 uses as a consultant in these cases?

17 A. She's one of them, but yes, she's worked
18 on a lot of cases with our office, yes.

19 Q. Where's she located out of, do you know?

20 A. I think it's California.

MS. KICE: California.

THE WITNESS: Los Angeles area I believe.

23 THE COURT: All right. And before you
24 leave the stand, can I ask, there were some other
25 issues, are you gonna be asking him or Ms. Radosta

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1 or can you just go over -- there's a couple other
2 issues regarding that he's raised in the
3 post-conviction such as validity of the search
4 warrant trial counsel failed to correct the PSI.
5 He's on the stand. You might as
6 well ask him a couple questions regarding that. If
7 he's already here, I don't --

8 MS. KICE: That's fine, judge.

9 THE COURT: I don't think it will take
10 more than 10 minutes to ask him a couple more
11 questions regarding what else has been raised in the
12 evidentiary hearing. I mean what has been raised in
13 the petition. Excuse me. For example, no bench
14 conferences were recorded.

15 MS. KICE: That's my favorite issue, but.

16 THE COURT: That's, that's your what?

17 MS. KICE: That's my favorite issue.

18 THE COURT: You'll notice mine are.

19 MS. KICE: I know. And I've always been
20 very impressed with that. I'm sorry, Your Honor, I
21 have to kind of scroll through this.

22 FURTHER EXAMINATION

23 BY MS. KICE:

24 Q. Why weren't the bench conferences
25 recorded?

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1 A. I don't have any idea.

2 Q. Is it standard policy at the time and in
3 that courtroom not to record bench conferences?

4 A. I don't know how many trials you've done
5 in front of Judge Mosley, but there are a lot of
6 conferences with Judge Mosley that might not be on
7 the record initially. But everything I thought was
8 material in every trial I've ever done with, with
9 Judge Mosley since like 1990 I think was my first
10 trial in there, he'll go back and put it on the
11 record or give you an opportunity to put it on the
12 record.

13 So his normal, whatever was said, if
14 it was material I would have presumed was put on the
15 record.

16 Q. If there was something that stood out to
17 you that you would have recalled, you would still be
18 able to remember that today since he did give an
19 opportunity to make a record?

20 A. He always gave me an opportunity to make
21 a record. I've never remembered Judge Mosley saying
22 you can't, you know, make a record about an issue,
23 even if he disagreed with me.

24 MS. KICE: If I can just have the Court's
25 indulgence just for a moment.

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1 THE COURT: Sure.

2 BY MS. KICE:

3 Q. Was there a search warrant that was
4 issued in this case to get the buccal swab from Mr.
5 Henderson?

6 A. I don't recall off the top of my head.
7 Typically they do a search warrant to get it, but
8 they don't have to.

9 Q. They don't have to? Why don't they have
10 to?

11 A. Well, sometimes they can get it by
12 consent or depends on, and I don't recall if Mr.
13 Henderson was on parole or anything like that at the
14 time. I'm not -- I just don't remember, but there's
15 a lot of ways they can get that besides the search
16 warrant. If there was one, it should have, it
17 should have been in our file.

18 Q. Okay. Would it surprise you that there
19 was no affidavit in the file about getting a search
20 warrant?

21 A. No. It wouldn't surprise me at all.
22 Typically we'll just get the search warrant. And
23 then if there's an issue, we should raise that and
24 ask for that discovery as to the affidavit attached
25 to the search warrant.

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1 MS. KICE: Sorry, Your Honor. Just one
2 more moment.

3 THE COURT: That's all right.

4 BY MS. KICE:

5 Q. And prior to sentencing, did you get a
6 chance to go over the PSI with Mr. Henderson?

7 A. I'm sure we did. I don't remember. Ms.
8 Radosta would be the best person to answer that
9 question.

10 Q. Okay. Are you aware of the case of
11 Stockmeier versus State?

12 A. Very much so.

13 Q. Are you aware of the consequences of
14 Stockmeier versus State?

15 A. The consequences? The consequences are
16 that you can not sentence someone with an incorrect
17 PSI. But that case came out long after this case
18 was sentenced.

19 Q. Okay. But you -- it is your best
20 recollection that either you or Ms. Radosta went
21 over the PSI with Mr. Henderson?

22 A. Yes. And it's our practice, too. I mean
23 before Stockmeier, we wanted, we wanted Mr.
24 Henderson to have a correct PSI. If there were any
25 issues, you know, we would normally bring them up.

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1 As far as how they are -- the only
2 difference I see now with Stockmeier in terms of how
3 I practiced it is a lot of times we would
4 interlineate or write things in the PSI only later
5 to discover that that wasn't effective.

6 So Stockmeier in my opinion only
7 basically solidified the idea that the correct PSI
8 ends up in the hands of the Department of
9 Corrections.

10 Q. And there's collateral consequences for
11 not having a correct PSI; is that correct?

12 A. Absolutely. It has to do with
13 classification, parole. There's a lot of factors in
14 terms of a prison sentence. You want a correct PSI.

15 Q. Okay. And because this case was older,
16 when I requested the file from your office, is it
17 your understanding that I received everything that
18 you had in the file?

19 A. Not at the time. After the fact you did.

20 Q. After the fact, yes.

21 A. And I apologize for that. Hopefully
22 we've corrected that procedure. As you can
23 appreciate, we have a lot of people and a lot of
24 cases, but on any serious offense like this, it is
25 typically the assigned attorney that gets notified
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1 and then provides the file to the subsequent lawyer.
2 It's our responsibility. We fell down on the job on
3 that one. I apologize.

4 Q. At this point in time, are you confident
5 that I had everything that I needed?

6 A. Yes.

7 MS. KICE: That's all, Your Honor.

8 MS. CLOWERS: May I?

9 THE COURT: Go ahead.

10 MS. CLOWERS: Thank you.

11 FURTHER EXAMINATION

12 BY MS. CLOWERS:

13 Q. It sounds like you have a great deal of
14 experience, especially with search warrants; is that
15 fair to say?

16 A. Yes.

17 Q. You probably have a search warrant in
18 probably almost every case you've tried?

19 A. I'd say that's true.

20 Q. If not multiple search warrants?

21 A. Yeah, usually there's more than one,
22 especially in homicides.

23 Q. Have you ever raised an issue or taken
24 issue with a search warrant where the PC is based
25 upon a probable cause? Or I'm sorry. The PC is

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1 based upon a CODIS hit to then get buccal?

2 A. No.

3 Q. So you don't see any problem with that;
4 is that correct?

5 A. That's what I was trying to say, maybe
6 inartfully, is there's really -- there really isn't
7 a reason to search the affidavit. Because if the
8 probable cause is the CODIS hit, we had that
9 information and it's, it's more than probable cause
10 really. It's pretty conclusive.

11 Q. Okay. The Stockmeier case did change
12 things, how we do them procedurally; is that
13 correct?

14 A. Yes.

15 Q. Now we have the PSI's amended in the
16 paper form before somebody's allowed to be
17 sentenced?

18 A. That's correct.

19 Q. Previous to this, were there ever times
20 where you would review a PSI with somebody and find
21 an error and bring it up?

22 A. I've always tried to bring it up if it
23 was a legitimate complaint, that we'd either ask it
24 be amended, send a supplement, judges would
25 handwrite corrections on the PSIs. There was a
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1 variety of ways it was done.

2 Q. So Mr. Henderson faced hundreds of years
3 basically in prison in this case; is that correct?

4 A. That's correct.

5 Q. So you would have made sure that the PSI
6 was correct and to review it with him?

7 A. I would certainly hope so, yes.

8 Q. And that's your office policy?

9 A. Yes.

10 Q. And I assume it's your policy as just
11 being a good attorney as well?

12 A. Absolutely. It's important.

13 Q. Bench conferences, had the bench
14 conferences in this trial been recorded, would it
15 have changed the outcome of this trial?

16 A. Not based on my experience with Judge
17 Mosley. Because like I said, everything that I
18 thought was material was always put back on the
19 record.

20 Q. So as an experienced defense attorney,
21 you recognize and appreciate the value of a record?

22 A. I do. And the reason why I'm especially
23 in tune with that is Supreme Court Rule 250 which
24 governs death penalty cases, which I do a lot of,
25 requires that bench conferences be record.

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1 MS. CLOWERS: Thank you very much.

2 FURTHER EXAMINATION

3 BY THE COURT:

4 Q. Hold on. There's something. Is there
5 anything that the defendant told -- do you recall --
6 let me strike that.

7 Do you recall anything the Defendant
8 told you about his PSI that was incorrect at all
9 that you needed to correct it to the judge?

10 A. Not off the top of my head. Like I said,
11 Judge -- Violet Radosta probably did most of that
12 part of it. So if there was anything, she would be
13 able to address that better. I just don't remember.
14 I'm sorry.

15 Q. And even if there had been no affidavit
16 of the search warrant in this case regarding the
17 buccal swab, do you think that would have changed
18 the outcome in this particular case?

19 A. No.

20 Q. And why is that?

21 A. Because as long as they had a comparison
22 sample, they would be able to make the same
23 conclusions. They could have technically used the
24 buccal swab that was sent up to CODIS or one from
25 the prison system, but they independently did it

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1 just as a matter of procedure to be able to show
2 that they took a fresh swab.

3 But as the Court knows, you know,
4 DNA never changes. A buccal swab from 20 years ago
5 is the same DNA that is presently in existence.

6 Q. Did you check over -- I know you and Ms.
7 Kice have just been bantering back and forth
8 regarding what was in the public defender's file.

9 Are you aware of what Ms. Kice now
10 has in her file and do you feel that is sufficient
11 for this hearing?

12 A. I didn't go through the whole file, but I
13 can tell you that from the initial petition it
14 looked like there was some conclusions, like we
15 didn't do DNA.

16 And I again apologize, it wasn't
17 given to her initially. So whatever we have was
18 subsequently provided.

19 Q. That being perhaps the consultations with
20 Dr. Rudin?

21 A. That's correct.

22 Q. So they didn't have that during -- either
23 the defendant nor Ms. Kice had that during the
24 initial petitions?

25 A. That's correct.

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1 Q. But subsequently you turned all of that
2 over?

3 A. Yes, Your Honor.

4 THE COURT: Is there anything based on
5 what I've asked, it's just what I noticed was in the
6 petition just to make sure I've covered everything
7 for this hearing, is there anything more that I've
8 asked that either side wants to follow-up with? Ms.
9 Kice.

10 MS. KICE: I have one follow-up question.

11 THE COURT: Okay.

12 FURTHER EXAMINATION

13 BY MS. KICE:

14 Q. Based upon the offer, I know you don't
15 remember the specifics of the plea, possible
16 potential plea negotiation, did it strike you as
17 being something that Judge Mosley would not have
18 accepted had Mr. Henderson agreed to it?

19 A. No.

20 THE COURT: No, I -- that is so, that is
21 so beyond objectionable. I'm not gonna allow -- I
22 mean, it's just so speculative, that question. So
23 it's gonna be irrelevant.

24 MS. KICE: Okay.

25 THE COURT: Who knows what Judge Mosley
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1 would have done and there was just so much
2 speculation.

3 The actual question you just asked
4 was just so -- if you want to rephrase it you can,
5 but what you just asked was so -- it was speculation
6 upon speculation upon speculation, the actual
7 question.

8 If you want to rephrase it. Maybe
9 I'm just missing the point you're trying to make.

10 BY MS. KICE:

11 Q. Do you recall any specifics about the
12 term of years of the plea agreement?

13 A. I don't, but I pretty confident that Ms.
14 Radosta would.

15 Q. Okay.

16 A. I just remember there was an offer, it
17 was at the last minute, we didn't have a lot of time
18 to talk about it, and the jury was standing out
19 there ready to go and that was it.

20 Q. Had you ever had a plea negotiation that
21 Judge Mosley rejected?

22 A. No. But I mean, Judge Mosley, you would
23 have to talk to him about a deal if it was a set
24 deal, not if it was a range. But if you said hey,
25 we're gonna agree on a particular sentence, a

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1 stipulated plea, and I think a lot of judges may do
2 this, you (sic) would like to have you discuss in
3 advance so we don't go through the steps of him
4 saying I'm just not gonna accept this plea. So that
5 would be his normal procedure.

6 Q. Okay.

7 A. But I've dealt with him.

8 Q. And I apologize for not asking that
9 correctly the first time. That's all.

10 THE COURT: Is there anything, Ms.

11 Clowers? Do you have anything else as follow-up?

12 THE COURT: No, Your Honor.

13 THE COURT: Are both sides -- can I
14 excuse Mr. Reed now?

15 MS. KICE: Yes.

16 MS. CLOWERS: Yes.

17 THE COURT: Thank you very much for your
18 testimony, Mr. Reed. And you're excused.

19 THE WITNESS: Thank you.

20 THE COURT: We'll call Ms. Radosta.

21 (Whereupon, Violet Radosta was duly sworn
22 to tell the truth, the whole truth and
23 nothing but the truth.)

24 THE CLERK: Please be seated and state
25 your full name for the record, please.

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1 THE WITNESS: Violet Radosta.

2 R-a-d-o-s-t-a.

3 DIRECT EXAMINATION

4 BY MS. KICE:

5 Q. Ms. Radosta, how long have you been an
6 attorney?

7 A. How long have I been an attorney in
8 Nevada or total?

9 Q. How long have you been an attorney total.

10 A. Since 1990. I'm sorry. Since 1994.

11 Q. Okay. And based upon that, how many
12 jurisdictions are you licensed in?

13 A. Two.

14 Q. And where's the other jurisdiction?

15 A. California.

16 Q. And when you became licensed in
17 California in 1994, was that the first time you took
18 the bar exam?

19 A. Yes.

20 Q. And you became licensed in Nevada in what
21 year?

22 A. 1995.

23 Q. Did you take the Nevada exam more than
24 once?

25 A. No.

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1 Q. Okay. Have you ever had any discipline
2 issues?

3 A. No.

4 Q. How long have you been at the Public
5 Defenders Office?

6 A. Since December '98.

7 Q. And what did you do prior to the public
8 defenders office?

9 A. I worked at the Las Vegas city attorneys
10 office as a deputy city attorney.

11 Q. And in your role at the city attorney's
12 office, were you in the civil or criminal division?

13 A. Criminal.

14 Q. Okay. So how long have you been
15 practicing criminal law?

16 A. Since October 1995 if you count the years
17 I prosecuted.

18 Q. Okay. How many trials have you done?

19 A. Uhm.

20 Q. Ballpark.

21 A. Ballpark, including nonjury trials, I
22 would --

23 Q. Let's stick with felony jury trials.

24 A. Felony jury trials, I would have to say
25 30 or 40.

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1 Q. Okay. How many of those have you won?

2 A. I really don't keep track like that. I'd
3 say maybe 10, 12.

4 Q. How many of the felony jury trials have
5 you done included --

6 A. And by won -- I'm sorry. By won do you
7 mean --

8 Q. Not guilty.

9 A. Across the board not guilty so I
10 understand?

11 Q. How many of them have dealt with issues
12 involving DNA identification?

13 A. Of all of the, the jury trials?

14 Q. Yes.

15 A. I don't know. Maybe eight or 10.

16 Q. Okay. When did you first come into Mr.
17 Henderson's case? Not necessarily time wise but
18 procedurally.

19 A. I would say I had the case at least a --
20 I'm gonna -- I have to guess. I would say at least
21 a year before he went to trial I was assigned to the
22 case.

23 Q. Okay. And in that year time frame, what
24 were your primary responsibilities on the case?

25 A. I was the, I was the person that was

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1 assigned to the case.

2 Q. Okay.

3 A. It was primarily, I was the only person
4 assigned to the case until I brought Mr. Reed in
5 however many months before trial was scheduled to
6 go.

7 Q. And how -- why did you bring Mr. Reed in?

8 A. For any number of different reasons.

9 Generally speaking, in the public defenders office
10 we're encouraged to do trials in pairs. So number
11 one, I needed a second chair; number two, I felt
12 that given the nature of the charges that it would
13 be helpful to have a male attorney as opposed to
14 another female attorney on the case.

15 And I had done others trials with
16 Norm and so I felt that that would be -- we already
17 had a good working relationship so.

18 Q. Okay.

19 A. Asked him if he was free during the,
20 whenever the trial was scheduled and he had the time
21 available.

22 Q. Okay. And he testified -- what were his
23 primary responsibilities?

24 A. Primarily I brought him in because I knew
25 he had been dealing with DNA on a couple of murder

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1 cases that were well-known within the office. So I
2 brought him in to help me with the DNA on this
3 particular case because this particular case in my
4 opinion, it all came down to the DNA.

5 Q. Okay. In the time that you the case with
6 Mr. Henderson, did he maintain his innocence?

7 A. Yes.

8 Q. Okay. Fully and completely?

9 A. That's a difficult -- there were
10 conversations that we had that -- there were
11 conversations that we had that he changed his
12 version of, of his defense to us.

13 So certain parts of the case he, he
14 told -- he gave us two different defenses at one
15 point in time.

16 Q. Were they the same version of I wasn't
17 there or?

18 A. No.

19 Q. Okay. Who was the investigator that you
20 hired on this case? I mean, who's the investigator
21 from your office on this case?

22 A. I don't recall.

23 Q. Okay.

24 A. I honestly don't recall. At this point
25 in time we were -- sorry. I don't recall. We

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1 always got so many different investigators in the
2 office. I'm trying to remember back to when I was
3 on that team who my investigator was. It might have
4 been -- sorry. I'm drawing a blank on his name.

5 Q. Okay.

6 A. Sorry.

7 Q. But are you confident that you had an
8 investigator in this case?

9 A. I don't recall if I had the investigator
10 do -- I myself had any investigation done in this
11 case.

12 Prior to myself being assigned to
13 the case, other public defenders in the office had
14 been assigned to the case because I know they had
15 some investigation done on the case.

16 Q. Such as?

17 A. There was some oddness to the facts of
18 the case having to do with the circumstances
19 surrounding how the individuals came into the house
20 and things that were said when they are were inside
21 the house that led I think all the defense attorneys
22 involved to think that there was something not told
23 to the police in this case.

24 The public defenders prior to me I
25 know explored that more than I did with their

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1 investigators.

2 Q. And that involved the, the victims -- one
3 of the victims didn't want to go to the hospital; is
4 that --

5 A. Yes. And also comments that were made
6 such as to the alleged -- from what I recall,
7 comments that were made to the alleged male victim
8 and male victim in this particular case of do you
9 want to know who sent us, do you want to know why
10 we're here, do you want to know what this is about
11 which caused us to believe that there was some
12 connection between the individuals that came into
13 the house and the people that were inside the house
14 or potentially mistaken identity of the victims that
15 were inside the house, if the people that came in
16 thought they were people that weren't.

17 But those parts of the case were
18 investigated prior to the case being assigned to me
19 by other public defenders that weren't in the
20 office.

21 Q. Okay. And in the file that I received
22 from you, there were a lot of information about the
23 male victim's partner in his dental office.

24 Do you recall what that was about?

25 A. No. That was stuff that I did not look

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1 into.

2 Q. Okay. So you knew that based on the fact
3 that there were potential co-defendant's in the
4 case?

5 A. Yes.

6 Q. Did you eventually become aware of the
7 fact that another individual had been arrested?

8 A. I knew that there was -- the fact, as I
9 recall them, is there were three individuals that
10 came into the house. The first individual who came
11 into the house did not wear a mask. That individual
12 was eventually arrested. The other individual who
13 was wearing a mask as far as I knew was never
14 arrested.

15 Q. Okay. Did you know the individual
16 without the mask?

17 A. Uh-huh.

18 Q. Did you know that he was arrested?

19 A. Yes.

20 Q. Okay. Do you recall his name? It's Abud
21 Chaziza or Chaziza or something like that.

22 A. Now that you say that, that sounds
23 vaguely familiar. I knew he had been arrested, I
24 knew the State was proceeding against him
25 separately, obviously in a separate trial than our
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1 case.

2 And I remember discussing it briefly
3 with Ms. Collins about the fact that he had also
4 been charged with sexual assault. And we were just
5 discussing more in the abstract that concept that
6 somebody was charged with sexual assault who
7 hadn't -- it wasn't alleged that they had
8 participated in any way, shape or form in a sexual
9 assault. So we were more discussing, like I said,
10 the abstract.

11 Q. Okay. Once you were aware of the
12 co-defendant's arrest, did you pursue any
13 investigation or conversation with him?

14 A. No.

15 Q. Okay. Even though Mr. Henderson said he
16 wasn't there?

17 A. Yes. I felt that the, the -- since the
18 DNA seemed to be the piece of evidence that was
19 putting him at the scene, that that wasn't the most
20 important thing for us to deal with, regardless of
21 what anybody else may have said.

22 If the, if the witnesses testify
23 that his DNA was at the scene, no matter what we
24 presented to the jury, if we weren't able to poke a
25 hole in the DNA, it wasn't going to do any good.

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1 Q. But you knew from Ms. Rudin's

2 conversations that there were -- there were some
3 problems with the DNA?

4 A. We were able to cross-examine on the DNA,
5 yes.

6 Q. Okay. And even though you knew you would
7 be able to cross-examine on the DNA, and if you were
8 able to punch enough holes in that, if you had had
9 information from a co-defendant that said Mr.
10 Henderson wasn't there, you chose not to pursue that
11 avenue?

12 A. I -- we did not interview the
13 co-defendant, no.

14 Q. Okay. Mr. Reed said that his main
15 responsibility was to attack -- examine, interpret
16 and attack the DNA.

17 Is that your recollection of how the
18 work load was divided?

19 A. When I brought him in at whatever point
20 in the case, yeah. I mean, I, yeah, had decided
21 that he had more experience with DNA than I did so I
22 asked him to take that portion of the case.

23 When I first brought him into the
24 case, it was our belief that we were also going to
25 be creating more of a defense involving the actual
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1 alleged crimes and going after the alleged victims
2 more.

3 And as we got deeper into the case,
4 we decided that that was not going to be a winning
5 strategy so it became much more about the DNA.

6 Q. But going into it, you, you felt that
7 there was a defensible strategy -- you could defense
8 the case on the DNA with the cross-examination.

9 Was that your recollection of the --

10 A. I felt that that was the only defense
11 that we could put on that could -- that -- I felt
12 that was the only defense we could put on that would
13 convince a jury that he did not commit the crime.

14 Q. Okay. Because in fact that's the only
15 thing that tied him --

16 A. Right.

17 Q. -- to the crime scene?

18 A. Absolutely. And the -- if I remember
19 correctly, and I'm talking off the top of my head
20 here, but I believe the DNA was a perfect match. So
21 I mean, but I could be wrong. I could be crossing
22 my cases.

23 So I mean in the end if the, if the
24 jury heard that, like I said, any, any -- anything
25 else we put forward, if it was just gonna be -- the

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1 State would be able to stand up in closing and say
2 yes, but his DNA's there, but his DNA's there.

3 Q. Were you aware that Mr. Henderson had
4 prior felony convictions?

5 A. Yes.

6 Q. Okay. Do you recall what they were for?

7 A. No.

8 Q. Do you recall if any of them were for
9 sexual crimes?

10 A. I'm pretty sure that they were not.

11 Q. Okay.

12 A. Actually if I, I want to say they were
13 drug related but -- or even nonviolent.

14 Q. Okay. But you don't recall any drug or
15 sex convictions?

16 A. No, no, no. Because the conversations
17 about, about potential penalties would have been
18 completely different if he had priors for sex.

19 Q. And is it in your training and experience
20 was defendant's since you are on -- you're on the
21 special victims team now at the --

22 A. Yes.

23 Q. -- at the PD's office?

24 A. I wasn't at the time that I tried this
25 case, but yes, now I am.

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1 Q. Is it unusual for someone to start off
2 with a sexual assault when they're in their 30s?

3 A. I couldn't even begin to talk about that.
4 They're all over the place. I mean, I have some
5 clients in their 60s that have never been arrested
6 previously and other people who are 18 when they're
7 arrested.

8 Q. Okay.

9 A. It's all over the place.

10 Q. Okay. So do you -- since Mr. Henderson
11 maintained that he wasn't there, do you, do you
12 recall what investigative efforts were done to
13 establish what his alibi was for the night of the
14 crime?

15 A. That's where it always is problematic. I
16 don't recall how far after the alleged incident he
17 was arrested, but it was several months. Four or
18 five, six months after the alleged incident.

19 I'm sure you can relate that when
20 you go and you say to any client where were you on
21 such and such a day, it's almost, it's almost
22 impossible to say oh, I'm at Tuesday night, six
23 months ago I was here.

24 And that's what I recall happening
25 in this particular case. He, you know, we went back

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1 and we were like well, is this near your birthday,
2 is this near anybody you know, anything, any point
3 of reference where we could use it as a jumping off
4 point as to where were you. And we weren't able to
5 come up with any specificity as to where he was on
6 that particular date.

7 Q. Did you ask if he had a cell phone?

8 A. No. Not that I recall.

9 Q. Okay. At what point in time in your
10 experience were they able to use the cell phone
11 pinging to locate people?

12 A. I have no idea.

13 Q. Okay. I'm sorry. I --

14 A. I, I've never used that technology now.

15 Q. Okay.

16 A. So.

17 Q. So when it came to the DNA, you -- that
18 was Mr. Reed's primary area on this; is that
19 correct?

20 A. Yes.

21 Q. Okay. What involvement did you have with
22 the DNA since Mr. Reed came in --

23 A. Well, I --

24 Q. -- later into the picture?

25 A. I actually had the case for at least

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1 several months prior to Mr. Reed getting -- me
2 asking Mr. Reed to second chair the case with me.

3 I had already hired Norah Rudin
4 prior to Mr. Reed getting involved in the case. I'd
5 had several conversations with her about the DNA
6 prior to him getting involved in the case.

7 But then as I said, as we were
8 getting closer and closer to trial and it was
9 becoming obvious for whatever reasons, I can't
10 remember if we weren't getting an offer or if Mr.
11 Henderson had made it clear that he wasn't
12 interested in any offers, I'm not really sure which
13 way that went, but it was becoming more and more
14 obvious that we were going to trial in this case
15 that I felt Mr. Reed would be helpful in any number
16 of capacities. One of them being the DNA.

17 And then he also had another case
18 that was coming up for trial right around that time
19 where he had a different DNA expert that we also
20 just ran this information by that person as well and
21 they agreed.

22 Q. When you say "ran this information by,"
23 what exactly did that encompass?

24 A. The expert was in Mr. Reed's office
25 pretrialing on another case and we said -- we were

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1 just going over the direct, the, the direction of
2 our cross with this other DNA expert kind of as a
3 troubleshooting.

4 Q. Okay.

5 A. Yeah, exercise, you know, just make sure
6 that what would, what would your response to this
7 question be, you know, that type of a scenario.

8 To be honest though, I can't
9 remember the name of that expert.

10 Q. And that expert agreed with the
11 cross-examination questions that you had?

12 A. Essentially, yeah.

13 Q. Okay.

14 A. Yes.

15 Q. At some point in time, you filed, Mr.
16 Reed said that you filed a motion to retest DNA.

17 Do you recall doing that?

18 A. I recall we filed the motion to retest
19 the DNA. I don't recall if I did it or if he did
20 it, but one of us did it.

21 Q. And do you know why that there was no
22 retesting done?

23 A. There was no sample left.

24 Q. Okay.

25 A. That's what I recall. We found out that
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1 there was no sample left for whatever reason. And I
2 don't remember the specifics as to why they had used
3 all of the sample, but the sample had been used in
4 its entirety so we couldn't do a retest.

5 And then I think we also filed --
6 when we found that out, then we filed a motion to
7 prevent the testimony from being --

8 THE COURT: Wait. And then you did
9 another motion what?

10 THE WITNESS: I think just basically on
11 lost or destroyed evidence, along that vein that
12 since we weren't able to retest, it caused a problem
13 with the defense.

14 And so we moved to preclude the
15 testimony of the DNA in its entirety if I remember
16 correctly, and Judge Mosley denied that motion.

17 BY MS. KICE:

18 Q. And Judge Mosley denied that motion?

19 A. If I'm remembering correctly, yes.

20 Q. But as you testify today, it's your
21 understanding that all of the samples taken from the
22 crime scene, forensic crime scene -- forensic
23 samples taken from the crime scene have been
24 consumed in their entirety?

25 A. Yes. Which I know the crime lab tries to

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1 avoid doing. So I'm not -- I don't remember if they
2 gave us a reason why. It was entirely used because
3 they, they try not to do that for this exact reason
4 so that if the defense wants to retest, we can.

5 Q. Okay. And had that motion been granted,
6 what would your strategy have been at that point in
7 time?

8 A. Which motion?

9 Q. The motion to retest the DNA.

10 THE COURT: Let me get this straight.

11 Did Judge Mosley actually do that before we're going
12 down this road? Because that's opposite of what
13 Norm Reed just said.

14 MS. KICE: I'm trying to find it, Your
15 Honor.

16 THE COURT: So before we go into if and
17 da-da-da, did Judge Mosley deny a motion? She's
18 saying she remembers it, but that's, you know.

19 THE WITNESS: Well, he couldn't order
20 retesting.

21 MS. KICE: If you can give me just a
22 second, I can pull it.

23 THE COURT: I don't know. I mean,
24 unfortunately we're paperless now. I only have a B
25 file. So I don't know if it's in the A file or I

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1 don't know.

2 MS. CLOWERS: Can I read to you from the
3 Nevada supreme court decision in the case that tells
4 us what happened.

5 THE COURT: Can I see that?

6 MS. CLOWERS: Of course.

7 THE COURT: I'm sure I read it prior to
8 this and I know I did, but this has been set so many
9 times.

10 MS. CLOWERS: It's the second paragraph
11 on the first page where he denied the motion to
12 dismiss.

13 THE COURT: Okay. It says here, and I
14 don't know, I'm not sure, it says that Henderson
15 claims that the district court erred by denying his
16 motion to dismiss the information and alternative
17 motion to preclude the State's DNA evidence based on
18 the State's alleged consumption of all the available
19 DNA material because Henderson's claim that the
20 State did not preserve DNA material from each sample
21 for defense retesting is belied by the record. We
22 conclude that the district court did not abuse its
23 discretion.

24 That makes it sound like there's a
25 sample out there.

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1 MS. KICE: Okay.

2 THE COURT: So I don't want this record

3 to be filled with facts that are just not what

4 happened at trial.

5 MS. KICE: I'm not trying --

6 THE COURT: And I don't know, I wasn't

7 the trial judge. For me, you know, we're paperless.

8 For me to click on -- I mean, it's incredible. If I

9 can just look at the minutes, I could figure it out,

10 but I have to literally click on. I have no idea

11 what happened because each page only has like 10

12 events. So for me to go back to 2006 is like a 20

13 minute ordeal. So maybe --

14 MS. KICE: I understand, Your Honor. I

15 wasn't trying to lay the water. We just got two

16 different answers. That's why I was asking for

17 clarity.

18 THE COURT: You need to go back then.

19 Because she just said that there was no DNA left and

20 that's why she made the -- she made the argument.

21 That's not what, that's not what Mr. Reed said. So

22 you need to go back and clarify this record.

23 MS. KICE: Okay.

24 BY MS. KICE:

25 Q. Would it be -- now that you've heard this

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1 information, is it possible that there are still

2 extractions or samples that are left to test?

3 A. I, I -- my, my recollection is that

4 there, there was nothing left for us to retest.

5 The only reason why we would not

6 have, had there been a sample to retest, the only

7 reason why we would not have retested, there's,

8 there's two reasons. One, there's no sample to

9 retest; or two, because our expert tells us you

10 don't want to retest it, that's not gonna help you

11 at all. Those are the only times we don't retest if

12 there's a sample.

13 If our ex -- if there's a sample

14 there and our expert says go retest it, we go retest

15 it. We, we file a motion on the court and ask to

16 have it retested.

17 Q. Okay. Can I approach, Your Honor?

18 THE COURT: Sure.

19 MS. KICE: I think that this will clear

20 up the record.

21 THE COURT: Sure. Because I'm not clear.

22 I want to see what his order said. What did Judge

23 Mosley say at that time?

24 MS. KICE: Your Honor, I'm gonna show Ms.

25 Radosta.

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1 THE COURT: Sure.

2 BY MS. KICE:

3 Q. At the minutes from a hearing on June

4 17th, 2008, you could read right there.

5 THE COURT: June what?

6 MS. KICE: 17th, 2008, Your Honor.

7 THE WITNESS: Right. And I mean, I'm not

8 sure what Mr. Reed testified to, but I'm reading

9 this again. And what it's saying to me is that we

10 didn't have the ability to retest.

11 BY MS. KICE:

12 Q. Okay. And that's because you couldn't

13 retest extractions?

14 A. That's -- yeah, that there wasn't enough

15 there to retest.

16 Q. Okay.

17 A. That's my understanding that we did not

18 have the option to retest.

19 Q. Okay.

20 A. And I mean, that's my recollection.

21 Q. Okay. And, Your Honor, I've shown this

22 to Ms. Clowers, I'll show it to Your Honor.

23 THE COURT: Sure.

24 MS. KICE: I ask to please excuse the

25 writing on the --

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1 THE COURT: Sure. Can you believe this?

2 I am still trying to -- it's just trying to go into

3 other minutes. It's unbelievable. Hold on. This

4 is useless, Odyssey, seriously. Hold on.

5 MS. CLOWERS: Your Honor, I would like to

6 give you --

7 THE COURT: I'm trying to get the order.

8 I mean, I'm reading something. Let me read this for

9 a second because I'm trying to figure out the

10 chronology of what happened based on -- and let me

11 ask you this: Do you have an order on the denial of

12 the July 17th, '08 transcript that you're making

13 this motion on?

14 Because what I see is that the trial

15 actually begins on July 20 -- or excuse me. June

16 23rd of '08. This motion was brought, it looks

17 like, on the eve perhaps calendar call on June 17th,

18 of '08 to protest.

19 So I was wondering if there was a

20 formal order denying. No? Okay.

21 MS. CLOWERS: I looked through my file,

22 Your Honor. I don't see it. I do have the State's

23 opposition which is a one page, it will tell you,

24 because there was the three samples of DNA that

25 matched to Mr. Henderson and --

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1 THE COURT: Right.
 2 MS. CLOWERS: It tells you what was
 3 available for each --
 4 THE COURT: I'll look at it. Let me just
 5 keep reading.
 6 MS. CLOWERS: Can I approach?
 7 THE COURT: Because what -- I mean, how
 8 it's proceeded, since I'm a blank slate up here,
 9 it's disjointed. And so if the supreme -- if it's
 10 disjointed to me, it'd be disjointed, this record,
 11 to the supreme court.
 12 So I want it to be clear of the
 13 chronology of what actually happened on the
 14 retesting since that's his issue.
 15 But let me continue to read this, so
 16 I get a good chronology. Okay. So let me see.
 17 Well, correct me if I'm wrong, Ms.
 18 Kice, I've now looked at the testimony and the
 19 defense was ready for trial. And what we're talking
 20 about on June 17th, there was an issue of retesting.
 21 The State's opposition says that there's clearly
 22 enough to retest.
 23 Now, I know that it's been five more
 24 years that Ms. Radosta comes up here cold to start
 25 testifying, but it appears here, and now the Nevada
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1 supreme court, that everything I'm seeing, there was
 2 enough to retest and that on the eve of trial, you
 3 know, originally they wanted to retest it, then we
 4 withdrew it, on the eve of trial Mr. Reed brings it
 5 up about retesting, and then at the end of the day
 6 it appears that Judge Mosley found that there was
 7 enough to retest and denied any motion as far as to
 8 dismiss for destruction of evidence. And Mr. Norm
 9 Reed then said hey, we're ready for trial.
 10 I mean, that's how I read it.
 11 MS. KICE: Okay.
 12 THE COURT: Okay. So the problem is the
 13 impression that Ms. Radosta says I don't remember
 14 that because apparently they didn't think that there
 15 was enough.
 16 MS. KICE: Okay.
 17 THE COURT: At least at one point.
 18 MS. KICE: Correct.
 19 THE COURT: But at some point they decide
 20 to go forward and --
 21 MS. KICE: Without retesting.
 22 THE COURT: Without retesting and it
 23 appears that the State said that there was enough to
 24 retest and the Court found that there was enough to
 25 retest.

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1 MS. KICE: Correct. And so my question
 2 continued to be why didn't they have the material
 3 retested.
 4 THE COURT: Well, then that's really a
 5 misstatement of the record because it does appear
 6 that there was enough to retest it.
 7 MS. KICE: Okay. I'll get back. I was
 8 just gonna get my paper.
 9 THE COURT: Maybe you need Ms. Radosta to
 10 relook at this. It -- I mean, the problem is she
 11 says she doesn't remember. She believes that there
 12 was enough to retest but they made a motion to
 13 dismiss.
 14 MS. KICE: Right. And Mr. Reed --
 15 THE COURT: So then you continue on with
 16 the record of Judge Mosley denied it. Everything is
 17 belied by the record of what just -- of what just
 18 went on here.
 19 MS. KICE: Okay.
 20 THE COURT: So I don't want this record
 21 to be wrong.
 22 MS. KICE: Okay. I don't want it to be
 23 wrong either.
 24 THE COURT: So sometimes attorneys have
 25 a -- they don't have a good memory of what happened
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1 because she's partially right, she did make a
 2 motion, she's partially right, Mosley did deny it,
 3 but she's incorrect because it appears that there
 4 was enough to retest and that they just said ready
 5 for trial.
 6 That's what I'm reading. And
 7 correct me if I'm wrong, either side.
 8 MS. KICE: I'm not gonna correct Your
 9 Honor.
 10 THE COURT: Is that correct?
 11 MS. KICE: I believe that is correct.
 12 THE COURT: Is that correct?
 13 MS. CLOWERS: Yes, Your Honor.
 14 THE COURT: Is this what the Nevada
 15 supreme court says?
 16 MS. KICE: Yes, Your Honor.
 17 THE COURT: Then let's go with that.
 18 Let's go with okay, even if there was enough to
 19 retest, which clearly now it shows that there was
 20 enough to retest, why didn't you retest. Let's go
 21 that route. Because I don't want to go through a
 22 route that isn't what happened.
 23 MS. KICE: Okay. I don't --
 24 THE COURT: Does that make sense?
 25 MS. KICE: Absolutely. I don't know that
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1 that's what I was attempting to do.

2 THE COURT: Well, that's what I got. And
3 I mean, this thing is dead by the way, JoAnn, up
4 here. So we need to have the computer rebooted.

5 THE COURT REPORTER: Okay.

6 THE COURT: Well, I don't know how to do
7 it with the battery and whatever, but I'm not
8 following with you at all.

9 But what I heard was completely the
10 wrong line of questioning based on what really
11 happened. So I just want the record to be clear.
12 Because whoever reads this again, no matter what way
13 I go on this case, it's going to the supreme's,
14 they're gonna read a transcript, and I don't want
15 what really happened to be wrong.

16 MS. KICE: And neither do I, Your Honor.

17 THE COURT: Okay. So --

18 MS. KICE: And I'll take Ms. Clowers'
19 order back to --

20 THE COURT: Let's just go with again,
21 there was enough to retest.

22 MS. KICE: Okay.

23 THE COURT: Why didn't she retest it
24 then, what was her reasoning for saying ready for
25 trial.

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1 MS. KICE: Okay.

2 THE COURT: Because that's what I just
3 read. Norm Reed said ready for trial.

4 MS. KICE: Okay. So she didn't give it
5 to me. She kept it.

6 THE COURT: Oh, I'm sorry.

7 MS. CLOWERS: Your Honor, may I --

8 BY MS. KICE:

9 Q. Why wasn't the material retested?

10 THE COURT: Oh, I'm sorry. Is this
11 yours?

12 MS. CLOWERS: Yeah. Do you still need
13 it?

14 THE COURT: No. I mean, we all agree
15 there was enough to retest. So I don't think I need
16 to read anymore.

17 MS. CLOWERS: Thank you, Your Honor.

18 THE WITNESS: From what I recall, there
19 were -- and if, if I'm misremembering the facts of
20 this case, please correct me.

21 THE COURT: And maybe I should just
22 clarify because if, if -- you know, if there's a big
23 difference between ineffective assistance of counsel
24 proceeding on a case in which they should have moved
25 to retest versus there is enough to retest.

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1 MS. KICE: Exactly.

2 THE COURT: And what I just heard Mr.
3 Reed testify to.

4 MS. KICE: Correct.

5 THE COURT: So I just want to make sure
6 we're all on the same page. Okay, go ahead.

7 THE WITNESS: From what I recall on this
8 particular case, there were two samples that came
9 back as a match to my client.

10 There was a sample on the breast and
11 then there was a vaginal swab both which came back
12 as a match. We were able to make a good
13 cross-examination out of the vaginal swab. The
14 breast swab on the other hand, there was no mixture,
15 it was just a match to Mr. Henderson.

16 Based on that breast swab and our
17 conversations with our experts, it was not in his
18 best interest to have the -- either swab retested.
19 Because even if the vaginal swab came back as not
20 him or issues with him, they were still able to rely
21 on the breast swab which was a 100 percent
22 non-mixture match to Mr. Henderson. That's what I
23 recall.

24 And so although he had maintained
25 his innocence the whole way through, sometimes we

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1 have to protect to our clients from themselves. And
2 even if he had insisted on wanting to retest, to
3 retest it and then have our own expert then become a
4 witness for the State because we have to make the
5 motion to the court to have the retest done, they
6 know our witness is retesting it and then they're
7 gonna find out that it potentially comes back as a
8 match, that does not help Mr. Henderson's case at
9 shaw!.

10 So we ultimately would have decided
11 that to just use the State's expert against them,
12 use the cross-examination as best we could.

13 BY MS. KICE:

14 Q. So that was your strategy?

15 A. Yes.

16 Q. And that's why the DNA that did exist,
17 whether in pull or extraction, was not retested?

18 A. Yeah. I mean, that's the best to my
19 memory. Because there were the two separate
20 matches, the breast sample, the breast swab and the
21 vaginal swab.

22 Q. Okay. I'm gonna have to look at my -- do
23 you recall when a plea offer was made on this case?

24 A. Last minute.

25 Q. Last minute. How last minute?

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1 A. Very last minute. Like maybe the
2 afternoon before we were picking the jury or even
3 the morning we were picking the jury.

4 Q. Okay. Do you recall the specifics of
5 that plea agreement?

6 A. What I recall about the specific offer is
7 it was 15 to life. 15 years to life were the
8 numbers. I don't recall the charge that was offered
9 off the top of my head. I don't know how we would
10 have gotten to 15. It might have been a sexual.
11 I'm guessing it was a sexual assault offered and
12 some other felony consecutive.

13 And I remember Ms. Collins making a
14 comment to either myself or Mr. Reed the day or two
15 before we were starting trial that Mr. Henderson had
16 made it obvious that he wasn't interested in a
17 negotiation.

18 And we asked her where in the world
19 did she get that idea from because we had never said
20 that to her. I mean, we'd never really discussed
21 offers with him because there hadn't -- one was
22 never really made. We were just continually running
23 into a brick wall with Ms. Collins on offers.

24 And then she finally made that
25 comment, well, he said he didn't want an offer. And

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1 I said, I don't -- you know, I don't know where you
2 got that idea. She said it may have come back as
3 far as like maybe preliminary hearing time, like
4 maybe one of the other public defenders may have
5 made that comment to her. I know I never made that
6 comment to her. He never made that comment -- Mr.
7 Henderson never made that, made that comment to me
8 that he was absolutely 100 percent, you know, shut
9 off to the idea of an offer.

10 I mean, that's -- generally
11 speaking, clients don't say things like that.
12 They're always willing to listen.

13 And so when she realized that, she
14 made us the offer, but it was the morning of that we
15 were discussing the offer with him in the back room
16 of the court -- or I mean, in the room off of the
17 courtroom, the holding cell off the courtroom.
18 That's where we were discussing the offer with him.

19 Q. Okay. And do you know how much time you
20 were able to spend with him on that?

21 A. We were able to spend I would say 45
22 minutes, maybe an hour with him. I mean, we
23 expressed -- we explained to Judge Mosley that this
24 offer had just come through, that it was substantial
25 time and that it wasn't a decision that, you know,

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1 was gonna be quickly made.

2 I don't recall Judge Mosley really
3 breathing down our necks in terms of, you know, come
4 on, come on, come on, we have a jury waiting. I
5 don't recall that. But he wasn't gonna give us all
6 afternoon either.

7 Q. Do you recall, do you recall asking him
8 for more time, Judge Mosley?

9 A. No. Well, I honestly don't recall. I
10 don't recall Mr. Henderson being overly interested
11 in the offer, but at the same time had I had -- had
12 the offer come through two weeks, three weeks
13 earlier, you never know.

14 If you're able to have more than one
15 conversation with a client about an offer, really
16 able to explain the potential benefits, what could
17 happen at trial in contrast to this offer, sometimes
18 they change their mind.

19 When you're talking 15 years to
20 life, very few clients are gonna go yeah, I'll take
21 that in the first time you offer it to them.

22 So I may, I may have asked Judge
23 Mosely for more time, but I may not have just
24 because Judge Mosley was my -- that was my track, I
25 knew how Judge Mosley operated, we had announced

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1 ready for trial.

2 And I, even if I had asked for it, I
3 highly doubt he would have given it to me, but I
4 don't recall if I made a specific request or not.

5 Q. Okay. Are you familiar with Missouri
6 versus Fry and Lafler versus Cooper?

7 A. Not off, not off the top of my -- I mean,
8 yes, I know, I know the cases, but I couldn't quote
9 their holdings.

10 Q. Okay. Well, it deals with effective
11 (sic) assistance of counsel as it relates to the
12 plea agreements. Both of them.

13 A. Uh-huh.

14 Q. Given the time that you --

15 MS. CLOWERS: Judge, if I can just
16 interrupt just quickly and just make an objection.
17 I read through the petition. And maybe I missed the
18 portion where they brought up any of the issues
19 regarding an offer of ineffective assistance
20 regarding the offer.

21 And the reason I'm bringing it up is
22 because as you know, I wasn't trial counsel in this
23 particular case. Ms. Radosta was not the first
24 public defender. There were I think four or five
25 public defenders as well as Mr. Ruggeroli. I would

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1 not be prepared to cross-examine Ms. Radosta on this
2 issue. I don't -- Mr. Turner can't be here because
3 he's in a capital trial down the hall.

4 And so without either trial counsel
5 or more preparation, or the fact that it's just
6 never brought up in the petition, it's just not
7 appropriate for this time, judge.

8 THE COURT: I'm gonna overrule it.
9 Here's the deal on this revenue case: This
10 petition's been hanging out there for probably two
11 years, so I don't think it affects anything because
12 at the end of the day, he, he refused it.

13 And that, the case that she's
14 alluding to, my recollection from Justice Kennedy
15 speaking with us, is that basically, you know, these
16 are attorneys that never conveyed an offer, never
17 conveyed an offer to a client. And had they had the
18 offer conveyed, which was substantially a lot less
19 time, they may have taken it. So they become
20 ineffective because they never conveyed an offer.
21 So here an offer was conveyed and an offer was
22 refused and then the trial occurred.

23 So I'll allow you to continue to
24 explore it only because this petition is so old, but
25 I don't think that's what that case holds. And in

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1 fact, we see much more on post-conviction relief on
2 rush, rush. I hear hundreds of oh, he rushed me
3 into the deal, oh, it was a knowingly,
4 voluntarily -- it's a damned if you do, damned if
5 you don't for the defense attorneys. What's enough
6 time? I don't know.

7 You know, and I don't think the
8 supreme court's gonna tell us based on this, but you
9 know, at the end of the day, I'm hearing offer, I'm
10 hearing refused and I hear trial.

11 So I'm not so sure that that's an
12 issue for this, but I'll allow you to continue to
13 make a record.

14 MS. KICE: Thank you, Your Honor.

15 MS. CLOWERS: Thanks, judge.

16 BY MS. KICE:

17 Q. When you were discussing the offer with
18 Mr. Henderson, did you explain to him that he was
19 facing multiple, potentially multiple life
20 sentences?

21 A. Absolutely.

22 Q. That could be run consecutively with one
23 another?

24 A. Absolutely. We made it very clear that
25 Judge Mosley is not a judge you want to go in trial

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1 in front of on a case like this, not when there's
2 DNA evidence that while we felt -- and we made it
3 very clear to Mr. Henderson that we could make a lot
4 of noise about the DNA evidence. But if the
5 prosecutor saw through our noise on the vaginal swab
6 and was able to point to the breast swab, there was
7 no getting around a potential conviction on this
8 case.

9 We felt that we made that clear to
10 him. And we made that clear to him when this 15 to
11 life offer came through the morning of, of jury
12 selection. I mean, we advised him to take it and we
13 absolutely acknowledged that it was still a lot of
14 time, but I didn't see it ending up any differently
15 than that if we went to trial.

16 MS. KICE: Okay. I don't have any
17 further questions, Your Honor.

18 THE COURT: And just for the record, he
19 refused to take that offer; is that correct?

20 THE WITNESS: Yes.

21 THE COURT: And he wanted to go to trial
22 even after despite the fact that you gave him the
23 offer?

24 THE WITNESS: Yes.

25 THE COURT: All right. Cross.

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CROSS-EXAMINATION

2 BY MS. CLOWERS:

3 Q. Did he know about how much time he was
4 facing from at least when you got on the case?

5 A. Absolutely, yes. I mean, I have that
6 conversation with all my client multiple times. I
7 usually tell them you're gonna get sick and tired of
8 me telling you the potential penalties because I
9 don't want to hear back from you, you didn't tell me
10 the offer -- or I mean, you didn't tell me the
11 potential penalties, particularly when you're
12 talking about sex assault cases and murder cases.

13 When life sentences are on the
14 table, I tell my clients probably almost every time
15 I visit them that they're facing those types of
16 sentences.

17 Q. Would you remember if Mr. Henderson asked
18 you if there was an offer?

19 A. He -- my guess would be he had asked
20 about offers which is why we started asking Ms.
21 Collins why she wasn't giving us an offer.

22 If I don't have any indication from
23 my client that he's in any way interested in an
24 offer in the few days prior to trial, I'm not gonna
25 waste my time trying to get an offer from the DA. I

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1 have better ways to spend my time.

2 Q. And did you get that same impression from
3 the DA, that she felt he didn't want to negotiate
4 and that's why an offer hadn't been related?

5 A. That's what she eventually told us, but I
6 didn't know where she -- I remember being confused
7 by that response from Ms. Collins because --

8 Q. If --

9 THE COURT REPORTER: Wait, wait, wait.

10 THE WITNESS: Sorry. I had never told
11 her that he wasn't interested in an offer. She said
12 that was her impression, she didn't remember where
13 she got it from. We started asking if maybe it came
14 from one of the other public defenders.

15 And just to clarify the record, Mr.
16 Ruggeroli was a public defender when he was on this
17 case. He was --

18 BY MS. CLOWERS:

19 Q. Okay.

20 A. He was with the PD's office. He was one
21 of the public defenders that was on the case.

22 Q. And to your knowledge, there were
23 multiple public defenders who had Mr. Henderson's
24 case?

25 A. The one that I recall, there was two.

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1 Mr. Ruggeroli was lead counsel at one point and Mr.
2 Avants was lead counsel at one point. Both of whom
3 were assigned to that track prior to me being
4 assigned to that track.

5 Q. And when you tried this case, it was in
6 June of 2008; is that correct?

7 A. Yes.

8 Q. And you'd been in office for about 10
9 years by that time?

10 A. Yes.

11 Q. And earlier you said you'd done maybe 10
12 to 12 cases that went to trial that had to deal with
13 DNA; is that right?

14 A. Yes.

15 Q. How many cases have you dealt with just
16 in general that have had DNA?

17 A. Actually not that many more than that.
18 There are -- the -- I don't do murder cases
19 generally speaking. So I don't, the only cases that
20 we really see DNA on are sex cases or murder cases
21 generally speaking.

22 So the cases that I had dealt with
23 were generally the sex cases which at that point
24 were, you know, in that ballpark; 8, 10, 12.

25 Q. Is that why you asked for Mr. Reed to

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1 come on the case with you then?

2 A. Absolutely. I always feel like, like I
3 said earlier, two heads are better than one. And
4 what's the point of bringing somebody on a case like
5 this that doesn't understand DNA when the whole case
6 is about DNA.

7 Q. Fair to say that you were being extra
8 cautious?

9 A. Yes.

10 Q. And earlier you were asked about the
11 defendant maintaining his innocence and you
12 hesitated a bit. There were times during your
13 discussions with him with Mr. Reed present where he
14 doesn't deny being at that location; is that
15 correct?

16 A. There was one conversation that we had
17 where he gave us a different defense that helped, in
18 his opinion, explain why his DNA would have been
19 there.

20 Q. Okay.

21 THE COURT: And just for the record, Ms.
22 Radosta, he waived attorney/client privilege with
23 Mr. Reed so.

24 THE WITNESS: It just makes me un -- it
25 just makes me uncomfortable to --

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1 THE COURT: I understand.

2 THE WITNESS: You know.

3 THE COURT: He did waive it in open
4 court --

5 THE WITNESS: Okay.

6 THE COURT: -- with Mr. Reed.

7 THE WITNESS: Thank you.

8 BY MS. CLOWERS:

9 Q. I'm gonna move on a little bit. Do you
10 remember during this case that he also had an open
11 and gross lewdness case pending?

12 A. No. It wasn't assigned -- wait a minute.
13 It may, it may have been trailing behind this, but I
14 don't think it was in Judge Mosley's courtroom.

15 Q. No, that is correct, it wasn't in Judge
16 Mosley's courtroom.

17 A. So I, I think, now that you mention it,
18 it vaguely rings a bell, but it wasn't anything,
19 anything even close to similar to this.

20 If I recall, it was -- actually I
21 don't recall the facts, but I remember not being
22 overly concerned with it.

23 In the end if we would have been
24 able to get a not guilty verdict on this case, then
25 I would have become much more concerned with the

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1 open and gross lewdness because it's a potential sex
2 offense.

3 Q. So this was much more important?

4 A. Absolutely, yes. I'm assuming that open
5 and gross lewdness was a gross misdemeanor?

6 Q. Yes.

7 A. But just the potential penalty alone.

8 Q. I want to talk to you a little bit about
9 the DNA evidence in this case. And you didn't have
10 your file to review before testifying today; is that
11 fair to say?

12 A. I review, reviewed it prior to other
13 dates that we had this set, but I did not review it
14 prior to today.

15 Q. I just want to direct your attention. Do
16 you remember there actually being three places where
17 his DNA was found?

18 A. I -- no, I remember the vaginal swab and
19 the breast swab.

20 Q. Well, and factually what the victim told
21 the police was that when the people entered in, the
22 suspect that's later determined to be Mr. Henderson,
23 licked her breasts downstairs; is that correct?

24 A. Yes.

25 Q. Okay. And then she's moved upstairs by
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1 him where he then sexually assaults her vaginally;
2 is that correct?

3 A. Actually I recall that there were two
4 separate sexual assaults. One downstairs in the
5 living room and then a second sexual assault
6 upstairs in the master.

7 Q. And I apologize. And just to be clear,
8 what I was really indicating was the licking of the
9 breast took place downstairs; is that correct?

10 A. That's what I recall from, from the
11 victim's testimony, yes.

12 Q. And you remember, obviously from your
13 earlier testimony, that the DNA results on the
14 breast came back at identity presumed one in 600
15 billion that it was Mr. Henderson?

16 A. Yeah, it wasn't a mixture sentence unlike
17 the vaginal swab. And that's why we had such a hard
18 time defending against that, that particular part of
19 the case.

20 Q. Do you remember also that there was a
21 swab taken from the bed sheets upstairs that came
22 back as his identity being assumed on it as well?

23 A. No, I don't recall that.

24 MS. CLOWERS: May I approach, Your Honor?

25 THE COURT: Yes.

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1 BY MS. CLOWERS:

2 Q. I'm gonna, if you don't mind, showing you
3 a Metro lab report dated July 25th of 2005, prepared
4 by Cathy Guenther.

5 And if you could just look in this
6 section here.

7 A. Uh-huh.

8 Q. And I'm referring to KMG 4.

9 A. Uh-huh. I honestly don't remember
10 discussing the bed sheet much with our expert. And
11 possibly that's because when you look at the
12 forensic laboratory, the breakdown sheet, it's not
13 really mentioned on there. The bed sheet is not
14 mentioned on this.

15 The vaginal swab from Ms. Kim as
16 well as from her breast are what we seem to focus on
17 more than the bed sheet.

18 Q. Those are the ones you felt were more
19 defensible?

20 A. Well, those were the ones that the lab,
21 that the DNA, the crime, Metro crime lab, sorry,
22 LVMPD crime lab seemed to focus in on, and it seemed
23 like they were going to be testifying more about
24 those than the bed sheet.

25 Q. Does it refresh your memory though that
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1 there was his DNA found on that bed sheet which was
2 listed as KMG 4?

3 A. In looking at the report, yes.

4 Q. Just a couple quick questions. During
5 your investigation, did you ever find a link between
6 the victim and the defendant?

7 A. No, we did not find a link between the
8 victim and the defendant. He, he told us at one
9 point that there was a link between them, but he
10 told us that at the last moment when we weren't able
11 to investigate it.

12 And additionally, the way he
13 explained the link between them I didn't feel would
14 be helpful defense at trial.

15 Q. But it was investigated and at the end of
16 the day you didn't feel that it would help him?

17 A. He told us about the link between himself
18 and the victim the morning trial started. So it was
19 not investigated.

20 Q. I apologize. I apologize. I meant to
21 say you investigated it earlier.

22 A. That was the first we had heard about a
23 link between my client and Ms. Kim.

24 Q. Okay.

25 A. So.

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1 THE COURT: What did he say the link was?
 2 THE WITNESS: He told us, when we had
 3 explained, once again, this was the conversation
 4 regarding the plea, he told us that he knew her,
 5 that she had bought drugs from him, that he knew
 6 that there was, through her money and other drugs in
 7 the house, that the way she paid for her drugs was
 8 to have sex with him. That's why his DNA was there.
 9 He was having consensual sex with her in the house
 10 that night, but that he was there with his friends
 11 to rob the money and the drugs.

12 Our response back to him was the
 13 defense you're presenting to us right now is a
 14 defense of the sexual assault charge only, not a
 15 defense of all of the other felony charges that
 16 you're charged with. And we didn't feel it would be
 17 a successful defense to defend on the sexual assault
 18 charge.

19 BY MS. CLOWERS:

20 Q. Was --

21 A. In the manner that he had just told us.

22 Q. And was there any indication during the
 23 pendency of this trial that that information was
 24 true?

25 I realize you learned it at the end
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1 of the day, but was there anything that verified
 2 that information?

3 A. No, there was nothing that verified that
 4 information except just the overall oddness of the
 5 case. There was something, as I said earlier, there
 6 was something about the case that was not fully
 7 explained.

8 Q. You mean the connection between the
 9 people?

10 A. Yes.

11 Q. Okay.

12 A. So other than just the oddness of that,
 13 but beyond, there was, there was no evidence that
 14 Miss -- that the victim had been using drugs or
 15 anything like that, that we felt we could confirm
 16 that.

17 THE COURT: Let me go back. Because are
 18 you telling me he said that for the first time close
 19 to trial that it was him and that it was consensual
 20 sex?

21 THE WITNESS: Yes.

22 THE COURT: Okay.

23 THE WITNESS: That was -- yes.

24 THE COURT: So that would have had to
 25 change your entire defense, that being against the

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1 DNA?

2 THE WITNESS: Yes.

3 THE COURT: All right.

4 THE WITNESS: Because we explained to him
 5 that the DNA was such a huge part of the case.

6 BY MS. CLOSERS:

7 Q. So it would have explained away the DNA?

8 A. It would have explained the DNA.

9 Q. And that was learned right after the
 10 motion to dismiss was denied; is that correct?

11 A. No, I don't know if it was right after.
 12 It was prior to trial starting. So the motion was
 13 denied, on what, the 17th, and we started trial the
 14 23rd.

15 Q. Yes.

16 A. I recall that information being given to
 17 us by Mr. Henderson the day we gave him the offer.

18 Q. Okay. And do you remember -- well, would
 19 it refresh your memory that he was arrested or that
 20 at least a criminal complaint was placed out there
 21 on March 23rd of 2005?

22 A. I believe, yeah, that the incident had
 23 occurred four or five months prior to that and the,
 24 the CODIS match came in some time in early 2005.

25 Q. Do you remember that it was March 2005
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1 when the defendant was first held in CCDC in this
 2 case?

3 A. That sounds about right.

4 Q. Okay. And so it was about,
 5 mathematically I don't know if I'm gonna do this
 6 right, three-and-a-half years from the time he was
 7 arrested until he went to trial, or three, three
 8 years and three months or so?

9 A. Yes.

10 Q. And that was the first time that
 11 information was relayed?

12 A. To me.

13 Q. And so at the end of the day with this
 14 case, you guys didn't hire a DNA expert but you
 15 consulted one?

16 A. Yes.

17 Q. And you determined that strategically had
 18 you tested that DNA it would have played against you
 19 at trial, the State would have been able to use
 20 that?

21 A. That, yes.

22 Q. Do you remember a PSI being done in this
 23 case?

24 A. Yes.

25 Q. Okay. Do you remember there was a

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1 supplemental PSI too as well?

2 A. No.

3 Q. Okay. May I approach the witness, Your
4 Honor?

5 THE COURT: Yes.

6 BY MS. CLOWERS:

7 Q. I'm gonna show you the presentence
8 investigation report and the supplemental
9 presentence investigation report if I may.

10 They're both for this same case, is
11 that correct, 212968?

12 A. Yes.

13 Q. And at the time of sentencing, did you
14 review the PSI with Mr. Henderson?

15 A. I don't have a specific recollection of
16 reviewing it with him. Generally speaking, my
17 policy now is to review the PSIs with my clients.

18 At that point in time the new
19 standards were just coming into practice more -- the
20 new -- the Nevada supreme court standards were just
21 coming into more use.

22 I don't recall specifically going
23 over this with him, but given the amount of time
24 that he was facing, I would be surprised if I handed
25 it to him in court and said let's go get

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1 sentenced --

2 Q. Okay.

3 A. -- that day. But Judge Mosley had a
4 policy that if you did not call him the day before
5 and tell him to not prepare a sentencing, if he
6 prepared it, you were probably going forward with
7 sentencing.

8 That said, on a case with this much
9 time, he might have -- even if I'd asked that
10 morning for a continuance, if I needed one, he might
11 have given me one given the amount of time Mr.
12 Henderson was looking at because Judge Mosley would
13 have wanted to make sure that there weren't any
14 potential issues on his part.

15 Q. Okay. But you have no independent
16 recollection of actually reviewing it with him?

17 A. No, I do not.

18 Q. Okay. If he had pointed out something to
19 you in that PSI that was incorrect and it was of
20 material value, would you have had it corrected or
21 bring that information up to the court?

22 A. I would have brought it up to the court.
23 It wasn't my policy at that time to have PSIs
24 corrected. It is now because once again, it's
25 become much more of an issue in the time that since

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1 this case, since I tried this case. Inaccuracies in
2 PSIs we used to bring them up on the record all the
3 time.

4 Q. Now of course there's the Stockmeier
5 case --

6 A. Right.

7 Q. -- and it changed things?

8 A. Absolutely, yes.

9 Q. So previously it was more though we just
10 made a record of what the errors were?

11 A. Right.

12 Q. And had there been errors in this
13 particular case, looking at how much he was facing,
14 would you have brought this up to Judge Mosley?

15 A. If they were substantive, yes. And we're
16 talking about like five felonies that weren't his,
17 you know, things like that, yes, I would have
18 brought those up to the judge.

19 Q. But you don't have any independent
20 recollection of him bringing anything up to you that
21 was incorrect in those PSIs?

22 A. No.

23 Q. Okay. Do you recall why there was a
24 supplemental one issued?

25 A. No. And they're, they're prepared on the
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1 same date. So that seemed really odd.

2 MS. CLOWERS: May I approach and grab
3 those, Your Honor?

4 THE COURT: Yes.

5 MS. CLOWERS: I have no further
6 questions, Your Honor.

7 MS. KICE: And, Your Honor --

8 THE COURT: Is there a redirect?

9 MS. KICE: No. I need to make a
10 clarification for the record. In the writ that I
11 filed, there is an issue about the not being
12 affidavit of search warrant.

13 I've been so focused on the DNA I
14 forgot that there is actually an affidavit included
15 in the material I received after I drafted this. So
16 I withdraw that portion of the writ and I apologize.

17 THE COURT: All right. The record will
18 reflect that the defense is withdrawing the portion
19 of the writ in which they claim error on the part of
20 defense counsel for not getting the affidavit to the
21 buccal swab for the search warrant.

22 And since that time from the initial
23 filing there's been sometime throughout this process
24 that the case has been supplemented, continued, et
25 cetera, that Ms. Kice has in fact received the

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1 affidavit.

2 MS. KICE: Yes. And I apologize.

3 THE COURT: So that part will be
4 withdrawn from this proceeding.

5 MS. KICE: And I apologize for the error.

6 THE COURT: That's fine.

7 MS. CLOWERS: Your Honor, if I may just
8 approach Ms. Radosta?

9 THE COURT: Sure. As an aside, I think
10 that's really a nonissue anyway because CODIS is
11 just giving the State PC anyway to take the blood.
12 And so inevitably they would have gotten a blood
13 with or without that affidavit, wherever it was.

14 MS. KICE: Certainly, Your Honor, but I
15 don't want there to be a misrepresentation on my
16 part.

17 THE COURT: That's fine.

18 BY MS. CLOWERS:

19 Q. I'm gonna approach and show the two PSIs
20 again to Ms. Radosta. I'm just gonna direct your
21 attention to page two.

22 Does it appear to you where it talks
23 about offenses four and five --

24 A. Uh-huh.

25 Q. -- you're holding the regular one and
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1 then the supplemental one, that the penalties may
2 have been incorrect on the first one and perhaps
3 they changed it?

4 A. What's the first one? Yeah, I think what
5 ended up happening is, and actually I think they did
6 it on every -- now I'm looking at each of the
7 felonies. On the first presentence report, they did
8 the consecutive with use of a deadly weapon under
9 the 1 to 20, the new, the new law that went into
10 effect in the interim between when this, when this
11 crime was charged and when he was convicted, the law
12 for with use of a deadly weapon changed, the
13 potential penalty.

14 So the first PSI shows 1 to 20, the
15 supplemental shows equal and consecutive, which is
16 what the law was at the time when the crime was
17 allegedly committed.

18 MS. CLOWERS: Thank you. May I approach
19 and grab those?

20 THE COURT: Yes.

21 MS. CLOWERS: Thank you. I have nothing
22 further, Your Honor.

23 THE COURT: Is there anything further?

24 MS. KICE: No, Your Honor.

25 THE COURT: Can this witness now be
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1 excused from both sides?

2 MS. KICE: Yes.

3 MS. CLOWERS: On behalf of the State.

4 THE COURT: All right, thank you. Thank
5 you again, Ms. Radosta.

6 THE WITNESS: Thank you, judge.

7 THE COURT: All right. At this time I'll
8 hear arguments from both sides and we'll allow Ms.
9 Radosta to leave the courtroom.

10 MS. KICE: Your Honor, could you please
11 explain to Mr. Henderson why he can't testify?

12 THE COURT: Well, I think he can if he
13 wants to.

14 THE DEFENDANT: Yes, I want to.

15 MS. KICE: He wants to testify.

16 THE COURT: Yeah. Why can't he? I think
17 he can --

18 MS. KICE: Okay.

19 THE COURT: -- for ineffective. He can
20 rebut whatever they said, but I'd like him just to
21 stand there and do that.

22 MS. KICE: You want him --

23 THE COURT: Well, maybe you want to stay
24 outside, Ms. Radosta, just in case you're recalled
25 as a witness. You should have ran.

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1 THE CLERK: Raise your right hand.

2 (Whereupon, the Defendant, Joseph
3 Alexander Henderson, was duly sworn to
4 tell the truth, the whole truth and
5 nothing but the truth.)

6 THE CLERK: State your name for the
7 record.

8 THE DEFENDANT: Joseph Alexander
9 Henderson.

10 THE CLERK: You can be seated.

11 THE COURT: All right. Did you want to
12 question him, Ms. Kice, or --

13 MS. KICE: No, Your Honor.

14 THE COURT: All right. Have you advised
15 him not to?

16 MS. KICE: Yes. I specifically told him
17 not to.

18 THE COURT: All right. Mr. Henderson,
19 what did you want to say?

20 THE DEFENDANT: I want to say --

21 MS. CLOWERS: Your Honor, if I may
22 just -- I don't mean to interrupt Mr. Henderson. I
23 don't know if we should make a record that whatever
24 he says here and say this is reversed --

25 THE COURT: What? Say again. Whatever
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1 he says what?

2 MS. CLOWERS: Whatever he testifies here
3 today and perhaps if this gets reversed somehow or
4 gets a new trial, that the State could use this if
5 he decided to ever take the stand or for other
6 purposes as well, judge.

7 THE COURT: Well, he certainly knows that
8 at this point, okay. His 5th Amendment right's
9 nonincriminating. He's convicted.

10 MS. CLOWERS: I understand.

11 THE COURT: So here he is, Ms. Kice has
12 told him not to testify and he wants to testify. So
13 I think he has the right to testify and I'm gonna
14 allow him to and he can do it at his own peril.

15 MS. CLOWERS: And I didn't want him to
16 be --

17 THE COURT: It's not as if he has a 5th
18 Amendment right. That kind of went by the wayside
19 at his conviction. So I don't think he has a 5th
20 Amendment right, but --

21 MS. KICE: I don't know if --

22 THE COURT: You're aware that it's in the
23 realm of possibilities this was ever to get
24 reversed, anything you say in a courtroom can be
25 used against you and you understand that?

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1 THE DEFENDANT: Yes, ma'am.

2 THE COURT: All right, sir. Go ahead.

3 THE DEFENDANT: What I want to say is
4 that both of the judge -- I mean, both of the
5 lawyers, they just got on the stand and, and
6 straight purely lied. We never discussed nothing
7 about a deal until like 10 minutes before trial was
8 about to start and Mosley told them to come on down.
9 Ms. Collins was saying come on, come on, come on.

10 I was in jail three-and-a-half
11 years. They offered me -- they came to me -- at
12 first they say would you like to take a lie detector
13 test. I said yes, I would like to take a lie
14 detector test. They pushed it out the way. I've
15 been trying to show that I've been innocent the
16 whole time.

17 This is the problem that I've having
18 right here. I went to prison here in, in the year
19 2 -- 2000. This case happened in 2005. I don't
20 know how they was able to get the evidence upload
21 into the Nevada database, not get a match. I'm in
22 there and, and Nevada uploaded me into the CODIS,
23 too, also.

24 Now, this is the problem I'm having.
25 If California gave them my name, why wasn't I able

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1 to see one document from California matching me to
2 anything? They never sit there and told me, oh,
3 well, well, that wasn't the way it was gonna go
4 because we didn't want to mention your prior
5 history.

6 I would have told them go ahead and
7 mention my prior history because I wanted to see
8 them documents. Them is the most important
9 documents, Ms. Silver, to, to everything.

10 If California match me to something,
11 I just don't see Ms. Collins not calling them to
12 actual trial to testify against me. Still yet I
13 have one document from California or CODIS matching
14 me to anything.

15 Now, this is the problem I'm having
16 right here. Ms. Everett was the actual sexual
17 assault nurse. She's here, she did a toluidine blue
18 dye test on the victim. And she said she didn't see
19 anything. She said she did a microscopic test, she
20 said she didn't see anything. But yet once Ms.
21 Guenther got the evidence, she was able to say that
22 she retested it.

23 Now, now, I don't know why my lawyer
24 did not bring that actual e-mail. That's why I,
25 that's why I didn't want to send it to her. I

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1 wanted to come show it to you personally. This is
2 what the e-mail exactly has said. It said that she
3 was able to go behind Mr. Welch's work and she says
4 she seen minor peaks of Henderson in his data.

5 Once she swabbed my mouth, Your
6 Honor, she was able to come back and match me one in
7 500 billion to all of the evidence. That's a major
8 problem right there.

9 And so, and then so I'm telling
10 these lawyers the whole time, I said how is this,
11 how is this happening to me. Where is the people
12 from California. I want to be able to test -- I
13 want to be able to cross-examine. They say we're
14 gonna have them here, we gonna have them here.

15 Yet still today I have one paper and
16 she can't produce one paper from California matching
17 me to anything. It's all hearsay.

18 This is what the, the actual DA say,
19 well yes, you know, we have the paperwork from
20 California matching Mr. Henderson to everything, but
21 how come it wasn't in the, in the discovery. I
22 still have not been able to cross-examine anybody
23 that matched me to anything.

24 This is what happened. Okay. Mr.,
25 Mr. Welch said that, he said that the, Mr. Jeffries,

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1 which, which is the detective in the case -- this is
2 what I'm reading in this case. It says that once
3 Jeffries notified him and asked him hey, would you
4 go and do a DNA test on this, on this sexual assault
5 kit, he said okay.

6 Once he went over to the vault, he
7 said that well, that certain number, I guess it was
8 152, because there's two event numbers, 152 and 158
9 which is all of the evidence. One evidence from the
10 house, one evidence from somebody's job. I guess
11 it's from Mr. Bernzweig's job. He said well, since
12 it wasn't that, I mixed both event numbers together.
13 So that mean he had both evidence.

14 Now, he never mentioned anything
15 about no sheets or anything. And this is the
16 problem. I'm like okay, well, he -- then he named
17 them all of the evidence that he had. Never was no
18 sheets.

19 Once they came and swabbed my mouth,
20 after that, after she said, after she tested
21 twice -- Ms. Guenther did two tests. She retested
22 Welch's paperwork and everything, which that, that's
23 why the e-mail was gonna be so important I wanted
24 you to see. She said I did see minor peaks of Mr.
25 Henderson in here. How can you go from minor peaks

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1 and then turn around and match me one in 500
2 billion.

3 Because Ms. Collins had told her,
4 she said, hey, they want to get all the paperwork
5 from California and CODIS. She said well, I'm gonna
6 need a search warrant for that.

7 And I was like why would you need a
8 search warrant for that if CODIS matched me to
9 some -- or California, or California, all due
10 respect, it would have been some type of paperwork
11 generated. Something. Still I have not been able
12 to cross-examine CODIS or California.

13 Then Ms. Guenther decided to just
14 come out the blue with these sheets.

15 Now, if you look at the, at the
16 actual paperwork, you will see Ms. Don is the one
17 who was the, who was the crime lab -- she the one --
18 she's the CSI lady. She said she didn't see nothing
19 on the, on the sheets.

20 I got numerous paperwork that I'm
21 reading right where -- right here I can show you,
22 right here this is documents from the first officer
23 who talked to the victim. Clearly said that she
24 asked him hey, well did the guy ejaculate. She said
25 no, no. All of a sudden it didn't come with the

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1 ejac -- ejaculation until after Mr. Welch got the
2 report which they say California matched me to the
3 actual crime scene. Then once that happened,
4 everything just exploded.

5 I was never able to see one document
6 from California matching me to anything. And you
7 know the same what I know. Regardless of the fact,
8 I don't have any sex crimes. What sense does it,
9 does it actually make in order for them to sit there
10 and say, well, we didn't feel it was necessary for
11 us to bring CODIS because it was the only match to
12 Henderson.

13 I need to see that paperwork by, by
14 right. I have a right to, to confront everybody
15 that's, that's against me, right? I have a right to
16 confront everybody against me. I never was given
17 that opportunity.

18 In my whole discovery, Ms. Silver,
19 not one paperwork come from, from CODIS or from
20 California. The only thing I see in this paperwork
21 is this says well, Ms. Guenther, because they saying
22 that Welch, once he ran it through the Nevada
23 system, which I know I'm in there, I know -- since
24 I'm in here, I went to prison here in 2000. He said
25 that once he ran it against the local, it was no, no

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1 match. Then it was uploaded into CODIS.

2 Now after that, there was no
3 paperwork generated. No nothing. So are you saying
4 that I wasn't able to actually cross-examine these
5 people from California.

6 I've been to prison in California,
7 and I'm pretty sure you have dealt with the
8 California officials before. If California would
9 have felt I did something this serious of nature,
10 you know California would have been here to testify.
11 And Ms., and Ms. Collins definitely would have had
12 them at least on her sheet to have them come and
13 testify. She never even put them on her witness
14 list sheet. That's why I was like well, where's the
15 California people.

16 The whole time Ms., Ms. Radosta and,
17 and the other guy was telling me don't worry,
18 they're gonna be here, they're gonna be here. So
19 I'm like okay, so I'm the whole time they telling me
20 I wanted to get on the stand. And they was like no,
21 we don't want you to get on the stand.

22 So I was never able to cross-examine
23 nothing to do with the DNA. The only thing I know
24 is that they swabbed my mouth. If they have my DNA
25 on file here, they swabbed my mouth.

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1 She said she went back and retested
2 the actual evidence that Welch already tested. If
3 Welch already tested it, now you go back and
4 retested it and you said you seen minor peaks and
5 you got me in one in 500 billion and then all of a
6 sudden the sheets pop up, oh, yeah, I was able to
7 match Mr. Henderson to the, to the sheets.

8 Now, now, this is the problem. Just
9 like on the little issue what they were saying about
10 the evidence where it wasn't nothing to be tested,
11 it wasn't -- this, this is what I was told, Your
12 Honor. I was told this: Well, Mr. Henderson, I can
13 show you right here in the report which is, which is
14 the documents that you had that, that she brought up
15 there to you, this was the problem, once -- because
16 Ms. Radosta, she didn't know nothing about this DNA.
17 She clearly told me that. So that's, that's when
18 she brought Reed aboard.

19 Reed clearly said, he said
20 Henderson, there's no evidence to be tested. I'm
21 like, what you mean. I want it retested. Why
22 wouldn't I want it retested. He said no, this is
23 the problem that we're having, we can't retest it
24 because there's only extractions and we're not going
25 to actually retest extractions because it will be --

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1 if we retest extractions, that it's not good because
2 it's not original evidence. That was, that was,
3 that was my understanding of what was going on.

4 That's the reason why he put the
5 motion in to try to get it kicked out because he's
6 saying that they were aware that we wanted to retest
7 all of the evidence. But then they kept on using up
8 all of the evidence and not leaving us none. And
9 this is how I can prove it. Because we pressured
10 them, we want to, we want to retest, we want to
11 retest.

12 Once she came up with the sheets, we
13 clearly told her we would like to retest some parts
14 of the sheets. She said she had two parts of semen
15 on the sheets. Why did she have to use both parts
16 of the sheets.

17 This is what's happening. I'm not
18 being able to get no evidence that I can retest
19 except extractions when they had all this evidence.

20 Now, this is my understanding of
21 what happened: That the feds and somehow CODIS came
22 and retrieved all the evidence. This is what my
23 first -- Joseph Ruggeroli, he did a motion. We went
24 into court.

25 I am so confused. And I'm so

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1 confused right now, but I'm trying to just pull part
2 out to you. He went in there and he said hey, how
3 did y'all release the evidence to the feds without
4 notifying us and Henderson has counsel. They said,
5 hey, we don't know, they just came and took the
6 evidence.

7 So after that, that's when all the
8 extractions start, start coming. And Ms. Collins
9 clearly said no, no, no, no, I took pictures of
10 all -- I have pictures of all of the evidence and
11 you just have that, that actual motion what she said
12 she had pictures of all of the evidence.

13 So evidently if the feds came and
14 took it, where is the paperwork to what the feds
15 came and took. It wasn't nothing there but
16 extractions they said to the breast swab, extraction
17 to the vaginal swab.

18 What did they have -- what did they
19 come and take? It was never no original evidence.
20 So, so the only thing that they could come and take
21 is the extractions, but yet nobody wants to look at
22 that.

23 And I, and I also raised the issues,
24 I'm trying to find out what is going on. I even
25 told, told my lawyer, I told her thousands and

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1 thousands of times this is, this is what I want to
2 do, this is what I want to focus on.

3 If the SANE nurse did a blue
4 toluidine test on, on the victim, with all respect
5 on the victim and did not see anything on her -- I'm
6 pretty sure the court know what a blue toluidine
7 test is. That mean it showed if it was --

8 THE COURT: Yeah, I know what it was,
9 alright. I know what it is. Thanks.

10 THE DEFENDANT: A microscopic test and --

11 THE COURT: I know what it is.

12 THE DEFENDANT: They didn't see anything.

13 THE COURT: I know what a nurse --

14 THE DEFENDANT: And then, and then she
15 clearly --

16 THE COURT: A nurse who didn't see
17 anything.

18 THE DEFENDANT: Uh-huh.

19 THE COURT: Okay. Versus a DNA expert.

20 THE DEFENDANT: Uh-huh.

21 THE COURT: Who in three different
22 parts --

23 THE DEFENDANT: Uh-huh.

24 THE COURT: -- of three different pieces
25 of evidence found that you're the source of the DNA.

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1 Little different.

2 THE DEFENDANT: See, I now -- see, now
3 this is -- she was the first one --

4 THE COURT: So tell me -- why don't you
5 wrap it up. I know you don't agree with the DNA
6 evidence. Wrap it up. I already got it.

7 Now you're repeating yourself, and
8 you're talking about things that are nonissues in
9 this case.

10 So this is about ineffective
11 assistance of counsel.

12 THE DEFENDANT: Yeah.

13 THE COURT: Is there anything else you
14 want to add to what you've already told me now? And
15 I've let you repeat yourself like three times.

16 THE DEFENDANT: Yes, ma'am. There is
17 something else that I would like to say.

18 THE COURT: Then go to it.

19 THE DEFENDANT: I have -- I specifically
20 told them once I got the paperwork and we went over
21 it, they said it was a cigar tip, the victim said
22 somebody had smoked a cigarette. They said, they
23 said that he had hair that was never tested. I
24 asked them would you please make sure that it was
25 tested. And they said that it would, but it never

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1 happened.

2 That right there, and then also
3 Birch Henry which is, which is the specialist
4 manager over at the crime, the crime lab, after,
5 after, after Welch did his paperwork, his data on
6 everything, his boss signed off asking please,
7 saying that, that everything was correct.

8 Then once Ms. Guenther did it, he
9 signed off on that as complete, yet my lawyers, I
10 told them, I said hey, don't you think you, you need
11 to call that, that person there which is their boss,
12 if you got one evidence, regardless of how many
13 different evidence they say, they say they got one
14 evidence and two specialists come back with two
15 different findings, wasn't that, wasn't -- wouldn't
16 that be a reason for us to cross-examine them.

17 I specifically asked them to call
18 him to cross-examine him and they said that they
19 would, but they didn't.

20 And, Your Honor, the only thing I
21 want to say -- I mean, it looks bad. I just, just
22 by the way it sounds.

23 But when this, this woman gets up
24 here and they blatantly lying and said I did it,
25 I've never seen Ms. Kim before ever in my, my life.

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1 I've never seen these people before in my life.

2 And there's no way that I would sit
3 there and tell these people oh, yeah, I gave her
4 some drugs for sex. I don't know where this come
5 from. There is nothing in the record that will,
6 that would show that.

7 And, and now I'm just stuck in a
8 position where, where just DNA. I know for a fact
9 this is a problem that I'm having also with the,
10 this guy Chaziza, he could have cleared me. If me
11 and him have the same case, if me and him, if I was
12 supposed to be with him and we supposed to be the
13 guys who knocked on the door, why wasn't we
14 convicted together? Why wasn't we together?

15 Because I told my lawyer, I said
16 hey, go and investigate him because he can clear me.
17 Once he say that it wasn't me, then it's gonna put a
18 real big discrepancy in anything. But nobody choose
19 to do nothing about it.

20 So now I couldn't even use him to
21 come in here and say that it wasn't me. And I'm
22 just stuck. And it seem like they want to beat
23 around the bush when they saying, well, yeah, I did
24 it because you have felonies, that's the reason why.

25 Is that the reason why that, that I
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1 don't get a chance to get no paperwork from
2 California or from CODIS matching me to anything?
3 Is that the reason why?

4 And after, and after, and then after
5 that I rest.

6 THE COURT: All right. Is there any
7 cross-examination by the State?

8 MS. CLOWERS: No, Your Honor.

9 THE COURT: All right. Then do you rest
10 your case-in-chief then?

11 MS. KICE: Yes, Your Honor.

12 THE COURT: All right. Is there anything
13 in opposition or rebuttal?

14 MS. CLOWERS: No, Your Honor.

15 THE COURT: All right. Does defense have
16 argument at this time, Ms. Kice?

17 MS. KICE: Just a couple things, Your
18 Honor.

19 There are some disturbing things
20 about this case. He was never matched in Nevada
21 database. There was a five-year gap between when he
22 first went to prison in Nevada, when he should have
23 been swabbed, when that profile should have been
24 added to the Nevada database.

25 Without clear -- I don't have access
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1 to that information. I don't know why he wasn't --
2 if he wasn't in the database, it calls into question
3 the procedures of the lab. If he didn't match then,
4 his DNA didn't change between California and Nevada.

5 I'm concerned about the trial
6 strategy of not interviewing Ms. Chaziza who is the
7 other individual who's been convicted for this
8 crime, especially given the fact that they were --
9 they knew from the outside that they were going to
10 be able to or attempt to poke holes in the DNA.

11 Mr. Henderson has always maintained
12 his innocence to me. And had Mr. Chaziza been
13 questioned as to Mr. Henderson's identity, it's
14 possible this could have had a different outcome.

15 I'm troubled by the fact that an
16 investigator wasn't hired, wasn't -- neither Mr.
17 Reed nor Ms. Radosta can speak intelligently about
18 any investigation that was done in this case to
19 provide Mr. Henderson with an alibi or to verify his
20 whereabouts on that day.

21 And I think if you take things
22 accumulatively, Your Honor, there was ineffective
23 assistance of counsel enough to warrant a new trial.
24 Thank you.

25 THE COURT: Thank you, Ms. Kice. Ms.
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1 Clowers in response.

2 MS. CLOWERS: My response is that, Your
3 Honor, I think that Mr. Henderson received an
4 amazing defense.

5 The fact that they bring Norm Reed
6 in from the murder team just to attack the DNA,
7 which was the evidence in this case, is more than
8 what a lot of defendant's get.

9 The fact that he wasn't in the
10 Nevada database under Strickland wouldn't change
11 anything. Even if he was, that just means we would
12 have got the warrant and the buccal faster, but
13 instead we had to wait until we got it from
14 California to get the buccal. So that would change
15 nothing. The outcome would not be different.

16 The fact they didn't interview
17 Chaziza, well, Mr. Chaziza was pointed out was never
18 accused of being the rapist in this case and he pled
19 guilty to doing this and committing these crimes
20 with Mr. Henderson.

21 If they interviewed Mr. Chaziza, it
22 wouldn't changed the outcome of this trial. He
23 still would have been found guilty of all these
24 charges. And even though he's maintaining his
25 innocence --

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1 THE COURT: Let me get this correct.

2 CODIS wasn't even entered in at trial, right? I
3 mean, they couldn't have entered that in because
4 that would have been -- right?

5 MS. CLOWERS: Say again.

6 MS. KICE: No.

7 THE COURT: CODIS wasn't even entered in
8 at trial. I mean, he's complaining about CODIS.

9 MS. CLOWERS: Correct.

10 THE COURT: It wasn't even entered at
11 trial.

12 MS. CLOWERS: Correct. I'm sorry.

13 THE COURT: The jury knew nothing about
14 CODIS.

15 MS. CLOWERS: I thought you were talking
16 about Chaziza.

17 THE COURT: No, I mean, let me get this
18 straight. CODIS has nothing to do with anything.
19 It wasn't even entered in at trial.

20 MS. CLOWERS: No, you are absolutely
21 correct. There was a strategy --

22 THE COURT: Just the probable cause in
23 order to get his buccal swab.

24 MS. CLOWERS: And I, I've never
25 personally presented a case where I used CODIS at a
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1 trial level or even at grand jury or preliminary
2 hearing level.

3 What we do is we take the test
4 that's done from a buccal and that way we have no
5 chain of custody issues. If you bring in CODIS,
6 you're gonna have chain of custody issues. So it's
7 great for probable cause, but -- and not problems
8 with chain of custody. You're gonna have six people
9 who have to testify to a CODIS hit where as with
10 buccal you have the detective who took it.

11 THE COURT: Well, you have to explain to
12 a jury why is there evidence -- why is there
13 evidence in a state wide database.

14 MS. CLOWERS: Yes.

15 THE COURT: Which is more problematic and
16 more prejudicial than anything.

17 MS. CLOWERS: And in addition, what you
18 heard Norm Reed say was that it would have only
19 helped the State's case had you had two people come
20 in and say that that DNA affirmatively belonged to
21 the defendant.

22 No investigator, go get an outside.
23 Well, investigators shouldn't go out and fetch
24 alibis. The defendant should be able to provide
25 enough information that they can locate him if in

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1 fact he wasn't at the scene of his crime.

2 And what you heard from his
3 attorneys today was he didn't actually ever
4 continuously maintain innocence.

5 At one point he concocted a story so
6 that he can explain his DNA by disparaging the
7 victim being a drug abuser and basically a
8 prostitute, exchanging sex for money. And it wasn't
9 until the motion to dismiss was denied he came up
10 with that defense.

11 I think you had two seasoned
12 attorneys on that case, Your Honor, that would have
13 never presented that defense because they would have
14 known for a fact it wouldn't have been ethical to do
15 such.

16 Quickly, Your Honor, I didn't hear
17 any -- just going back to the petition, there was
18 nothing about the PSI in the petition that indicated
19 what needed to be different. There were no errors
20 pointed out or anything like that. So the result
21 wouldn't have been different that either.

22 With the search warrant, again going
23 back to CODIS, it's a probable cause. Norm Reed
24 said he wouldn't challenge it. With all the
25 experience he has, he wouldn't challenge it. I

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1 don't think Your Honor would grant it challenging a
2 search warrant based upon CODIS. That's one of the
3 stronger PCs we can come up with.

4 The DNA expert I've mentioned was
5 not necessarily hired but was consulted and they
6 used the appropriate strategy.

7 THE COURT: Well, they are hired, they're
8 paid --

9 MS. CLOWERS: I guess --

10 THE COURT: -- from the public defenders
11 office.

12 MS. CLOWERS: I was thinking they weren't
13 hired to come in to testify at trial, Your Honor,
14 but yes, they were hired and consulted.

15 They got the answer that probably
16 they didn't want to hear, but they used it to their
17 best advantage by her giving them cross-examination
18 questions which they utilized.

19 And again, judge, even though the
20 bench conferences aren't recorded, it would not have
21 changed the outcome of this case. Norm Reed
22 specifically stated that he states and puts the
23 important things on the record at any given moment
24 that he can in front of Judge Mosley.

25 And so with that, judge, I don't

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1 believe that the outcome of this would have been any
2 different.

3 I don't think they've met the
4 standard on Strickland and I think you should deny
5 the petition, Your Honor.

6 THE COURT: Is there anything in
7 response?

8 MS. KICE: No, Your Honor. Other than I
9 withdraw the issue of the search warrant.

10 MS. CLOWERS: Oh, I forgot. I'm sorry.

11 THE COURT: That's okay. All right. So
12 now both sides have now submitted it to the court.
13 It's now submitted to the court for decision.

14 All right. This is a petition for
15 writ of habeas corpus based on post-conviction
16 relief based on various claims of ineffective
17 assistance of counsel.

18 The court will do a detailed order
19 denying the defendant's petition for a myriad of
20 reasons which have come up at this particular
21 evidentiary hearing.

22 Under Strickland and its progeny,
23 the Court had listened to the testimony of both Ms.
24 Radosta and Mr. Reed, two of the more veteran public
25 defenders, both of which have -- I mean, they're

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1 probably two of the most seasoned public defenders
2 at the PD's office. Norm Reed specializing in
3 murders and Violet Radosta specializing in sexual
4 assault cases.

5 Ms. Radosta even brought Mr. Reed in
6 because this was a case in which DNA had been
7 questioned, and which clearly up until it sounds
8 like the day of trial the defendant had maintained
9 his innocence and said he was not the perpetrator,
10 based on what I heard, at least up until the day of
11 trial.

12 The claims of ineffectiveness are
13 belied by the record. First of all, unlike what the
14 petition alleges, Mr. Reed and Ms. Radosta had in
15 fact contacted a DNA expert, that being Norah Rudin
16 who is one of the nation's renowned DNA experts out
17 of Los Angeles. The public defender's office uses
18 her quite a bit as far as consultations from all of
19 these hearings that come before me.

20 But all of the DNA was reviewed in
21 this case and the testimony from Norm Reed was that
22 the bed sheet, the vaginal swabs, the breast swabs
23 were all reviewed by a separate independent expert,
24 and that although there were some differences on how
25 they would come about the result, the result at the

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1 end of the day, even from an independent defense
2 expert, was that this defendant was in fact the
3 source of the DNA identity presumed.

4 You know, one in so many billion
5 that it's like five times the population of the
6 earth. And he could be the only source of that DNA,
7 that the breast swab alone, there was only a single
8 source and that there was no real way to attack that
9 particular DNA sample.

10 Clearly the record, after I reviewed
11 the record again, shows that there was enough to
12 retest and that strategically both counsel decided
13 not to retest because as Ms. Radosta said, Mr. Norm
14 kind of -- Reed shied away from it. But had they
15 retested it, there is an obligation to give it to
16 the State, the result of that test.

17 And they knew that CODIS had already
18 hit on it which -- and they did. In fact, Ms. Rudin
19 did review the California DNA results. She
20 concurred with those. They didn't want to bring in
21 the California or CODIS hit because it just would
22 have showed yet another independent lab had found
23 that it was the defendant's DNA.

24 So you have a California lab finding
25 it's the defendant's DNA, a buccal swab done, based

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1 on the probable cause of CODIS hit and based on
2 Metro's DNA testing that that found that the
3 defendant was a source of the DNA.

4 And then you have the third
5 consultation by Norah Rudin, Dr. Rudin, that says
6 yes, that's exactly the defendant's DNA
7 conclusively.

8 So three different DNA experts found
9 it was the defendant's DNA.

10 Based on that, Mr. Reed and Ms.
11 Radosta felt like the best defense or the only
12 defense, since he was wearing a mask and could not
13 be identified by the defendant, and this was a who
14 did it kind of case, that the best trial strategy
15 would be to keep out the CODIS because that's just
16 one more lab identifying the defendant, plus the
17 fact that it would have raised questions as to why
18 the defendant's DNA was on file with California,
19 which would have been obviously prejudicial, but
20 strategically they kept that out. Strategically
21 they didn't want it retested because they would have
22 had to turn it over to the State.

23 And the best way for them to try to
24 put holes in the State's case was to only be faced
25 at trial with Metro's lab where they could try to

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1 cross-examine the DNA expert regarding testing
2 procedures such that it may raise doubt to the jury
3 that this defendant was the source of the DNA. And
4 that is what they did.

5 In fact, they had mock trials and
6 they had -- it sounded to me like they practiced
7 their cross-examination with the help of Norah Rudin
8 assisting them and formulating their questions to
9 the DNA expert as to how they should proceed with
10 cross-examination in an effort to defend this
11 defendant.

12 As an aside now at the evidentiary
13 hearing, the Court would note that all of their
14 efforts may very well have been futile because the
15 Court was able to listen to the credibility of both
16 Norm Reed and Violet Radosta, as well as this
17 defendant now here before the court and making
18 credibility determinations.

19 Both counsel stated that just prior
20 to trial, basically the eve of trial, and perhaps in
21 an effort to explain away the DNA in this case
22 putting him at the scene of the crime as the
23 perpetrator, both counsel testified that this
24 defendant then admitted to being at the premises
25 when this crime was committed.

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1 Mr. Reed didn't go into it as much,
2 but Ms. Radosta clearly testified after the
3 defendant had waived his privilege that in fact this
4 was consensual sex and he actually put himself there
5 in this hearing based on the evidence, that he
6 wanted to change his defense, that he was the source
7 of the DNA because it was consensual sex, that he
8 knew the victims in this case and that the victim of
9 the sexual assault was actually consenting to sex,
10 that he sold her drugs before and apparently wanted
11 to change the defense.

12 Ms. Radosta explained that although
13 that was a defense to the sexual assault charge,
14 there were multiple other charges in this case and
15 that his version would not have exculpated him, this
16 defendant, from all of the other charges that were
17 contained in the Information, including all the
18 crimes against the other victim in this case.

19 And so for those reasons, they
20 strategically continued to defend the defendant
21 against the evidence regarding the DNA results.

22 As far as the defense bringing up
23 the Nevada database didn't hit on this defendant,
24 the Court feels that's a nonissue, that the CODIS
25 hitting on the defendant's DNA is just probable

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1 cause, that it's irrelevant.

2 And as Mr. Reed stated, it's of no
3 consequence at all that Nevada did not hit on the
4 defendant's DNA sample.

5 As far as the, now being brought up
6 I think for the first time really at the evidentiary
7 hearing that there was a co-defendant being tried at
8 the same time, this defendant admitted that he was
9 there at the scene pursuant to both counsel. And so
10 really as far as strategy, it's of no consequence to
11 this Court either that defendant was concerned or
12 wanted to know why the co-defendant wasn't
13 interviewed.

14 The Court does not find that any
15 investigation regarding alibi fell below the
16 standard. Ms. Radosta explained that the defendant
17 simply could not explain where he was six months
18 before based on lack of memory. And so they did not
19 fall below the standard of investigation for an
20 alibi defense.

21 The defendant and the defense have
22 never proffered what errors were in the PSI that
23 should have been corrected. And any errors anyway
24 were belied by the record that counsel stated that
25 it's their habit, routine and practice to go over

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1 that and they believed that they had gone over it
2 with the defendant and that he wasn't sentenced
3 based on any errors.

4 Mr. Reed testified that although
5 Judge Mosley does not record his bench conferences
6 that he was not prevented in any way from making a
7 record on anything that was said at a bench
8 conference.

9 And in fact, the defendant has not
10 proffered anything that was not on the record that
11 should have been somehow put on the record and how
12 that could have been error for ineffective
13 assistance of counsel.

14 And I know since the time of the
15 original petition, the entire public defender's file
16 has been turned over, including all the DNA
17 analysis.

18 And so the fact with another note of
19 research in the file which has been belied by the
20 record and by the evidentiary hearing, for all those
21 reasons and the reasons set forth in the opposition
22 and the State's oppositions and moving papers and
23 what has been presented at the evidentiary hearing,
24 for all those reasons, the Court is gonna deny the
25 defendant's request for post-conviction relief.

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1 I'm gonna ask the State to prepare
2 the appropriate order.

3 I'm gonna ask my court reporter to
4 make a copy of the transcript. You don't have to do
5 it expedited, but if you could get it over to the DA
6 in the next 15 days or so, the DA can supplement the
7 order.

8 If you would please put -- send it
9 Ms. Kice for her to look at and then I'll take a
10 look at that order as well.

11 And I'll enter a formal written
12 order by which the defendant is free to appeal and
13 do whatever he'd like to do at that time. We're
14 gonna put it on for 30 days from now for status
15 check the Court's written formal order denying the
16 defendant's post conviction petition for
17 post-conviction relief.

18 So thank you, ladies and gentlemen.
19 And that will conclude today's proceeding.

20 THE CLERK: Do you want to put it on a
21 Tuesday, a regular hearing day?

22 THE COURT: Yeah, just put it on a
23 regular hearing day. I just want to make sure I
24 sign the order.

25 MS. CLOWERS: Are we having the defendant
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1 transported?

2 THE COURT: No. It's just for me to sign
3 the order. All it is is for me to remember to sign
4 the order so it doesn't get lost somewhere. So I
5 put it over 30 days.

6 If I haven't signed it yet because
7 you all haven't had it done, all that happens is
8 I'll continue it another 30 days.

9 And I'll make sure that something
10 happens within that time period. It's just a way
11 for me to keep track of an order so I don't not
12 enter a written order by which he can appeal.

13 MS. KICE: Correct.

14 THE COURT: Because until I do a written
15 order, he really can't appeal me based on what I
16 just said today. So he has to have a written order.
17 And so I'm sure he will, and so that's fine, but I
18 have to do a written order. This keeps everybody on
19 track as to when this is gonna be.

20 THE CLERK: November 20th.

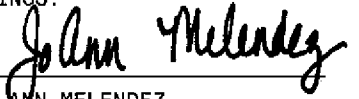
21 THE COURT: And, counsel, neither side
22 needs to be here either. It just needs -- I need to
23 make sure I sign off on it.

24 MS. CLOWERS: Okay.

25 THE COURT: It's just really for me.

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1 MS. CLOWERS: Okay, thank you.
2 THE CLERK: That will be at 9 a.m.
3 THE COURT: That will conclude the
4 proceedings.
5 MS. CLOWERS: Thank you.
6 ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF THE
PROCEEDINGS.

7 
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JO ANN MELENDEZ
CCR NO. 370

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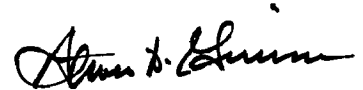
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,
Plaintiff,

-vs-

JOSEPH HENDERSON,
#1502730

Defendant.

CASE NO: **05C212968**

DEPT NO: **XV**

FINDINGS OF FACT, CONCLUSIONS OF

LAW AND ORDER

DATE OF HEARING: OCTOBER 22, 2012
TIME OF HEARING: 1:00 PM

THIS CAUSE having come on for hearing before the Honorable ABBI SILVER, District Judge, on the 22nd day of October, 2012; the Petitioner being present, represented by STEPHANIE B. KICE, ESQ.; Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through SHANON CLOWERS, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, the testimony of Defendant's former attorneys, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

//

FINDINGS OF FACT

1. On July 11, 2005, Joseph Henderson, hereinafter "Defendant," was charged by way of Information with Count 1 - Conspiracy to Commit Burglary, Count 2- Burglary While in Possession of a Firearm, Count 3 - Conspiracy to Commit First Degree Kidnapping, Counts 4 and 5 - First Degree Kidnapping With Use of a Deadly Weapon, Count 6 - Conspiracy to Commit Sexual Assault, Counts 7, 8, and 9 - Sexual Assault With Use of a Deadly Weapon, Count 10 - Conspiracy to Commit Robbery, Counts 11 and 12 - Robbery With Use of a Deadly Weapon, Count 13 - Open or Gross Lewdness, and Count 14 - Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm.
2. On June 27, 2008, Defendant was found guilty by a jury of all counts.
3. On August 28, 2008, Defendant was sentenced as follows: As to Count 1 – to Twelve (12) Months in the Clark County Detention Center; As to Count 2 – to a Maximum of One Hundred Fifty-Six (156) Months with a Minimum Parole Eligibility of Sixty-Two (62) Months, to run Concurrent with Count 1; As to Count 3 – to a Maximum of Sixty (60) Months with a Minimum Parole Eligibility of Twenty-Four (24) Months, to run Consecutive to Count 2; As to Count 4 – to Life with a Minimum Parole Eligibility after Sixty (60) Months, plus an Equal and Consecutive term of Life with a Minimum Parole Eligibility after Sixty (60) Months for the Use of a Deadly Weapon, to run Consecutive to Count 3; As to Count 5 – to Life with a Minimum Parole Eligibility after Sixty (60) Months, plus an Equal and Consecutive term of Life with a Minimum Parole Eligibility after Sixty (60) Months for the Use of a Deadly Weapon, to run Consecutive to Count 4; As to Count 6 – to a Maximum of Sixty (60) Months with a Minimum Parole Eligibility of Twenty-Four (24) Months, to run Consecutive to Count 5; As to Count 7 - to Life with a Minimum Parole Eligibility of One Hundred Twenty (120) Months, plus an Equal and Consecutive term of Life with a Minimum Parole Eligibility of One Hundred Twenty (120) Months for the Use of a Deadly Weapon, to run Concurrent with Count 6; As to Count 8 - to Life with a

1 Minimum Parole Eligibility of One Hundred Twenty (120) Months, plus an Equal and
2 Consecutive term of Life with a Minimum Parole Eligibility of One Hundred Twenty
3 (120) Months for the Use of a Deadly Weapon, to run Consecutive to Count 7; As to
4 Count 9 – to Life with a Minimum Parole Eligibility of One Hundred Twenty (120)
5 Months, plus an Equal and Consecutive term of Life with a Minimum Parole
6 Eligibility of One Hundred Twenty (120) Months for the Use of a Deadly Weapon, to
7 run Consecutive to Count 8; As to Count 10 – to a Maximum of Sixty (60) Months
8 with a Minimum Parole Eligibility of Twenty-Four (24) Months, to run Consecutive
9 to Count 9; As to Count 11 – a Maximum of One Hundred Eighty (180) Months with
10 a Minimum Parole Eligibility of Seventy-Two (72) Months, plus an Equal and
11 Consecutive term of Maximum of One Hundred Eighty (180) Months with a
12 Minimum Parole Eligibility of Seventy-Two (72) Months for the Use of a Deadly
13 Weapon, to run Concurrent with Count 10; As to Count 12 – to a Maximum of One
14 Hundred Eighty (180) Months with a Minimum Parole Eligibility of Seventy-Two
15 (72) Months, plus an Equal and Consecutive term of Maximum of One Hundred
16 Eighty (180) Months with a Minimum Parole Eligibility of Seventy-Two (72) Months
17 for the Use of a Deadly Weapon, to run Consecutive to Count 11; As to Count 13 – to
18 Twelve (12) Months in the Clark County Detention Center, to run Concurrent with
19 Count 12; As to Count 14 – a Maximum of One Hundred Fifty-Six (156) Months with
20 a Minimum Parole Eligibility of Sixty-Two (62) Months, to run Consecutive to Count
21 13; with One Two Hundred Fifty-One (1,251) Days credit for time served. Further
22 Ordered, a Special Sentence of Lifetime Supervision is imposed to commence upon
23 release from any term of imprisonment, probation or parole.

- 24 4. Defendant's Judgment of Conviction (Jury Trial) was filed on September 24, 2008.
- 25 5. Defendant filed a Notice of Appeal on October 9, 2008. The Nevada Supreme Court
26 affirmed Defendant's conviction on February 3, 2010 (case no. 52573). Remittitur
27 issued on March 2, 2010.

28 //

- 1 6. Defendant filed his pro per Petition for Writ of Habeas Corpus (Post-Conviction) on
2 January 11, 2011. The State's response was filed on March 29, 2011.
- 3 7. On March 15, 2011, the court granted Defendant's Motion for the Appointment of
4 Counsel. Stephanie B. Kice confirmed as counsel on March 17, 2022.
- 5 8. On August 26, 2011, through counsel, Defendant filed a Supplemental Petition for
6 Writ of Habeas Corpus (Post-Conviction) (hereinafter "Supp. Pet." or "Supplemental
7 Petition"). The State responded to the Supplement on September 30, 2011.
- 8 9. On December 1, 2011, the matter was set for an evidentiary hearing to expand the
9 record. Following continuances, the court held an evidentiary hearing on October 22,
10 2012, during which Norm Reed and Violet Radosta, Esqs., were sworn and testified
11 regarding Defendant's claims of ineffective assistance of counsel. Defendant was
12 present with counsel.
- 13 10. In Grounds 1, 5, and 6 of the Petition, Defendant claims (1) the State deprived him of
14 his confrontation rights when it "failed to provide [him] the evidence submitted to the
15 [DNA lab], (2) the State consumed all available material for DNA testing, and (3) the
16 district court erred in failing to dismiss the information due to the State's alleged
17 consumption of all available DNA material. Pet. at 5g-i, 5s-t. Defendant raised claims
18 regarding the State's handling of the DNA evidence and the district court's denial of
19 his motion to dismiss on direct appeal. The Nevada Supreme Court held, "Because
20 [Defendant's] claim that the State did not preserve DNA material from each sample
21 for defense retesting is belied by the record, we conclude that the district court did not
22 abuse its discretion." 02-03-2010 Order Affirming at 1. Grounds 1, 5, and 6 are
23 therefore barred by the doctrine of law of the case.
- 24 11. In Ground 7 of the Petition, Defendant argues that the State should have been
25 prevented from identifying him as the perpetrator through the use of the DNA
26 evidence. Pet. at 5t-x. Defendant claimed on direct appeal that the district court had
27 erred by denying a pretrial motion to preclude the improper use of DNA evidence.
28 The Nevada Supreme Court found this claim to be without merit. 02-03-2010 Order

1 Affirming at 2. Ground 7 of the Petition is therefore barred by the doctrine of law of
2 the case.

3 12. In Ground 8 of the Petition, Defendant claims the district court erred in denying his
4 motion for a mistrial. Pet. at 5x-y. Defendant also raised this same claim in his direct
5 appeal. The Nevada Supreme Court found that “the district court did not clearly abuse
6 its discretion when it denied the motion....” 02-03-2010 Order Affirming at 2. As
7 such, Ground 8 claim is barred as the law of the case.

8 13. In Grounds 2 and 3 of the Petition, Defendant claims that the State elicited perjured
9 testimony and that it did not prove each element of the crime beyond a reasonable
10 doubt. Pet. at 5j-p. In Ground 2 of the Supplemental Petition, Defendant alleges that
11 the State committed a violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194
12 (1963). Defendant did not raise these claims on direct appeal and, as such, they are
13 waived per NRS 34.810.

14 14. Defendant alleges that the victim pressed herself onto her injured fiancé’s bloody
15 body and knelt in a pool of his blood, and this may have contaminated the DNA
16 evidence. Pet. at 5r. Defendant fails to support this assertion with specific factual
17 allegations and the claim is therefore dismissed. Moreover, there is no evidence in the
18 record that supports Defendant’s contention that the victim “pressed herself” on to
19 Mr. Bernzweig’s body or “kneeled” in the pool of blood. See 6/24/08 TT p. 149-150;
20 6/25/08 TT p. 35. Defendant fails to explain how coming into contact with Mr.
21 Bernzweig’s blood in any way makes the DNA test results identifying him as the
22 perpetrator unreliable. Defendant’s DNA was not rendered undetectable, and DNA
23 profiles of individuals can be discerned from mixed profiles. As such, Defendant fails
24 to demonstrate that counsel was deficient or that he was prejudiced.

25 15. Defendant claims his attorney was ineffective for failing to “call into question and
26 have tested the evidence of California authorities’ lab work matching petitioner to
27 Nevada’s profile.” Pet. at 5q. Defendant was identified as a suspect by witness Kathy
28 Gunther, who matched the unknown DNA profile to Defendant with the assistance of

1 outside agencies. 6/26/08 TT p.109. Defendant claims that his attorney should have
2 challenged the DNA profile generated by the outside agency which identified him as
3 the unknown perpetrator. However, such an action by trial counsel would have been
4 useless since Ms. Gunther matched the DNA profile of the unknown perpetrator to a
5 buccal swab obtained from Defendant in a confirmatory match. Id. As such,
6 Defendant does not demonstrate that counsel was ineffective or that he was
7 prejudiced, since counsel cannot be deemed ineffective for failing to make futile
8 objections or motions.

9 16. Defendant argues that his counsel was ineffective for failing to challenge Ms.
10 Gunther's testimony that she detected spermatozoa sufficient to obtain a genetic
11 profile. Pet. at 5r. Defendant failed to demonstrate that such an attempt by counsel
12 would have achieved favorable testimony. Moreover, Defendant's DNA was also
13 detected on the breast swab taken from the victim. 6/26/08 TT 115. As such,
14 Defendant fails to demonstrate prejudice.

15 17. In the Supplemental Petition, Defendant claims his attorney was ineffective for failing
16 to retain his own DNA expert to either retest or make an independent evaluation of
17 the DNA report. Supp. Pet. at 8-9. The mere failure to retain an expert does not render
18 counsel per se ineffective. Further, Defendant's bare allegations that mistakes "may
19 have been made" during testing are insufficient to demonstrate prejudice under
20 Strickland.

21 18. Mr. Norm Reed's and Ms. Violet Radosta's testimony at the evidentiary hearing was
22 credible.

23 19. Defendant waived his attorney client privilege at the evidentiary hearing. 10-22-2012
24 Evidentiary Hearing at 12.

25 20. At the evidentiary hearing, Ms. Violet Radosta testified that she brought Mr. Norm
26 Reed in because the DNA evidence in the case had been questioned. 10-22-2012
27 Evidentiary Hearing at 82. Mr. Reed was second chair on the case, and his job was to
28 examine, interpret, and attack the DNA evidence. 10-22-2012 Evidentiary Hearing at

10. Defendant's allegation that defense counsel failed to consult with a DNA expert is belied by the record. Mr. Reed and Ms. Radosta consulted with a DNA expert, Norah Rudin, one of the nation's renowned DNA experts. 10-22-2012 Evidentiary Hearing at 26-27, 53, 128. Ms. Rudin reviewed the DNA evidence – the entire forensic file – including the bed sheet, the vaginal swabs, the breast swabs, and the California DNA results. Id. Reviewing the entire file allows her to make her own interpretation of it. Id. at 29. Mr. Reed consulted with Ms. Rudin regarding her findings. Id. at 27. Ms. Rudin concluded, first, that the testing procedures were done correctly. Id. at 29. Ms. Rudin further concluded that, although there were some differences in how she would arrive at the result, at the end of the day, Defendant was the source of the DNA. Id. at 29-30, 53. Defendant was the single-source contributor of the DNA on the sheets. Id. at 55. Defendant was the single-source contributor of the DNA on the vaginal swab of the victim taken pursuant to the sexual assault kit. Id. at 55-56, 107. Defendant was the single-source contributor of the DNA on the victim's breast area. Id. at 57, 107.

21. Defense counsel made the strategic decision not to put Ms. Rudin on the stand because, although she disagreed with some points of interpretation, she agreed with the overall results reached by Metro, which were that Defendant's DNA was present at the scene. 10-22-2012 Evidentiary Hearing at 30-31.

22. There was enough DNA to retest, but defense counsel made the strategic choice not to do so because they would have been obligated to turn the results over to the State. 10-22-2012 Evidentiary Hearing at 40, 101-104, 106, 108. Ms. Rudin advised against having the DNA retested. Id. at 39-40. Retesting would in effect turn the defense expert into a witness for the State. Id. at 108. Had counsel brought in the California or CODIS match, it would have simply illuminated that yet another independent lab found that Defendant's DNA was on the victim. In total, three different DNA experts found that the DNA was Defendant's: (1) the California lab, (2) the buccal swab done based on the probable cause of the CODIS match, and (3) Metro's DNA testing. 10-22-2012 Evidentiary Hearing at 36, 52. Bringing in the CODIS or California match

1 would also raise questions about why Defendant's DNA was on file with California
2 and lead to the inference that he was a felon. 10-22-2012 Evidentiary Hearing at 52.

3 23. Based on the number of independent labs confirming Defendant's DNA at the scene,
4 Mr. Reed and Ms. Radosta made the reasonable strategic decision to proceed only
5 with Metro's lab results, so they could try to cross-examine the DNA expert regarding
6 testing procedures such that it may raise doubt to the jury that this Defendant was the
7 source of the DNA. 10-22-2012 Evidentiary Hearing at 88-89. To advance this trial
8 tactic, Mr. Reed and Ms. Radosta held mock trials and practiced their cross-
9 examination with the help of Norah Rudin. Ms. Rudin prepared a list of potential
10 cross-examination questions for counsels. 10-22-2012 Evidentiary Hearing at 31.

11 24. On the eve of trial, Defendant sought to change his defense to an argument that his
12 DNA was present on the victim because the sex with the victim was consensual. 10-
13 22-2012 Evidentiary Hearing at 119-20, 124-27. Ms. Radosta explained to Defendant
14 that although this would be a defense to sexual assault, it was not a defense to the
15 other charges. Id. at 125. Given this, defense counsel chose to continue with their
16 strategy of attacking the DNA results.

17 25. It is irrelevant that the Nevada database did not have a match for Defendant. 10-22-
18 2012 Evidentiary Hearing at 60. Mr. Reed testified that it was unusual that the CODIS
19 hit did not come from Nevada because Defendant had a previous conviction in
20 Nevada, but the CODIS hit only provides a probable cause determination. 10-22-2012
21 Evidentiary Hearing at 34. Following the hit, the State performs an independent exam
22 of the evidence and a manual comparison. Id. at 34-35, 51-52. Because both
23 California got the match right and Metro's manual comparison was right according to
24 the defense expert, defense counsel could only have emphasized that Defendant
25 should have been in the Nevada system because of his prior conviction by
26 investigating why the CODIS hit did not come from Nevada. Id. at 59-61.

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1 26. As to Defendant's allegations that defense counsel failed to investigate a potential
2 alibi, raised for the first time at the evidentiary hearing, his arguments lack merit. It is
3 of no consequence that a co-defendant admitted he was at the scene. 10-22-2012
4 Evidentiary Hearing at 45-48. Further, Ms. Radosta testified that Defendant could not
5 explain where he was at the time of the crime based on lack of memory. Id. at 85-88,
6 90-91. Defense counsel did not fall below the standard of investigation for an alibi
7 defense.

8 27. In the Supplemental Petition, Defendant argues his counsel should have challenged
9 the validity of the search warrant. Supp. Pet. at 9-10. Defendant's bare allegation that
10 the search warrant "may" have been based upon false statements is insufficient to
11 demonstrate ineffective assistance. Further, simply stating the evidence "may very
12 well have been suppressed" does not show a reasonable probability the outcome
13 would have been different, so Defendant fails to demonstrate prejudice. Defense
14 counsel testified that he saw no issue with the search warrant in this case. 10-22-2012
15 Evidentiary Hearing at 70-71, 73-74. In any case, appellate counsel withdrew the
16 issue of the search warrant affidavit at the October 22, 2012 evidentiary hearing. 10-
17 22-2012 Transcript at 132, 159.

18 28. In the Supplemental Petition, Defendant claims that he was not allowed to review his
19 presentence investigation report ("PSI"), and his counsel was ineffective for failing to
20 allow him to do so. Supp. Pet. at 10-11. However, Defendant fails to specifically state
21 what errors his PSI allegedly contains and thus fails to demonstrate any prejudice
22 under Strickland. Further, defense counsels testified at the evidentiary hearing that it
23 is their habit, routine, and practice to over the PSI and that they believed they had
24 gone over Defendant's PSI with him. 10-22-2012 Evidentiary Hearing at 68-69, 129.
25 Had there been substantive errors in the PSI, defense counsel would have raised the
26 issue with the sentencing judge. Id. at 131.

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1 29. In the Supplemental Petition, Defendant claims that trial counsel failed to make an
2 adequate record by recording bench conferences. Supp. Pet. at 11. Defendant's
3 general allegations of unrecorded bench conferences fail to explain which judicial
4 actions should have been preserved, how such actions did or did not have merit, or a
5 reasonable probability that their preservation would have alter the outcome of his trial
6 or appeal. Defendant's allegations are too vague to warrant relief per Hargrove and
7 NRS 34.735(6). Further, Mr. Reed testified at the evidentiary hearing that he was not
8 prevented in any way from making a record on anything that was said at a bench
9 conference. 10-22-2012 Evidentiary Hearing at 66. The trial judge always gave
10 defense counsel the opportunity to put material off-record discussions on the record at
11 a later time. Id. Mr. Reed testified that nothing in the unrecorded bench conferences
12 would have changed the outcome of the trial. Id. at 72.

13 30. In the Supplemental Petition, Defendant alleges trial counsel was ineffective for
14 failure to keep necessary notes, conduct research, or properly document the file. Supp.
15 Pet. at 11-12. Defendant does not cite, nor has this Court been able to locate, any case
16 holding an attorney ineffective for such reasons. Post-conviction counsel's opinion
17 that trial counsel's note taking abilities are inadequate does not render him
18 incompetent or ineffective. Trial counsel does not need to take every conceivable
19 action in order to protect himself against allegations of inadequacy. Counsel is not
20 required to document every step during litigation in his personal file for the purpose
21 of making post-conviction counsel's attempt at alleging him ineffective easier.
22 Defendant's bare allegation is insufficient for relief, and Defendant fails to
23 demonstrate how the outcome of his trial would have been different had counsel done
24 a better job at taking notes. He is not entitled to relief under Strickland.

25 31. Although appellate counsel raised for the first time at the evidentiary hearing the late
26 timing of the State's plea offer, Ms. Radosta testified that defense counsel was able to
27 discuss the offer with him for about forty-five minutes to an hour. 10-22-2012
28 Evidentiary Hearing at 110-11. Over counsels' advice to the contrary, Defendant

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IN NEXT
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IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: 05C212968

Docket No: 85367

RECORD ON APPEAL VOLUME 3

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- 1 Q. That's the leather white couch?
 2 A. **Yes.**
 3 Q. It's not the couch in the living
 4 living room with the kitchen area. It's the white
 5 couch with the big screen tv; is that correct?
 6 A. **Yes.**
 7 Q. When did he put his fingers in your
 8 vagina?
 9 Was that before he put his penis in
 10 your vagina or was it after?
 11 A. **Before.**
 12 Q. Did he say anything to you when he did
 13 that to you?
 14 A. **He was groaning. He didn't say**
 15 **anything. I don't recall him saying anything to me.**
 16 Q. Did he do that immediately before he
 17 placed his penis in your vagina or was it some time
 18 before that?
 19 A. **I'm sorry?**
 20 Q. Did he do it immediately before he
 21 placed his penis in your vagina or is it sometime
 22 before that?
 23 Was it just prior to it?
 24 A. **Just prior to that to it.**
 25 Q. Do you recall how many fingers he put

- 1 in your vagina?
 2 A. **No.**
 3 Q. Let's fast forward to the time on your
 4 bed. This is your master bed; is that correct?
 5 A. **Yes.**
 6 Q. This is the bed that you were sleeping
 7 on when you were awakened?
 8 A. **Yes.**
 9 Q. You said he may have put his fingers
 10 in your vagina again. Do you recall whether he did
 11 that or not?
 12 A. **He did.**
 13 Q. Do you recall whether he was wearing
 14 gloves at that time?
 15 A. **No.**
 16 Q. Was he wearing gloves the first time
 17 he put his fingers in your vagina?
 18 A. **No.**
 19 Q. He did that -- talking about about the
 20 time on your bed now, when he put his fingers in
 21 your vagina, was that immediately prior to him
 22 putting his penis in your vagina?
 23 A. **Yes.**
 24 Q. How long did he have his penis in your
 25 vagina?

- 1 A. **Not very long.**
 2 Q. Did something happen?
 3 A. **Upstairs?**
 4 Q. Do you know of any reason why he
 5 stopped?
 6 A. **Downstairs, he stopped because of the**
 7 **commotion.**
 8 Q. What about on the bed?
 9 A. **On the bed, no, he didn't. He**
 10 **finished.**
 11 Q. You say he finished. What exactly did
 12 he do?
 13 A. **He ejaculated.**
 14 Q. Did he ejaculate inside of you?
 15 A. **No.**
 16 Q. What did he do?
 17 A. **He ejaculated on the bed.**
 18 Q. How do you know that; were you able to
 19 see?
 20 A. **I heard him.**
 21 Q. Did he make some noise?
 22 A. **He was moaning and groaning.**
 23 Q. Were you able to see what he was doing
 24 during that time?
 25 A. **No.**

- 1 Q. But you could tell that's what he was
 2 doing?
 3 A. **Yes.**
 4 Q. Where was he at the time he ejaculated
 5 in relation to you in the bed?
 6 A. **Right by me.**
 7 Q. Would that be on your right side or
 8 left side?
 9 A. **My left side.**
 10 Q. Would that be closest to the
 11 headboard?
 12 A. **Yes.**
 13 Q. Do you have any types of sheets or
 14 anything else on that bed?
 15 A. **I don't remember. There were sheets.**
 16 Q. There were sheets?
 17 A. **Yes.**
 18 MR. TURNER: Approach?
 19 THE COURT: You may.
 20 BY MR. TURNER:
 21 Q. Showing you what has been marked
 22 State's proposed exhibit 46, I'll ask you to take a
 23 look at the exhibit and tell me if you recognize it.
 24 A. **That's my bedroom.**
 25 Q. That fairly and accurately depicts

1 your bedroom as it appeared on the evening that this
2 took place?

3 A. Yes.

4 Q. If you can describe to the jury what
5 angle are we looking at here?

6 A. What angle?

7 Q. What's in the very back of the
8 picture?

9 A. Bed.

10 Q. And where -- when you describe going
11 through the doors into your bedroom where is the
12 bathroom in position to those doors in the bathroom
13 in relation to this picture?

14 A. The bathroom is to the right.

15 Q. It's off of this photograph?

16 A. Yes.

17 Q. So the person who would take this
18 photograph would be facing away from where the
19 bathroom is?

20 A. Yes.

21 Q. Where is the door that you entered;
22 would those be to the left of the person who took
23 that photograph?

24 A. I'm sorry. Where are the doors?

25 Q. Yes, the doors that the individual

1 took you into the room before he assaulted you
2 again.

3 A. It would be away from here, because,
4 um, from this distance would be the door to the
5 balcony would be here.

6 Q. You're motioning to the right side of
7 the picture?

8 A. Yes.

9 Q. So the doorway would be on the left?

10 A. Yes.

11 Q. And I'm showing you what has been
12 marked state's proposed Exhibit 65. I ask you if
13 you recognize what's depicted in that exhibit.

14 A. Yes.

15 Q. What is that?

16 A. My bed.

17 Q. Does that fairly and accurately depict
18 your bed as it appeared on that particular evening?

19 A. Yes.

20 MR. TURNER: State moves to admit
21 state's proposed exhibits 46 and 65.

22 THE COURT: Any objection?

23 MS. RADOSTA: No objection.

24 THE COURT: They are received.

25 BY MR. TURNER:

1 Q. You indicated you were facing the
2 window at the time that you were sexually assaulted
3 the second time; is that correct?

4 A. Yes.

5 Q. Where is the window -- where would the
6 window be in position to the photograph, State's
7 exhibit 65?

8 A. On the side of the bed.

9 Q. You're motioning to the right-hand
10 side of that picture?

11 A. Yes.

12 Q. In relation to this picture where
13 would the suspect be standing, the person who
14 sexually assaulted you?

15 A. Right in the front side of the bed.

16 Q. The left side of the bed?

17 A. The left side.

18 Q. In this picture?

19 A. Yes.

20 MR. TURNER: Move to publish.

21 THE COURT: Fine.

22 BY MR. TURNER:

23 Q. After the shorter of the two black
24 males sexually assaulted you for the second time and
25 ejaculated what happened next?

1 A. He was sweating really heavy on me and
2 he wiped me off.

3 Q. What did he wipe you off with?

4 A. He had something to wipe me off with.
5 I think it was his T-Shirt.

6 It was a very soft material.

7 Q. You don't know for sure?

8 A. I don't.

9 Q. Did he wipe anything else off?

10 A. The bed.

11 Q. Where on the bed?

12 A. To the left of me.

13 Q. On the area he was standing at the
14 time you thought he ejaculated?

15 A. Yes.

16 Q. Did you see what this individual did
17 with the item he used to wipe you?

18 A. Um, I didn't see what he did with it.

19 Q. What part of your body did he wipe?

20 A. My vagina.

21 Q. What did he do after he wiped these
22 locations?

23 A. Um, smoked a cigarette.

24 Q. Did you smoke?

25 A. No.

- 1 Q. Does Eric smoke?
- 2 A. **Occasionally.**
- 3 Q. Do you know if there were any
- 4 cigarettes in the house?
- 5 A. **I don't recall. I don't think there**
- 6 **was at that time.**
- 7 Q. What what were you doing when this
- 8 individual was smoking a cigarette?
- 9 A. **I was still on the bed.**
- 10 Q. Were you still in the same position
- 11 you were at the time he assaulted you?
- 12 A. **Yes.**
- 13 Q. Did he say anything to you during that
- 14 time period?
- 15 A. **No, I don't recall.**
- 16 Q. About how long a time period was it
- 17 from the time you went into the bedroom and got on
- 18 your bed and were assaulted until the time he smoked
- 19 that cigarette?
- 20 About how much time passed?
- 21 A. **Not very long. I don't remember the**
- 22 **time span.**
- 23 **It wasn't very long.**
- 24 Q. Did you see any other individual come
- 25 into the bedroom during that time you were assaulted

- 1 the second time?
- 2 A. **Yes.**
- 3 Q. Who came in?
- 4 A. **The middle eastern man.**
- 5 Q. At what point did he come into the
- 6 room?
- 7 A. **After he sexually assaulted me.**
- 8 Q. And was this when he was smoking a
- 9 cigarette?
- 10 A. **I don't remember.**
- 11 Q. What happened when the middle eastern
- 12 man came into the room?
- 13 A. **I think he said I believe her.**
- 14 Q. Do you know what he was talking about?
- 15 A. **The safe.**
- 16 Q. That's what he kept asking you about?
- 17 A. **Yes.**
- 18 Q. Did the man who sexually assaulted you
- 19 say anything in return?
- 20 A. **I don't remember.**
- 21 Q. What happened next?
- 22 A. **He left.**
- 23 Q. Who left?
- 24 A. **The three men left.**
- 25 Q. The middle eastern man left?

- 1 A. **Yes.**
- 2 Q. And the man who sexually assaulted you
- 3 left as well?
- 4 A. **Yes.**
- 5 Q. Did you see them leave?
- 6 A. **I could hear them leave.**
- 7 Q. What did you hear?
- 8 A. **Noises going down the stairs.**
- 9 Q. Did you hear the front door close?
- 10 A. **I heard the front door close.**
- 11 Q. What did you after heard the front
- 12 door close?
- 13 A. **I got out of the ties and I hopped**
- 14 **over to the bathroom and untied myself, yes.**
- 15 Q. Let's back up a little bit. You said
- 16 you got out of the ties.
- 17 What ties did you have?
- 18 A. **I got out of the zip ties the middle**
- 19 **eastern guy tied me up with.**
- 20 Q. Those were the ones that tied your
- 21 hands behind your back?
- 22 A. **Yes.**
- 23 Q. You said you got some other ties?
- 24 A. **Yes.**
- 25 Q. Where were those ties?

- 1 A. **My legs.**
- 2 Q. When were your legs bound?
- 3 A. **Right before they left someone tied me**
- 4 **up.**
- 5 Q. Do you remember which one?
- 6 A. **No.**
- 7 Q. Were -- you weren't able to see or you
- 8 don't recall?
- 9 A. **I just don't recall.**
- 10 Q. Do you recall what they tied your legs
- 11 up with?
- 12 A. **No.**
- 13 Q. That occurred immediately prior to
- 14 them leaving?
- 15 A. **Yes.**
- 16 Q. Now, you testified earlier that the
- 17 bindings you had on your wrists were loose?
- 18 A. **Yes.**
- 19 Q. What about the bindings for your legs;
- 20 were those tight?
- 21 A. **I don't remember how tight they were.**
- 22 **I just remember hopping to the bathroom to get my**
- 23 **scissors.**
- 24 Q. You were able to get your hands free
- 25 first?

1. A. **Yes.**
2. Q. And then what did you do with the
- 3 other bindings?
4. A. **I hopped to the bathroom.**
5. Q. What did you do?
6. A. **I got the scissors and cut myself**
- 7 **loose.**
8. Q. Where did you cut yourself loose at?
9. A. **My legs.**
10. Q. Was that in the bathroom of your
- 11 master bedroom?
12. A. **I think so, yes.**
13. Q. And during this time period were you
- 14 able to determine what happened to Eric?
15. A. **No.**
16. Q. When you cut yourself free what did
- 17 you do?
18. A. **I yelled for Eric.**
19. Q. Did you get a response?
20. A. **Yes.**
21. Q. What was that response?
22. A. **I asked him if he was okay. He said,**
- 23 **yes, but it was very muffled.**
24. Q. What did you do?
25. A. **I got my scissors and I untied him.**

1. Q. What condition was Eric in at the time
- 2 that you got him free?
3. A. **There was a pool of blood next to him**
- 4 **and he was all tied up.**
5. Q. Did you see where his injuries were?
6. A. **From his head.**
7. Q. And you were able to get him free?
8. A. **Yes.**
9. Q. And what did you do after you got Eric
- 10 free?
11. A. **I ran downstairs and dialed 911.**
12. Q. What room did you go to to dial 911?
13. A. **The bedroom downstairs.**
14. Q. And you were able to call the police?
15. A. **Yes.**
16. Q. And at some point did the police
- 17 arrive?
18. A. **Yes.**
19. Q. Did you tell the police what happened?
20. A. **Yes.**
21. Q. Did you walk them through what you had
- 22 just testified to here today?
23. A. **Yes.**
24. Q. What happened after you talked to the
- 25 police?

1. A. **They took me to the hospital.**
2. Q. And who did you speak with when you
- 3 were at the hospital?
4. A. **Some woman, a nurse.**
5. Q. Was a nurse?
6. A. **I think so.**
7. Q. What was the purpose of you talking
- 8 with the nurse?
9. A. **She asked me all the areas he**
- 10 **penetrated.**
11. Q. Did you tell the nurse about the area
- 12 where the person put their mouth?
13. A. **Yes.**
14. Q. An what did she do in response to
- 15 that?
16. A. **She took a swab of it.**
17. Q. Were you able to see she put the swab
- 18 in the location where you said the person put his
- 19 mouth?
20. A. **Yes.**
21. Q. And where else did she take swabs
- 22 from?
23. A. **My vagina, and I remember he sweated**
- 24 **on me and it fell somewhere at the bottom of my leg.**
- 25 **I pointed that area to her.**

1. Q. Prior to going in and speaking with
- 2 this nurse did you take a shower?
3. A. **No.**
4. Q. Why not?
5. A. **They told me not to.**
6. Q. When you were with the nurse did she
- 7 photograph you?
8. A. **Yes.**
9. Q. Photographed your injuries?
10. A. **Your.**
11. Q. What injuries did you have?
12. A. **The zip tie marks, marks on my hands.**
13. Q. Anything else that you recall?
14. A. **I think my legs, too.**
15. Q. After you spoke with her and she did
- 16 the examination what happened after that?
17. A. **I saw Eric in the hallway.**
18. Q. At some point did you go back to the
- 19 house?
20. A. **Yes.**
21. Q. Did you see the condition of the house
- 22 when you returned?
23. A. **I didn't go in.**
24. Q. Before you left, I guess, and you went
- 25 with the police to do the examination were you able

1. to see the condition of the house?
- 2 A. **Yeah.**
- 3 Q. What was the condition of the house?
- 4 A. **Things were just kind of pulled out of**
- 5 **places, like the dresser and I don't quite remember**
- 6 **everything.**
- 7 Q. Drawers were out, that type of thing?
- 8 A. **Drawers were out, yes.**
- 9 Q. That wasn't the condition it was in
- 10 when you first answered the door; is that right?
- 11 A. **Yes.**
- 12 Q. Do you know if any items were missing?
- 13 A. **Yes.**
- 14 Q. What items were missing?
- 15 A. **A laptop and MP3 player that went**
- 16 **along with it, money out of my purse.**
- 17 Q. How much money did you have in your
- 18 purse?
- 19 A. **A couple hundred dollars.**
- 20 Q. **Where was your purse located when**
- 21 **these men first came into your house?**
- 22 A. **It was upstairs in my closet.**
- 23 MR. TURNER: Approach the witness?
- 24 THE COURT: You may.
- 25 BY MR. TURNER:

- 1 Q. Showing you what has been marked
- 2 State's proposed exhibit 57, do you recognize that?
- 3 A. **Yes.**
- 4 Q. What is it?
- 5 A. **My purse.**
- 6 Q. Fairly and accurately depicts your
- 7 purse as it appeared on the evening this occurred?
- 8 A. **Yes.**
- 9 MR. TURNER: State moves to admit
- 10 state's proposed exhibit 57.
- 11 THE COURT: Objection?
- 12 MS. RADOSTA: No.
- 13 THE COURT: Received.
- 14 BY MR. TURNER:
- 15 Q. Was that the location of your purse
- 16 that evening before these individuals came into your
- 17 house?
- 18 A. **No.**
- 19 Q. Where was the purse?
- 20 A. **In my closet.**
- 21 Q. You said there was money taken out of
- 22 the purse?
- 23 A. **Yes.**
- 24 Q. Any other items missing that you
- 25 recall?

- 1 A. **My driver's license.**
- 2 Q. Did you have any cellphones, anything
- 3 like that?
- 4 A. **Yes.**
- 5 Q. Were any of those items missing that
- 6 you recall?
- 7 A. **Yes, but we found them at another**
- 8 **location.**
- 9 MR. TURNER: Move to publish state's 57.
- 10 THE COURT: You may.
- 11 BY MR. TURNER:
- 12 Q. During the time period where the
- 13 sexual assaults occurred, where the -- first of all
- 14 it was the same black male that put his penis in
- 15 your vagina that both times; is that correct?
- 16 A. **Yes.**
- 17 Q. That was the same black male who put
- 18 his fingers in your vagina; is that correct?
- 19 A. **Yes.**
- 20 Q. During all the time periods that that
- 21 took place was there any other individual in the
- 22 room with you on any of those occasions?
- 23 A. **Just the middle eastern guy.**
- 24 Q. Was he in there when it occurred?
- 25 A. **No.**

- 1 MR. TURNER: Court's indulgence.
- 2 BY MR. TURNER:
- 3 Q. Are you aware of any other money that
- 4 was missing besides the money from your purse?
- 5 A. **At that time, it was just the money**
- 6 **from my purchases and we had some vacation money**
- 7 **stashed around somewhere.**
- 8 Q. Do you know if that was missing?
- 9 A. **I heard a noise and the area upstairs**
- 10 **where I could hear Eric's voice.**
- 11 Q. The money that you had that was in
- 12 your purse and the money that may have been
- 13 missing -- you two lived together; is that correct?
- 14 A. **Yes.**
- 15 Q. Did you share your finances?
- 16 A. **Pretty much.**
- 17 MR. TURNER: Pass the witness.
- 18 THE COURT: Cross-examination.
- 19 MS. RADOSTA: Thank you.
- 20
- 21
- 22
- 23 EXAMINATION
- 24 BY MS. RADOSTA:
- 25 Q. Good afternoon, Ms. Kim. I just have

1. a few questions for you.

2 You said that you went to the hospital
3 after this particular incident and you spoke with a
4 nurse at the hospital?

5 A. Yes.

6 Q. And that was fairly quick after the
7 incident occurred, correct?

8 A. Yes.

9 Q. Within an hour or so you were talking
10 with that woman?

11 A. **I don't remember how long it was.**

12 Q. But it wasn't the next day?

13 A. No.

14 Q. Within a few hours?

15 A. **Well, yes.**

16 Q. When everything was still very fresh
17 in your mind, the details of the event?

18 A. **Pretty much, yes.**

19 Q. Also beyond talking to the nurse you
20 also spoke with the police that night?

21 A. Yes.

22 Q. And then again the next day?

23 A. Yes.

24 Q. And that was two different police
25 officers; is that correct?

1 A. Yes.

2 Q. Do you recall in that first interview
3 with the police actually being asked if you knew how
4 tall the two black men that came in to your house
5 were?

6 A. Yes.

7 Q. And do you recall giving a specific
8 height to the detective that night?

9 A. **I'd say I don't know. I don't
10 remember what specific height was given.**

11 Q. If I were to show you your statement
12 from that night would that refresh your recollection
13 as to what you told the detectives?

14 A. Sure.

15 MS. RADOSTA: May I approach the
16 witness?

17 THE COURT: You may.

18 MS. RADOSTA: Read it to yourself and
19 let me know when you're done.

20 THE WITNESS: Yes.

21 BY MS. RADOSTA:

22 Q. So do you recall talking to the
23 detective that night?

24 A. Yes.

25 Q. And do you recall telling the

1 detective that night that the, that both of the

2 black men were about five, seven, or five, eight?

3 A. Yes.

4 Q. You gave that statement that night,
5 correct, right at the hospital?

6 A. **I gave two statements. I don't know.**

7 Q. You gave a shorter statement and then
8 a much longer statement; is that your recollection?

9 A. Yes.

10 Q. The shorter statement was at the
11 hospital?

12 A. **I don't know if it was at the house or
13 the hospital. I don't remember.**

14 Q. The one -- that's fine.

15 You gave two statements within about
16 24 hours of the incident happening?

17 A. Yes.

18 Q. In one of them you told the detectives
19 that both black men were five, seven or five, eight;
20 is that right?

21 A. Yes.

22 MS. RADOSTA: I have nothing further
23 judge.

24 THE COURT: Re-direct?

25 MR. TURNER: Briefly.

RE-EXAMINATION

2 BY MS. KOLLINS:

3 Q. How much opportunity did you have to
4 observe the black male that didn't sexually assault
5 you?

6 A. **Not very long.**

7 Q. As you sit here today how sure are you
8 that it was the same black male that assaulted you
9 every single time?

10 A. **How sure am I?**

11 Q. Yes.

12 A. **Very sure.**

13 Q. Is there any question in your mind?

14 A. No.

15 MR. TURNER: No further questions.

16 THE COURT: Anything further?

17 MS. RADOSTA: A couple questions.

RE-EXAMINATION

22 BY MS. RADOSTA:

23 Q. You also testified at a preliminary
24 hearing in this particular incident, didn't you?

25 A. Yes.

1. Q. And do you recall testifying at the
2 preliminary hearing that the rapist was five foot
3 eight?

4 A. I don't recall.

5 Q. If I were to show you your testimony
6 from that hearing would that refresh your memory?

7 A. Maybe.

8 THE COURT: You've already indicated
9 that what it says.

10 Is that what it says?

11 MS. RADOSTA: Yes.

12 THE COURT: Do you recall that at all,
13 ma'am?

14 THE WITNESS: Today, I didn't agree.

15 THE COURT: Next question.

16 MS. RADOSTA: Nothing further.

17 THE COURT: Anything further?

18 MS. KOLLINS: Nothing.

19 THE COURT: Thank you, you're excused.

20 Is it proper to break a little early?

21 Do you have anything that's

22 indispensable?

23 MS. KOLLINS: I don't have anything I
24 can accomplish in 10 minutes.

25 [Whereupon, the court admonished the

1 jury.]

2 THE COURT: Ladies and Gentlemen, you
3 might see see counsel as you come and go. Tomorrow
4 when you come in court they may be outside and you
5 may say good afternoon. They may ignore you.

6 They aren't being rude to you. They
7 are to have they contact with you whatsoever. As
8 officers of the court they are definitely bound by
9 the admonition. Please understand there can be no
10 dialogue between you and them, even how are you
11 doing? Thank you.

12 Court is adjourned.

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21 ATTEST that this is a true and

22 complete transcript of the proceedings.

23

24

25


J. A. D'Amato CCR 17

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DISTRICT COURT

FILED

CLARK COUNTY, NEVADA, 2008 NOV 25 A 8:26

THE STATE OF NEVADA,
Plaintiff,
vs.
JOSEPH ALEXANDER HENDERSON,
Defendant.

E. J. [Signature]
CLERK OF THE COURT

No. C212968
Dept. XIV

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DONALD M. MOSLEY

June 26, 2008
1:40 p.m.
Department XIV

APPEARANCES:

For the State:
MS. STACY KOLLINS
MR. BRAD TURNER
Deputy District Attorneys

For the Defendant:
MS. VALERIE RADOSTA
MR. NORMAN REED
Deputy Public Defenders

Reported by:
Joseph A. D'Amato
Nevada CCR 17

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NOV 25 2008

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

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Joseph A. D'Amato
Nevada CCR 17

2

THE COURT: The continuation of State of Nevada versus Joseph A. Henderson. Record reflect the presence of the Defendant, his counsel, Mr. Reed and Ms. Radosta, Ms. Kollins and Mr. Turner for the state.

The absence of the jury is noted.

Do we have our prospective witness, present, Ms. Kollins?

MS. KOLLINS: We do, yes.

THE COURT: Come forward and be sworn.

DAVID WELCH,
called as a witness herein, was sworn by the court clerk, was examined and testifies as follows:

THE COURT: State your name for the record.

THE WITNESS: David Welch.

THE COURT: I believe, Mr. Reed, you wanted to make some inquiry?

MR. REED: I did.

I assume, for the purposes of this record, the State will agree Mr. Welch is an expert in the area of DNA analysis?

MS. KOLLINS: Absolutely.

3

EXAMINATION

BY MR. REED:

Q. What I'd like to do, Mr. Welch, is ask you some questions particularly about extraction. First of all, let's start with in this case you did do an analysis of the breast swab; is that correct?

A. Yes.

Q. Can you explain to the Court the procedure that you used in extracting this from the sample to the swab itself?

A. Well, basically I examined a sexual assault kit. When we receive the kit and a request for analysis we also generally receive some information about the case.

We get hold of the nurse's notes and generally speaking the nurse will indicate certain things happen or didn't happen to give us an indication of what we want to sort of focus and concentrate on.

Again, this happened a while ago, but obviously there was some kind of indication that the breasts of the victim was licked by the suspect.

I performed an analysis. I analyzed the vaginal swab, it appears, and the breast swab.

4

Generally speaking, it varies, but generally when we talk about the breast swab there's usually a couple swabs taken by the nurse.

As part of our sort of policy at the time, in order to try to preserve evidence for a reanalysis if there were two breast swabs, I would just examine one of the swabs.

I'm going to make that assumption here.

Q. Stop you right there.

Is there something in your records that indicate that that's the procedure you actually employed or are you just going on how you normally do things?

A. I'm just going on how I normally would do it.

Q. So you would expect as to the vaginal swab you used one and one was remaining?

A. Do you mind if I look at my notes?

Q. Please.

A. Yeah. The same way with the vaginal swabs.

Generally speaking, there are -- to answer your question, breast swabs were extracted. That indicates to me there were probably two swabs

1 and because it was a breast swab generally I might
2 use two swabs.

3 I'm going to make the assumption I
4 used to two swabs here. The vaginal swabs,
5 generally four. However, sometimes there's two,
6 sometimes there's four, sometimes there's six.

7 It just depends. The same procedure
8 would hold.

9 In other words, we would try to
10 preserve some of the evidence and if there were four
11 I might examine one. I might examine two.

12 We always try to leave some for the
13 defense to reanalyze.

14 Q. Stop you there again. Let's -- you
15 started with the breast swab. Let me come back to
16 that for a moment.

17 Before we get into what method you
18 used do you recall or do the records reflect whether
19 there was anything left after you extracted the
20 breast swabs, the two breast swabs, was there any
21 material left to be re-extracted?

22 A. Okay. In my notes I indicate that
23 there is an extract left. As I -- as I mentioned in
24 part of my notes, swabs were extracted.

25 It was my opinion at that time that I

1 would take the two swabs, extract them both, because
2 I felt I would have a better chance of getting a
3 profile.

4 In a case like that where we consume
5 the entire -- both swabs, what we would do is we
6 would leave -- I'll end up with a certain amount of
7 liquid, very small amount, like a drop of liquid.

8 In my notes I indicate that an extract
9 was remaining. In other words, after I performed my
10 testing the breast swabs were consumed in the
11 analysis, but there was an extract that was left
12 that was put into a freezer at the DNA lab for
13 possible future examination.

14 Q. Let's go back to the vaginal swabs.
15 The same line of questioning.

16 Is there any sample left on the
17 vaginal swabs or were those just extracted and left
18 for the possibility of re-testing?

19 MS. KOLLINS: Apologize for
20 interrupting.

21 I thought this was limited to the
22 consumption of the breast swabbing. That was the
23 basis of the motion.

24 Am I missing something or are we going
25 through the extraction of everything?

1 MR. REED: It's as to everything --
2 well, two things.

3 We filed -- this is based on our
4 motion to dismiss or in the alternative to leave out
5 the breast swab.

6 I was provided an affidavit from Kathy
7 Gunther saying that there are some extractions that
8 are left, but I have a right to examine their expert
9 as to whether or not there's actual material left to
10 be re-extracted, which Mr. Welch may or may not be
11 able to answer those questions.

12 MS. KOLLINS: He didn't profile the
13 vaginal swabs because he found semen, no sperm. He
14 is really not the appropriate witness to ask this
15 question.

16 MR. REED: Extraction and profiling are
17 two different things.

18 THE COURT: The motion only goes to the
19 breast swabs. I guess as long as we're here --

20 MR. REED: I thought I was --

21 THE WITNESS: To answer your question,
22 according to my notes, again, there were probably
23 four breast swabs. I probably extracted one.

24 In my DNA summary chart off to the
25 side it says sufficient sample for re-test. I had

1 marked yes.

2 What that indicates to me is there
3 were vaginal swabs left. Whether there were two or
4 three, I don't have that in my notes.

5 There were certainly vaginal swabs
6 left.

7 With regard to the breast swabs, the
8 swabs were not left. However, there was an extract
9 that was placed into the Metro DNA vault freezer for
10 future analysis.

11 BY MR. REED:

12 Q. The only other line of questioning I
13 want to ask -- you may be able to cover it as to
14 both -- is the extraction process itself.

15 Do you recall what extraction process
16 that you deployed? Let's start with the breast
17 swab.

18 A. I can tell you this particular time
19 there was really only one extraction procedure that
20 I followed.

21 Q. Was that the organic extraction?

22 A. It was what we called a combination
23 extraction. In other words, the position of the
24 analysts working at the lab at that time was that
25 when you do an extraction you have several different

1 ways you can go.

2 You can perform an organic extraction.

3 That's one extraction procedure.

4 There is a kelex extraction. That's
5 another procedure.

6 THE COURT: What is your question?

7 MR. REED: My question was what
8 extraction method he deployed.

9 THE COURT: Just tell me what you did
10 with it right now.

11 How did you extract.

12 MR. REED: Which one did you use in
13 this case?

14 THE WITNESS: That's what I'm
15 explaining.

16 THE COURT: We don't need to know all
17 the possibilities. Tell us what you did.

18 How many extractions?

19 THE WITNESS: What we call a
20 combination is all of these things. In other words,
21 what I would do is take the swab, put it in sterile
22 PDS -- that's a saline solution -- let it sit
23 overnight.

24 The idea of doing that is if there are
25 any sperm or cells on the cotton tipped swab it sort

10

1 of eludes it off.

2 Then I performed a kelex as part of
3 the extraction which essentially binds metallic ions
4 that could interfere with the analysis.

5 I then did an organic extraction after
6 that and then I used something called a centricon
7 which concentrates the sample.

8 When I say a combination extraction, I
9 did all of those things, and the reason why is we
10 found through the years that when you spend this
11 time up front you come up with a purer sample when
12 you eventually get total amplification and analysis
13 of the sample.

14 BY MR. REED:

15 Q. Did you follow that same procedure
16 with the vaginal swabs?

17 A. Everything I did at that time it was a
18 combo extraction.

19 Q. That was the procedure you always
20 deployed for analyzing this type of material?

21 A. Yes.

22 Q. You did do the actual testing of the
23 breast sample, correct, of the swabbing of the
24 breast?

25 You did a comparison analysis on it?

1 A. I analyzed the breast swab.

2 Q. You did analyze the breast swab?

3 A. Yes.

4 Q. In doing that did you also send
5 through like a blank control to show that there
6 wasn't any foreign DNA in the test sample?

7 A. Yeah. Generally you would run a blank
8 at the beginning of your run.

9 Q. When you run a blank like that is that
10 also reflected in your notes?

11 Like you would have a chart that shows
12 it came out blank?

13 A. Yeah. There is a copy of electronic
14 data which would indicate that.

15 Q. Is that actually present in the
16 materials that you have with you today?

17 A. Yes.

18 MR. REED: Court's indulgence.
19 Pass the witness.

20 THE COURT: Anything further?

21 MS. KOLLINS: No, Your Honor.

22 THE COURT: You can step down. Thank
23 you.

24 What's your pleasure?

25 MR. REED: I would make a brief

12

1 argument and we can be done with this matter.

2 THE COURT: Go ahead.

3 MR. REED: According to the testimony
4 from Mr. Welch, the breast swabbing itself, that
5 material consumed -- albeit he did say there is an
6 actual swabbing that remains to be tested -- the
7 actual raw material itself is completely consumed.

8 In other words, we can't go back and
9 do our own extraction and we cannot go back and
10 re-test from the beginning from the original material
11 that was left at the scene. We can't reproduce it.

12 We have to assume, with all due
13 respect to Mr. Welch, everything was done correctly.

14 THE COURT: Excuse me. I thought he
15 said he had some extract, a drop or so left that
16 could be retested.

17 MS. KOLLINS: That is correct.

18 THE COURT: Isn't that what he said?

19 MR. REED: That is. We can get him to
20 clarify this.

21 My understanding of it is the
22 extraction itself was pulled from the original
23 material.

24 It is the processed, if you want to
25 call it that, material that would be available for

1 testing.

2 It isn't the original raw sample.

3 THE COURT: It's not the swab. It's
4 the extract?

5 MR. REED: Exactly.

6 Again, we don't have the right or
7 ability to actually go back and do that extract. We
8 didn't have the ability to have our expert be there
9 to see if Mr. Welch, when he's consuming all of the
10 material, actually did the process correctly.

11 Because of that we're going to renew
12 our motion to dismiss this case or in the
13 alternative that there be no testimony presented
14 concerning the breast swab.

15 THE COURT: Your argument is based on
16 the proposition that there's not a sufficient sample
17 so that Defense counsel can have their own
18 independent swab, and then it cannot be introduced
19 into evidence?

20 MR. REED: That's true.

21 THE COURT: Is there a law somewhere, a
22 case somewhere that supports that?

23 MR. REED: I'd ask for a Sanborn
24 Instruction. Sanborn versus State says the State
25 has to preserve -- when they have actual material

14

1 available for testing to preserve that material, and
2 they didn't do that.

3 THE COURT: There was an insufficient
4 amount. Isn't that the problem?

5 MR. REED: That's the analyst's
6 judgement. That's what Mr. Welch said.

7 Our expert never got a chance to look
8 at that to say, in my opinion, he could have
9 taken --

10 THE COURT: Just a moment.

11 What you're suggesting is an
12 impossibility. If the District Attorney's Office
13 sends some material somewhere across the country
14 that's been -- to have it analyzed you would have to
15 have an expert already on board and ready to
16 accompany the swab or to meet whoever it's going to
17 be delivered to to observe the process.

18 MR. REED: They don't send it across
19 the country. This was done in Las Vegas.

20 THE COURT: I've had them in Louisisna,
21 Texas, Utah.

22 MR. REED: I have, too.

23 This was done in Las Vegas. With my
24 client's life on the line, that's irrelevant.

25 THE COURT: If it's an impossibility,

1 it's not irrelevant.

2 You're not going to have an expert
3 hired ready to go and examine these swabs, if you
4 will, during the early part of the investigation.

5 In the first place your client is
6 probably not even named yet, oftentimes.

7 How would you do that?

8 MR. REED: Can I answer your question?

9 THE COURT: Wait and we'll let her
10 speak.

11 MR. REED: I can't help the fact that
12 the District Attorney and the forensic lab do these
13 things in this manner.

14 All I know is we have, in accordance
15 with one expert's opinion, a very small amount of a
16 critical piece of evidence that is on from the
17 licking of the breast that is impounded into
18 evidence.

19 He makes a judgment call, which is the
20 words he used, to consume all of that because he
21 felt like if he did he could get a sufficient enough
22 sample to do a comparison.

23 Now, I don't have any idea. From the
24 court's perspective, I can absolutely appreciate
25 we're not hired at that point. We don't have

16

1 experts at that point.

2 To protect my client's Constitutional
3 Rights, I'm not sure that is a factor. It is the
4 lab's obligation to know and to have a procedure in
5 place to handle this situation.

6 THE COURT: Okay.

7 MS. KOLLINS: Your Honor, at the time
8 that this extraction and profile was accomplished we
9 didn't know who the defendant was.

10 This is the very first extraction from
11 the original breast swabbing from the sexual assault
12 kit in November of 2004, four or five months before
13 we know who Joseph Henderson is.

14 He has no Constitutional Right to
15 re-test this evidence.

16 When our choice is consumption or no
17 profile, if the analyst, in his scientific judgment,
18 has to consume the sample in its entirety to get an
19 extraction to come up with a profile, then that's
20 what is accomplished.

21 There is an extraction there that
22 their expert, from August of last year, from all of
23 2007, when they came in here and made the
24 representation that they were going to re-look at
25 everything could have re-looked at.

1 They said, in April of 2008, at a
2 calendar call that they had made the strategic
3 decision not to re-test everything. Not because
4 they had been prevented from it, but because that
5 was a strategic decision.

6 That was reflected in the minutes in
7 the case.

8 You can't come in here the fourth day
9 of a jury trial with a pending motion to dismiss
10 based on our inability to re-test evidence, the
11 destruction thereof, when it has not been destroyed.

12 They are not entitled to a Sanborn
13 Instruction either.

14 THE COURT: Let me ask one other thing.

15 Is it true, as I would surmise from
16 what's been said thus far, that the vaginal swabs
17 were tested and they confirmed the same result as
18 the swabs from the breast area?

19 MS. KOLLINS: The vaginal swabs as well
20 as the swabbings from a bed sheet, that is correct.

21 THE COURT: They tested identically?

22 MS. KOLLINS: Correct.

23 THE COURT: Well, I understand your
24 argument, Mr. Reed. What you're asking is an
25 impossibility.

1 I don't think that we can expect the
2 State to do things that are so extraordinary just on
3 the possibility that something would be done
4 ultimately with the swabs or even the extracts.

5 If there is a showing of bad faith on
6 the part of the testers or the District Attorney or
7 any authority, then we might have something to
8 discuss. Certainly no indication of that.

9 Your motion will be denied.

10 Bring the jury in.

11 MS. KOLLINS: May we approach, Your
12 Honor?

13 THE COURT: Yes, please.

14 [Whereupon, the jury entered the
15 courtroom.]

16 THE COURT: Ms. Clerk, will you call
17 the roll of the jury, please?

18 [Whereupon, the court clerk called the
19 roll of the jury.]

20 COURT CLERK: The panel is present.

21 THE COURT: Very good. Good afternoon,
22 Ladies and Gentlemen. We had a housekeeping matter
23 to resolve.

24 Will counsel call the first witness of
25 the day, please?

1 MS. KOLLINS: State calls David Welch.

2
3
4 DAVID WELCH,
5 re-called as a witness herein, was sworn by the
6 court clerk, was examined and testified as follows:
7

8

9

EXAMINATION

10 BY MS. KOLLINS:

11 Q. Good afternoon. Would you state your
12 full name and spell your last for the record?

13 A. **My name is David W-e-l-c-h.**

14 Q. As a profession what have you done for
15 your career?

16 A. **I'm retired now. I was a forensic
17 scientist with the Las Vegas Metropolitan Police
18 Department for 30 years.**

19 Q. In what capacities did you function at
20 Metro?

21 A. **I worked in a number of different
22 areas through my career. I spent about 10 years
23 doing DNA.**

24 **However, I also did crime scene work,
25 arson work, toxicology and a variety of different**

1 **things.**

2 Q. Were your last 10 years or so with
3 Metro involved with DNA analysis?

4 A. **Yes.**

5 Q. What special training do you have that
6 qualifies you to perform DNA analysis, comparisons
7 and profiling?

8 A. **Well, I received my Bachelor's of
9 Science Degree from the University of Nevada Las
10 Vegas where I majored in biology.**

11 **I then attended graduate school at
12 Northeastern University in Boston, Massachusetts,
13 where I received a Master of Science Degree in
14 forensic chemistry.**

15 **As I stated, I have 30 years working
16 experience as a practicing forensic scientist and
17 during those 30 years I've worked on thousands of
18 cases.**

19 **Over that period of 30 years I've
20 attended numerous specialized training courses,
21 scientific symposiums and meetings.**

22 **I probably had six or seven
23 specialized courses in DNA analysis and DNA typing.**

24 **Over that 30 year period I've
25 testified in the courts of the State of Nevada over**

1 seven hundred times. I would say approximately 50
2 times in district courts regarding DNA analysis.

3 I was at that time a member of the
4 American academy of forensic scientists and I was
5 also certified as a generalist in the field of the
6 criminalistics by the American Board of
7 Criminalistics and a specialist in molecular
8 biology.

9 Q. You retired from Metro when?

10 A. The 1st of the year.

11 Q. This year?

12 A. Yes.

13 Q. And you returned pursuant to subpoena
14 to testify in cases you worked up while an analyst
15 for Metro, correct?

16 A. Yes.

17 Q. Did you participate in the startup of
18 the Metro lab in their DNA analysis section?

19 A. Yes. I was their only start at the
20 laboratory.

21 Q. You worked with several other analysts
22 there over the course of your career?

23 A. Yes.

24 Q. I want to draw your attention first of
25 all -- strike that. Excuse me.

1 Can you give the Ladies and Gentlemen
2 of the Jury a little bit of an idea what DNA is?

3 A. Sure. If I can use -- the drawing
4 tablet.

5 Q. There are some markers up there for
6 you.

7 A. I'd like to give you a very brief
8 introduction into the DNA analysis. You'll
9 eventually be seeing something call DNA summary
10 charts.

11 They look very complicated. They
12 really aren't. When you first see them they are a
13 series of sometimes hundreds of numbers. It kind of
14 like blows your mind a little bit.

15 I'll spend maybe 10 minutes telling
16 you a little bit about DNA analysis and what those
17 numbers mean so when you eventually see the DNA
18 summary chart you have an idea of what's going on.

19 How do we make the comparisons?

20 First of all, the human body is
21 composed of trillions of cells. If you looked at
22 these cells under the microscope most who have them
23 look something like that.

24 There is a center portion of the cell
25 that's called the nucleus. In cells that look like

1 this this is where the DNA is located.

2 There are also some specialized cells
3 in the human body we'll be talking about. One of
4 those is a sperm cell.

5 Again, it is the head of the sperm
6 that contains the DNA information that we're
7 interested in.

8 If I were to look -- say I'm looking
9 at one of these cells. This is a typical skin cell.
10 It has a center portion like that called the
11 nucleus.

12 If I blow that little center portion
13 up what I would see if I looked under a microscope,
14 there are 23 pairs of things we call chromosomes.
15 They come in pairs.

16 Under a microscope they look sort of
17 something like that, like an H with a little check
18 in between. There's 23 pairs of these things we
19 call chromosomes.

20 In each of these 23 pairs of
21 chromosomes is the DNA that we're talking about.

22 Again I'm going to take one of those
23 chromosome pairs and blow it up a nd that it's where
24 we find the DNA.

25 The chromosomes come in pairs because

1 we inherit half of who we are from our mom and half
2 of who we are from our dad.

3 The reason they are in pairs is the
4 genetic information that you are comes from both
5 your mom and your dad.

6 If I look more closely into one of
7 those chromosome pairs what I find is that DNA is
8 sort of string like and twisted string, in nature.
9 It looks like a twisted trinket.

10 The DNA sort of comes down in each of
11 those chromosomes like a little string like fax.
12 Then what happens is we see it kind of balls up a
13 bit. There's a lot of information there.

14 It strings down little bit more, balls
15 up a little bit and so on and so forth.

16 These little areas where the DNA balls
17 up are called genes. In these 23 pairs of
18 chromosomes there's a hundred thousand genes.

19 The genes are the genetic information
20 that make us who we are.

21 Are you male, are you female, do you
22 have blue eyes, do you have brown eyes, are you five
23 feet tall, six feet tall?

24 That's the information that's packed
25 into these genes.

1 From a forensic DNA point of view we
2 don't really look at these areas. There's legal
3 reasons that we don't do that.

4 What we're interested in as we look at
5 certain other areas of the DNA where we see
6 variations amongst individuals, these areas that
7 we're generally looking at are sort of in between
8 these genes.

9 It would be like this area right here
10 that we would be looking at. Now, what we've found
11 is we can target certain of these chromosomes to
12 look at.

13 If you look at one of these DNA
14 summary charts, sometimes you'll see letter
15 designations like D3 S13, 58. That is an example.

16 Well, the D, when you talk about
17 genetics and DNA typing, you represent the
18 chromosome number three. It's a way for scientists
19 to talk to other scientists.

20 If I call somebody on the phone and I
21 say I'm looking at chromosome number three,
22 locations, it's like an address on that chromosome,
23 S1358, the other scientist I'm talking to those
24 where I'm looking.

25 If he wants to look at the same spot

1 he can.

2 There's some older technology that's
3 used and the reason it's used is it's been around
4 for such a long time. There's something called TOP
5 which is actually another chromosome location on
6 chromosome. It's a site or location on chromosome
7 12.

8 Sometimes in these DNA summary charts
9 you're going to see this designation which is
10 chromosome three or if it's D5, chromosome five. If
11 it's D21, chromosome number 21.

12 Other times you see letter
13 designations like 2E position. Understand it's
14 another location on another chromosome.

15 In the DNA typing and testing we did
16 at this time, in 2004, we were looking at 14
17 different chromosomes.

18 What we were doing is we were looking
19 for -- looking at things we call Short Tandem
20 Repeats. You'll be hearing this terminology a lot.
21 It's designated STR, Short Tandem Repeats.

22 What a short tandem repeat is is the
23 DNA is composed basically of four different
24 substances. Adonine, which I'll put an A to
25 represent, guanine, G, thiamin, T, and citacine, C.

1 When we talk about DNA the strand of
2 the DNA is a billion of these different substances
3 long, but it's only composed of those four different
4 substances.

5 What we've found is that when we look
6 at DNA in certain areas we see these four substances
7 tend to repeat one another.

8 In other words, you see a GTC, and
9 then next grouping is a GTC. The next grouping is a
10 GTC. That's why it's called a short tandem repeat.

11 In other words, it's repeat units of
12 these four substances.

13 What we've found is that at these
14 different locations they vary amongst individuals.
15 So let's say this is -- I'll use a little box car as
16 an example.

17 Let's say I'm looking at this
18 particular chromosome. I'm looking at a particular
19 site and I'm looking at this area and what I want to
20 do is see how many Short Tandem Repeats are there.
21 I look at individual 1, that's one, this little box
22 represents this.

23 Let's say in one individual at that
24 particular location I look at chromosome number
25 three.

1 I look at that particular site. In
2 person number one what I find is there's four
3 repeats of this little box car in one half of the
4 chromosome and five repeats of the box car in the
5 other half of chromosome. So in DNA typing lingo
6 this person would be called a 4,5, because I see
7 four Short Tandem Repeats and five Short Tandem
8 Repeats.

9 Now I take and I look at another
10 individual, do their DNA typing, look at the same
11 site, same location of the same chromosome and in
12 another individual I find six and six.

13 That person would be called a 6, 6.
14 So it goes on and on.

15 I would take another individual at the
16 same site. That individual may be a 7,13. I look
17 at another individual, he may be a 5,12.

18 When you see all these numbers that's
19 what it represents. It represents the Short Tandem
20 Repeats that we're looking at and you'll see these
21 charts, little boxes with two numbers in them,
22 that's what it represents.

23 These numbers sort of are similar to
24 like conventional typing. Like most people know
25 what their ABO type is. We know we're either Type

1 A, Type B, Type AB or we're type O.

2 You can think of these numbers as
3 representing the same kind of thing. It's a
4 variation amongst a person.

5 It's a different DNA type, but instead
6 of looking at just like the ABO system, which is one
7 grouping, we're looking at 14 different chromosomes
8 and getting a lot more genetic information.

9 Let me end by saying you'll probably
10 be hearing something about statistics. Again, in
11 conventional typing we know you have to be a B, AB
12 or O. I'll throw the stat out. You find a Type B
13 individual in about 10 percent of the population.

14 If I were to represent this
15 statistically and I asked the question what is the
16 probability of finding a Type B person in the
17 general population the answer would be 10 percent or
18 we prefer to refer to it as about one in 10.

19 If I took a hundred people how many
20 people would you expect to have Type B blood?

21 One in 10, about 10 people. That's a
22 probability.

23 What is the probability of finding a
24 Type B person in a general population? That's one
25 factor.

1 Let's add another factor.

2 We also know most people are familiar
3 with you're either positive, you're A positive or B
4 negative.

5 Let's say this negative factor. I'm
6 going to tell you that's also about 10 percent of
7 the population.

8 Again, what is the chance of finding
9 the negative factor in the general population?
10 About one in 10.

11 Let's combine it together.

12 What if I want to say what is the
13 probability of finding a B negative individual in
14 the population?

15 10 percent of a hundred people is 10,
16 but then 10 percent of 10 for the negative is one.

17 The probability is one percent of the
18 population.

19 Another way to sort of say that is
20 what is the probability in a hundred people of
21 finding a B negative individual?

22 One in a hundred. That's how we get
23 the numbers.

24 When we're talking about DNA, instead
25 of talking about two factors we're talking about 26

1 factors.

2 Now that is one percent, instead of
3 being one in a hundred. If I look at another piece
4 of information, now it's one in a thousand.

5 Then it could theoretically be 26
6 zeroes behind the probability which reaches a point
7 where it then becomes identity.

8 You've far surpassed the population of
9 the earth. When you see these big numbers you'll be
10 hearing about, that's how we do it.

11 The reason it's so big is instead of
12 looking at two factors we're looking at 26 factors.

13 Q. What kind of material do you expect to
14 be able to discern a DNA profile from?

15 A. Cells, human, any type of cells,
16 epithelial cells, vaginal cells, there's something
17 called buccal swabs, which you'll hear about, which
18 is the swabbing of the inside of your cheek, sperm,
19 just a number of things.

20 Q. Epithelial cells being skin cells?

21 A. Yes.

22 Q. Blood?

23 A. Blood, yes, hair.

24 Q. Hair?

25 A. Tissue, bone, you know, there's some

1 DNA in bone. We find bodies out in the desert and
2 we can get a DNA profile from the bone if it's in
3 sufficient good shape.

4 Q. You said semen, but that would
5 actually be the spermatozoa from semen, not just the
6 seminal fluid?

7 A. Yes. For the male profile it's the
8 sperm in the semen.

9 Q. What types of communities use DNA
10 analysis?

11 It's not strictly used in the criminal
12 community, is it?

13 A. No.

14 I think it's used pretty much
15 universally in any kind of medical-related field,
16 genetics, medicine.

17 Q. Paternity?

18 A. Paternity testing, yes.

19 Q. How does DNA permit you to make an
20 identification of an individual other than what
21 you've just gone through, briefly?

22 A. As I mentioned, you'll be seeing
23 something called a DNA similar chart. It's a chart
24 that has a number of boxes on it. You'll see a
25 series of these numbers in the charts.

1 If I were to try to make a comparison
2 between a blood sample using conventional methods
3 like the B negative blood -- let's say I have blood
4 on a suspect's shirt and we take and we think this
5 person did something and we get a blood sample from
6 him and we find out he's a B negative person and
7 there's B negative blood on the shirt.

8 There is a good indication that that
9 person might be involved with the crime.

10 In DNA analysis, instead of those two
11 factors we're looking at 26 factors, actually 28
12 factors, and each of those numbers, like I say,
13 there will be a series of numbers, 26 numbers and a
14 couple of letters, and if they all match up it's
15 like this person is B, the blood is B.

16 This person is negative, this is
17 negative.

18 Well, in DNA analysis it would be this
19 person is a 15, 17, the blood here is a 15, 1, or
20 the sperm is a 15, 17.

21 This person is an 18, 20, the blood is
22 an 18, 20. This person is a 3, 4, the blood here
23 is, for or the semen, the sperm here is a 3, 4.

24 We look at all the numbers and
25 somewhere along the line if they all match it's

1 pretty much an identity. We can say this is in fact
2 the person.

3 Q. Probably be easier once we get to your
4 charting in this case. Can two people have the same
5 DNA profile?

6 A. The only -- yes.

7 One rule, one exception. Identical
8 twins can have the same DNA. Our fingerprint file
9 would argue that they do a better job because they
10 can separate identical twins by their prints, but we
11 can't separate identical twins by DNA.

12 The only exception is identical twins
13 have the same DNA profile.

14 Q. Can you explain to us overall how --
15 when you were a forensic analyst how a piece of
16 evidence would come to you and the procedure of how
17 you would receive that evidence and what you would
18 do?

19 A. Yes.

20 Basically what would happen generally
21 is we at the laboratory would receive a request from
22 a detective. If it's a homicide case the request
23 came from a homicide detective.

24 If it's a sexual assault case the
25 request came from a sexual assault detective.

1 On this request they would ask us to
2 look at a certain -- certain types of evidence. In
3 this particular case I was asked to look at a sexual
4 assault kit from a Julie Kim.

5 At that point I would call the
6 evidence up from our evidence vault, have it
7 delivered to the laboratory. I would then analyze
8 the evidence which could take from a day to maybe a
9 week or even longer.

10 I would analyze the evidence. After
11 the analysis is completed I would seal the evidence
12 back up and send it back to our evidence vault and
13 then generate a formal report for the detective and
14 the DA's office and anybody else who is interested
15 in that.

16 Q. That report goes through some kind of
17 peer review before it's finally submitted?

18 A. Yes.

19 A policy of the laboratory at this
20 particular time was I was the analyst that worked on
21 this particular case.

22 After I'm done with the case and the
23 formal report is typed we had a policy and procedure
24 where we would have a review by three other people
25 to make sure that no mistakes were made or to try to

1 catch any mistakes that were made.

2 After I finished the report the report
3 and all the data would go for what we call a
4 technical review. One of the other analysts in the
5 laboratory would look at my data and just -- it's
6 okay, or hey, did you think about this or if you
7 found any hairs, point it out.

8 Then there would be an administrative
9 review where another analyst would then review
10 everything again to see if they could find any
11 mistakes.

12 Then there would be another review
13 called a document review where there would be
14 another analyst that would look at the whole report
15 and see if they could find any mistakes.

16 This was sort of a system of checks
17 and balances that we had at our laboratory to try to
18 avoid the possibility of making a mistake.

19 Any time you have humans involved with
20 the process there's always a possibility of a
21 mistake being made.

22 This was our procedure for trying to
23 eliminate any mistakes that we could.

24 MS. KOLLINS: At this point it would be
25 a good time to -- for me to put the stipulation that

1 I have with Defense counsel on the record.

2 The stipulation is that the sexual
3 assault kit taken from Julie Kim impounded under
4 04088 -- excuse me -- 0340903-012 is in a sealed
5 condition in the evidence vault at Metro and it is
6 necessary it remain there and that it needs to
7 remain refrigerated so we opted not to bring it to
8 court today to have it opened up.

9 Everybody has concluded there's no
10 reason for that -- that Mr. Welch and Ms. Gunther
11 can testify to their testing and re-sealing of that
12 as well as the results.

13 MR. REED: That's correct, judge.

14 THE COURT: Thank you. Go ahead.

15 BY MS. KOLLINS:

16 Q. Did you receive a sexual assault kit
17 bearing those identifiers on it that I just
18 described as part of the our stipulation?

19 A. Yes.

20 Q. When did you receive that?

21 A. May I refer to my notes?

22 Q. If it would refresh your recollection,
23 without any objection from defense counsel.

24 MR. REED: No objection.

25 THE WITNESS: According to my notes I

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1 received or started the case on September 3, '04.

2 BY MS. KOLLINS:

3 Q. You received that kit almost
4 immediately from UMC; that is your understanding?

5 A. Yes.

6 Q. It was delivered to the lab by one
7 Detective Melissa Wilds, if you know?

8 A. I don't recall if it was delivered or
9 I called it up. Very rarely would a sexual assault
10 kit be delivered to the lab, but it has happened on
11 occasion.

12 Q. If that kit had not come to you in a
13 sealed condition would you have tested it?

14 A. No.

15 Our policy was if the kit was not in a
16 sealed condition we notify the detective and not
17 work on the kit.

18 Q. You mean sealed, everything intact,
19 the internal swabs intact as well as the outer box
20 or bag intact?

21 A. Yeah, pretty much. If there seemed to
22 be anything out of place, we would have contacted
23 the detective.

24 Q. Or at least annotate any abnormality?

25 A. Yes.

1 Q. What was contained within the sexual
2 assault kit that you received from -- pursuant to
3 the -- to this event number?

4 A. Generally the kits contained -- each
5 kit contains about the same amount of information
6 and samples.

7 There would be forms written out by
8 the nurse indicating what happened to give us some
9 information about what happened or what allegedly
10 happened, time frames, whether the victim, if it was
11 a female, had taken a shower or bath or reported the
12 crime a week after the incident or two hours after
13 the incident.

14 That's important information for us.

15 We usually have information from the
16 nurse that relates information from the victim that
17 gives us sort of a little idea of where we want to
18 go with the analysis of the kit.

19 Generally there's blood samples,
20 generally there's buccal swabs. In the case of a
21 female there's vaginal swabs, rectal swabs, oral
22 swabs.

23 Then there's sort of miscellaneous
24 swabs that if the victim was bitten there might be
25 bite mark swabs, if the victim was licked, there

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1 might be swabs from the area that the perpetrator
2 licked the victim.

3 There could be secretion swabs in
4 there, too. Sometimes there are panties and a
5 variety of other things.

6 Generally that's what's in it.

7 Q. Specifically in Julie Kim's kit did
8 you designate items A through J that you received in
9 a sealed condition?

10 A. I did.

11 Q. Could you list those items for the
12 record for us?

13 A. I have a sealed sexual evidence,
14 sexual assault evidence collection kit from Julie
15 Kim. I labeled it DWD1. If you looked at the box
16 you'd see DWD1 on it.

17 I listed A as a consent form, B,
18 assault form C, anatomical drawings, D, blood
19 samples, E, buccal swabs, F, vaginal swabs, G,
20 rectal swabs, H, oral swabs, J, debris/bite
21 marks/secretions.

22 Q. Item E, the buccal swab, that is a
23 buccal swab of the victim?

24 A. Yes.

25 Q. And what would you have done with

1 that?

2 A. The buccal swab from the victim would
3 have been used as a reference standard. In other
4 words, this is allegedly at this point a sexual
5 assault.

6 We have the victim, female, Julie Kim.
7 In order to proceed with analysis we want to know
8 what her DNA type is.

9 I would use the buccal swab to get her
10 DNA profile to make the comparison.

11 Q. You did that in this case?

12 A. Yes.

13 Q. Came up with a DNA profile for Julie
14 Kim?

15 A. I did.

16 Q. What other items of evidence did you
17 look at contained within that kit?

18 A. There were -- at this point in time I
19 concentrated on -- there was a swab within the kit
20 that was identified as breast swabs.

21 According to the nurse's notes, I had
22 some indication that perhaps there was licking of
23 the victim on the breast, so the nurse took breast
24 swabs from the breasts.

25 I then also looked at at the vaginal

1 swabs, the oral swabs and rectal swabs of the
2 victim.

3 Q. Knowing that someone had been licked
4 on the skin by another individual, what type of
5 biological fluid or DNA evidence would you be
6 looking for on that swab?

7 A. There would be -- there's a transfer
8 of cells from inside of your mouth and your tongue
9 onto the skin of the victim.

10 Q. Epithelial cells?

11 A. They are commonly referred to as
12 epithelial cells, yes.

13 Q. On the vaginal swabs you were looking
14 for?

15 A. On the vaginal swabs I'm looking for,
16 you would expect to find the victim's cells,
17 epithelial or vaginal cells on the vaginal swab, of
18 course, but what we're looking for is the presence
19 of semen and sperm to see if we can get a profile of
20 the suspects or of the male suspects in this
21 particular case.

22 Q. Just because there was no seminal
23 profile of this case can we get that out of the way
24 first?

25 You did look for semen with sperm on

1 the vaginal swabs and did not see any sperm at that
2 time, correct?

3 A. Yeah.

4 You know, at this particular time
5 there was -- generally speaking there would be four
6 vaginal swabs. It was kind of -- it was a policy
7 where we would always try to save samples, if we
8 could.

9 In other words, it was up to the
10 analyst if a decision was made by me that in a
11 particular case there were only two swabs and if I
12 thought there was a very small amount of semen
13 there, I might consume both swabs to try to get a
14 profile.

15 Whenever possible we would always try
16 to save some of the evidence for the defense, if
17 they wanted, for a time in the future where
18 reanalysis was requested.

19 In this particular case I probably
20 looked at one of the swabs. According to my notes,
21 I didn't observe any spermatozoa, although I could
22 determine semen was present.

23 Q. Is that unusual?

24 A. No, not unusual at all.

25 Q. Because is sperm necessarily equally

1 distributed within seminal fluid?

2 A. No, it's not.

3 If you were to take a semen stain just
4 picture it being circular, in nature, and quadrant
5 it off, you might find in one particular area of the
6 stain you may not find any sperm.

7 If you looked at another area of the
8 stain you may find those of sperm. It's the same
9 way with the nurse and their swabbing.

10 In other words, they will swab a
11 couple of swabs at a time and maybe they will swab a
12 couple swabs at a time and then they put those into
13 the kit, then they will take another couple of
14 swabs.

15 If we were to look at those for swabs,
16 individually, we may find a lot of sperm on one
17 swab, nothing or very little on another swab, but
18 still we want to retain a sample for the defense, if
19 possible.

20 In this case the other issue or
21 situation was I got a profile from the breast swabs.
22 At this particular time that was all we really
23 needed.

24 If, in a future date, it became
25 critical to find sperm on the other vaginal swabs, I

1 could have gone back and re-extracted the other
2 swabs and tried it on a profile, if I wanted to.

3 Again, I've since retired and somebody
4 else worked on this case after myself.

5 Q. You plan an extraction on the breast
6 swabs?

7 A. Yes.

8 Q. And did that demand a consumption of
9 those breasts swab samples?

10 A. Yes.

11 My experience in the past, having done
12 this for many many years, is that there isn't
13 usually a lot of foreign DNA on the breast swabs or
14 lickings of the victim.

15 Many times before I would try
16 analyzing one swab and got no results or poor
17 results.

18 It was just my policy that if I got
19 breast swabs, I consumed the two swabs because that
20 was my best shot at getting some type of typing
21 results.

22 Q. And there is an extraction that
23 remains at that, correct?

24 A. Yes.

25 Q. Were you able to get a pulled profile

1 out of what you extracted from the breast swabs?

2 A. I was.

3 Q. Did you document that in a report?

4 A. I did.

5 Q. Did you chart that report?

6 A. I did.

7 Q. Is your screen on?

8 A. That's better.

9 Q. I apologize. Every one of the cameras
10 is different.

11 We discussed the reference card of
12 Julie Kim and her known numbers. Do you see those
13 on there, Mr. Welch, on that chart?

14 A. Yes.

15 You can see that the DNA summary chart
16 is a series of four samples. The first one, it says
17 buccal swab, Julie Kim.

18 Then you see a series of 14 little
19 boxes. Those are the different chromosomes that I
20 was explaining we would look at.

21 You can see that her profile, if you
22 look at the first box in D3, she's what we would
23 call a 15, 16. VWA, again is another chromosome
24 location except we're using older terminology. She
25 would be a 14, 18.

1 FGA, she's a 19, 23. The third, fourth
2 box over it says amilo [phonetic], you see there's
3 an XX there.

4 Q. Yes.

5 A. We distinguish males from females. If
6 you're a female, it's XX. If you're a male,
7 you're XY.

8 Again, you can look across and those
9 series of numbers represent her DNA profile.

10 Q. From the known person of Julie Kim and
11 again you indicated on your chart on your
12 documentation a sufficient sample for re-test,
13 correct?

14 A. Yes.

15 Q. The vaginal swabs you just included
16 Julie Kim as a source, then, there was no profile
17 accomplished by you of any foreign DNA at that
18 point, correct, because you found no sperm?

19 A. If we look at the next two blocks what
20 we do in the lab is we have the ability to separate
21 the sperm from the female epithelial cells, the
22 vaginal cells.

23 In the separation we can then generate
24 a profile of the female and we try to generate a
25 profile of the male.

1 You can see that it says vaginal
2 swabs, Julie Kim, epithelial E1. That means that's
3 her vaginal cells. You can see, if you look at the
4 series of numbers, that they match her.

5 It's a good indication that nothing in
6 the kit was switched with perhaps another person.

7 In other words, it's her vaginal swab.

8 Now you look at the next grouping. It
9 says sperm fraction E2. You can see I have some
10 results there, but a lot of inconclusives, a lot of
11 no results, a lot of her DNA in what I call the
12 sperm fraction, but again when you looked at the
13 sperm with the vaginal cells under the microscope I
14 didn't see any sperm.

15 There could have been something there,
16 but so little that I just didn't get any typing
17 results.

18 I would say those results -- it
19 indicates that there is a mixture. The major source
20 is Julie Kim, but essentially there isn't very good
21 information there.

22 Q. So when that information -- I'm sorry
23 to interrupt you -- in your opinion, was not
24 reportable in terms of making an -- submitting a
25 profile you did not make that part of your ultimate

1 profile in this case?

2 In other words, that was excluded from
3 your final report?

4 A. I gave it a shot to see if I got any
5 results, and I didn't. However, I also analyzed the
6 breast swab at the same time and I got a great male
7 profile. At this point in time there was not a
8 suspect.

9 I had a male profile. There was no
10 need for me to do -- analyze anything else, because
11 I had the male profile.

12 We didn't know who the male was. He
13 was just described as an unknown male. If you look
14 at the breast swabs of Julie Kim, you see that there
15 is -- if you look at her profile, let's say the
16 first block, she's a 15, 16, the breast swabs were
17 15, 17.

18 In the VWA she was a 14, 18. The
19 breast swabs were 15, 19. If you go right along the
20 line there you see all those numbers don't match.

21 The other thing was you look at the
22 amalo, the fourth box over, you see it's an XY.
23 That indicates to me that it's a male.

24 This is a profile of somebody that
25 isn't Julie Kim who is a male so it was from whoever

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1 licked her on the breast.

2 At this point in time I have a nice
3 male profile and at that time he's described as
4 unknown male.

5 Where is the source? Unknown male.

6 Q. You submitted your results or
7 finalized them in your report when?

8 When did you finalize this report?

9 A. The report was finalized on November
10 16, 2004.

11 MS. KOLLINS: Approach your clerk?

12 THE COURT: You may.

13 MS. KOLLINS: State moves the admission
14 of State's proposed 155, the chart which the analyst
15 has been testifying from.

16 MR. REED: Let me see that.

17 MS. KOLLINS: That copy has been
18 provided to defense previously.

19 MR. REED: No objection.

20 THE COURT: Received.

21 BY MS. KOLLINS:

22 Q. So your conclusions were drawn two
23 months after September 2003, correct?

24 A. Yes.

25 Q. And you had come up with this unknown

1 male profile and it was just that, unknown.

2 You had no one to compare those
3 results to at that time?

4 A. Correct.

5 Q. No one by the name of Joseph Henderson
6 had been given to you at that time?

7 A. No.

8 Q. No known standard of Joseph Henderson
9 had been given to you at that time to compare to the
10 profile of the unknown male in your November '04
11 report?

12 A. That's correct.

13 Q. Did you then in fact give that unknown
14 profile to another analyst within the Las Vegas
15 Metropolitan Police forensic laboratory by the name
16 of Kathy Gunther?

17 A. To be honest, I don't remember what
18 the sequence was after that. I worked on the case.

19 There was a period of time where I
20 chose to not work in DNA and work in another area,
21 and perhaps it was during that time that they just
22 decided that I wasn't going to come back and re-work
23 this case.

24 They gave it to an analyst that was
25 working in DNA at that time, which happened to be

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1 Ms. Gunther.

2 Q. My point is you did no more work to
3 match that unknown suspect to any known profile?

4 A. That's correct.

5 Q. Once you documented your findings you
6 had no further responsibility to match that to
7 anyone?

8 A. Right.

9 MS. KOLLINS: Pass the witness.

10 THE COURT: Cross-examination.

11

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EXAMINATION

16 BY MR. REED:

17 Q. So you basically passed the torch to
18 Ms. Gunther?

19 A. I did. Yes, I did.

20 Q. I want to go back and ask you some
21 questions generally about DNA.
22 First of all, as far as your
23 experiments, you don't make any conclusions as to
24 how the DNA gets there?

25 A. No.

1 Q. Whatever information you might have
2 you don't know if it's true. It's second-hand
3 hearsay?

4 A. **Correct.**

5 Q. Just to try and help you maybe do
6 something better scientifically to get accurate
7 results?

8 A. **Right.**

9 **In other words, as I mentioned we have**
10 **access to the nurse's notes and they have some**
11 **general information about what happened.**

12 **We sort of rely on that a little bit**
13 **to make the determinations of how to approach the**
14 **case.**

15 **If need be, and something isn't clear,**
16 **I could call a detective or look at the detective's**
17 **notes to get other additional information.**

18 **I have no knowledge of what happened.**

19 Q. As far as the timing in which DNA is
20 present, you can't draw any conclusions as to how
21 long the DNA was placed there?

22 A. **Correct.**

23 Q. It could be there for who knows how
24 long?

25 A. **Right.**

1 Q. Are there cases where DNA has been
2 extracted from things even for past thousands of
3 years, right?

4 A. **Yeah.**

5 **If you allow me I would say, yeah. I**
6 **mean, DNA -- as I mentioned, we found bones out in**
7 **the desert which are probably years if not decades**
8 **old where we were sometimes able to get DNA off of**
9 **that.**

10 **I would just say in the case of a**
11 **sexual assault, if there is semen present in the**
12 **vaginal vault, I mean there is drainage that occurs**
13 **over a period of time, and to try to answer your**
14 **question -- in other words, I mean you'd expect to**
15 **find semen if the examination was performed a couple**
16 **hours later.**

17 **However, if the woman took a bath and**
18 **the examination was performed three weeks later, you**
19 **would certainly not expect to find any DNA.**

20 **That's where the nurse's notes help us**
21 **out, give us an idea of what's going on.**

22 Q. With that information you can't draw
23 conclusions as to how long an item may have been
24 there?

25 A. **No.**

1 Q. Or how it was placed there?

2 A. **Yes, you're correct.**

3 Q. I want to to ask you some questions
4 concerning the analysis itself.

5 Can I bring him some water? I think
6 he would like some.

7 THE WITNESS: Could I get a glass of
8 water?

9 THE COURT: My balliff will take care
10 of it.

11 MR. REED: Do you want to wait a
12 minute?

13 THE WITNESS: No.

14 BY MR. REED:

15 Q. There is some judgment involved in
16 analyzing the DNA?

17 A. **Yes.**

18 Q. I think you already told the jury
19 that, right?

20 A. **Yes.**

21 Q. There's not a situation where
22 everything can be read in the rule book. You have
23 to apply your own judgment based on your knowledge
24 and training in that field?

25 A. **Yes. So far a computer hasn't**

1 **replaced us, yes.**

2 Q. I guess this is along the lines of
3 some of us watch CSI where they plug the stuff in
4 and there is a picture of the guy that comes out on
5 the other side?

6 A. **Yeah. There's obviously an**
7 **interpretation of the data. The instruments we use**
8 **are very sophisticated, all computer augmented.**

9 **They certainly help with the analysis,**
10 **but the bottom line is there's an interpretation to**
11 **be made and as I stated, even the interpretation is**
12 **a little subjective.**

13 **That's why generally at our laboratory**
14 **at this time we have three or four other people look**
15 **at it just to make sure that the interpretation was**
16 **correct.**

17 Q. Ask you some questions along that same
18 line. You mentioned a technical review.

19 A. **Yes.**

20 Q. Would it be fair to say in a technical
21 review it isn't like they are reanalyzing. They are
22 looking at what you did and making sure all the
23 steps were followed properly?

24 A. **That's correct.**

25 Q. You mentioned there is a number of

1 other processes, too?

2 A. Yes.

3 Q. Fair to say with all these checks and
4 balances the system is not a hundred percent
5 foolproof?

6 A. **Whenever you have humans involved it's
7 never a hundred percent.**

8 Q. In fact there's been an error in the
9 Las Vegas Metropolitan Police Department forensic
10 lab on misidentification?

11 A. **I will say, yeah, yes, but qualify
12 that in that the way that this particular case
13 happened it was a clerical error where actually the
14 data and all the analysis was correct.**

15 **However, on a formal report a
16 secretary switched the names of the victim and the
17 suspect. So yes, a report was generated where a
18 person was wrongly accused of a sexual assault.**

19 **However, it was found out and that
20 particular person was not in jail, jailed or
21 anything like that. I mean it was an error that we
22 found.**

23 **To the best of my knowledge, that's
24 the only error that I can think of during my career.**

25 Q. I don't want to misspeak. It's

1 possible errors can be made even with the review?

2 A. **Again, whenever humans are involved
3 errors can occur.**

4 Q. Another area I wanted to ask you some
5 questions. Basically your first part of the
6 conclusion, which I think is you didn't make any
7 conclusions as to the unknown male suspect.

8 I think that that's readily clear,
9 right?

10 A. Yes.

11 Q. Again, if you were able to then we get
12 into this mathematical probability that you spent
13 some time explaining to the jury, right?

14 A. Yes.

15 Q. When it's an unknown we can't make any
16 like one in a billion or whatever conclusions?

17 A. Yeah.

18 **If you looked at this summary chart
19 you would see there is an area where statistics
20 could be placed in there.**

21 **Again I mentioned the statistics so
22 you had an idea how we got them. However, our
23 policy was we didn't apply statistics unless we had
24 somebody to compare it to.**

25 **In this case we had nobody to compare**

1 **it to, so no statistics were generated.**

2 Q. Would it also be fair to say that the
3 statistics are going to vary depending on how many
4 of these individual losi, points of reference are
5 matched?

6 A. Correct.

7 Q. The last area I want to ask you some
8 questions about concerns the third part of your
9 conclusions. I think you already testified about
10 this.

11 In your report you say semen was
12 detected on the vaginal swabs of the vagina?

13 A. Um-hum.

14 Q. I'll stop there and ask this question.

15 When it says vaginal swabs does that
16 mean that you looked at all of the vaginal swabs?

17 A. No.

18 **What that means to me is again
19 generally there's four swabs -- were four swabs in
20 this case. I probably extracted two of the swabs or
21 looked at two of the swabs.**

22 Q. You extracted, you felt enough as an
23 examiner that hopefully you'd get something?

24 A. That was my hope, yes.

25 Q. My next question would be is if

1 another person examined her following after you
2 could very well do the extraction and get the same
3 result and not find any sperm?

4 A. **Or they could -- in other words, if
5 they chose -- let's just say this is on this
6 particular, I extracted the two swabs. I didn't
7 find -- see any spermatozoa. However, I did other
8 testing that indicated to me semen was present.**

9 **You can have semen without sperm. Men
10 that are vasectomized have semen with no sperm
11 present. That happens, occasionally.**

12 **In this case I determined semen was
13 present. However, I didn't find or I didn't see any
14 spermatozoa.**

15 **Again, I mention that the randomness of
16 the sperm on these four swabs, you know, there may
17 not have been any sperm on swab number one, maybe
18 swab number two, but there may be thousands on swab
19 number four.**

20 **Another analyst somewhere down the
21 line could either reuse my extract and reanalyze the
22 case, and again you could get some positive results,
23 because the technology has become a lot more
24 extensive in the last four years, or if the person
25 analyzed the other two swabs, maybe there was a lot**

1 of sperm there and they got a profile.

2 Q. Make sure I'm not misunderstanding
3 your opinion.

4 It is possible that another examiner
5 could look at the other swabs and find no sperm or
6 lots of experiment or somewhere in between?

7 A. Right.

8 Q. When you say no sperm was observed,
9 would it also be fair to say that the more sperm
10 that is detected the better the chance of you
11 getting a profile?

12 A. Yes.

13 Q. Obviously it's relative. More is
14 better, in your area?

15 A. Right.

16 If I looked at the swab and I saw
17 thousands and thousands of sperm, in my mind I would
18 say there is a good chance I'm going to get a good
19 profile here.

20 When I examined the slide and I don't
21 find any sperm then I come up with a couple
22 conclusions.

23 One, maybe this person has had a
24 vasectomy or two, some people don't produce a lot of
25 sperm, or 3, there just wasn't any collected on the

1 particular swab.

2 I observed no sperm which made me
3 think during the analysis I'm probably not going to
4 get a good profile out of this.

5 Q. To sum it up, you were able to develop
6 a profile of an unknown suspect and no other
7 conclusions were made by you, is that fair?

8 A. That's fair.

9 MR. REED: Pass the witness.

10 THE COURT: Anything further?

11
12
13 RE-EXAMINATION

14 BY MS. KOLLINS:

15 Q. Mr. Reed brought up a mistake at the
16 Metro lab. It was the transposition of a victim and
17 suspect's name on some paperwork?

18 A. Yes.

19 Q. You said the analysis was correct?

20 A. Yes.

21 Q. And that is the reason for paperwork
22 and administrative reviews, correct, those details
23 and types of things are gone over now?

24 A. Yes.

25 Q. A victim suspect swab couldn't happen

1 in this case because of a man and a woman. You
2 wouldn't transpose profiles in this case?

3 A. Yeah. In fact, in that particular
4 case, both the victim and the suspect were male.

5 Q. To reiterate, statistical analysis on
6 what you did here wasn't necessary because you were
7 not matching the unknown to anyone because you had
8 no one to match it to?

9 A. Right.

10 Q. There's no reason to come up with a
11 statistical number for Julie Kim because we know who
12 she is and it doesn't matter?

13 A. Right.

14 MS. KOLLINS: No more questions.

15 MR. REED: No further questions.

16 THE COURT: You're excused.

17 (DISCUSSION OFF THE RECORD)

18 THE COURT: Call your next witness.

19 MR. TURNER: State would call Robbie
20 Dahn.

21 MR. TURNER: Proceed?

22 THE COURT: You may proceed.

23

24

25

1 EXAMINATION

2 BY MR. TURNER:

3 Q. Please state can your name and spell
4 your last for the record.

5 A. Robbie Dahn, D-a-h-n.

6 Q. Ms. Dahn, I'm going to draw your
7 attention back to September 3, 2004, approximately
8 2:55 am.

9 Do you recall that date and time?

10 A. Yes.

11 Q. Where were you employed?

12 A. I was employed at the Las Vegas
13 Metropolitan Police Department as a senior Crime
14 Scene Analyst.

15 Q. How long had you been a Crime Scene
16 Analyst up to that point?

17 A. Up to that point six years.

18 Q. Are you still employed with Metro in
19 that capacity?

20 A. Yes.

21 Q. What job responsibilities do you have
22 as a senior Crime Scene Analyst?

23 A. We're called out to assist detectives
24 or police officers to document crime scenes; we're
25 asked to document those scenes with photography, do

1 latent fingerprint processing, do a crime scene
2 search, evidence collection, crime scene
3 diagramming, blood stain analysis.

4 Just depends on the scene.

5 Q. What training and experience do you
6 have that qualifies you for that position?

7 A. When I was hired with Metro I had my
8 Bachelor's Degree in criminal justice. About 40 of
9 those credits were in the sciences, biology and such.

10 Once we're hired with Metro they put
11 put us through a Crime Scene Analyst academy. The
12 academy I attended was 400 hours, 10 to 40 hours a
13 week.

14 After that they put us through a field
15 training process where we start with less serious
16 crime scenes and we work our way into being able to
17 process those less serious scenes by ourselves.

18 After that because of the fact we do
19 testify in Court I know our crime lab section, our
20 training section, we're given numerous classes and
21 able to attend numerous classes every year.

22 Q. Not only do you have the educational
23 background you described, you also have the actual
24 work that you do and that background and experience
25 as well; is that correct?

1 A. Yes. I think that's the most
2 important.

3 Q. How many times, if you can recall,
4 have you testified in your capacity as a Crime Scene
5 Analyst in the District Courts of Clark County?

6 A. Approximately 70.

7 Q. I'm going to take you back to the date
8 and time I mentioned, September 3, 2004 at around
9 2:55 a.m.

10 Were you on duty at that time?

11 A. Yes.

12 Q. What were your normal working hours?

13 A. I worked graveyard at the time. I
14 responded to work at 10:00, get off at work the next
15 morning at 8:00 o'clock clock in the morning.

16 Q. At that particular time were you
17 called out from dispatch to respond to a crime scene
18 location at 7833 Lonesome Harbor Drive?

19 A. Yes.

20 Q. Was that a residence?

21 A. Yes, it was.

22 Q. When you arrived at that location who
23 was present?

24 A. There were two people present at the
25 scene. There was a patrol officer Koval present and

1 also one of our general assignment detectives by the
2 name of Shane Womack.

3 Q. Do you recall if the victims were
4 present?

5 A. They were not present.

6 Q. What did you do when you first arrived
7 at that location?

8 A. I made contact with the two, the
9 officer and Detective Womack. They basically filled
10 me in on the scene.

11 When we're dispatched we have a little
12 bit of information. We gain and gather most of our
13 information from the detectives who have already
14 done a preliminary investigation.

15 Q. How do they go about presenting you
16 with the information about the crime scene?

17 A. They take us through a walk through of
18 the crime scene, letting us know any information
19 that they may have gathered, prior to our being
20 there.

21 Q. They literally walk you through the
22 crime scene and then you make the determination of
23 what evidence may be important, what evidence may
24 need to be collected?

25 A. Yes.

1 Q. Did you do that in this case?

2 A. Yes.

3 Q. When when you walk through a crime
4 scene do you document that crime scene in any way?

5 A. Yes.

6 When I -- after I walk through the
7 crime scene and I'm left to start working the crime
8 scene my first duties are to document the crime
9 scene as I found it out with photography.

10 Q. You photograph the entire crime scene?

11 A. Yes, I did.

12 Q. A crime scene can be a large area; is
13 that correct?

14 A. Yes.

15 Q. In this case was it the entire
16 residence, to some degree?

17 A. Yes.

18 Q. And you photographed that residence?

19 A. Yes, I did.

20 Q. Items within it?

21 A. Yes.

22 Q. Would you ever take any additional
23 photographs after you would document the crime scene
24 and maybe collect evidence?

25 A. Sometimes, yes.

1 Q. Do you recall whether that was done in
2 this case with any items?

3 A. **I don't recall any at the crime scene.**
4 **When I did return back to the crime**
5 **lab I laid out the items of evidence and marked**
6 **those. I laid them out on paper and I took some**
7 **close up photography of just some of my evidence**
8 **before I impounded it.**

9 MR. TURNER: Approach the witness?

10 THE COURT: You may.

11 BY MR. TURNER:

12 Q. I'm showing you what has been marked
13 State's proposed exhibits 1 through 76. There are a
14 number of exhibits there.

15 I'll ask you if you can quickly look
16 through all those and when you're done let me know
17 if you recognize them.

18 A. **As I'm looking through these so far**
19 **they are the photographs I took at the scene. I've**
20 **got a few more.**

21 **Yes, all these pictures are pictures I**
22 **took at the scene.**

23 Q. Do each and every one of those
24 exhibits fairly and accurately depict the crime
25 scene you documented?

1 A. **Yes.**

2 **MR. TURNER: The State would move to**
3 **admit any exhibits that have not already been**
4 **previously admitted.**

5 MR. REED: No objection.

6 THE COURT: They will be received.

7 BY MR. TURNER:

8 Q. Showing what you has been marked
9 State's proposed exhibits 77 through 90, I ask if
10 you recognize those.

11 A. **Yes.**

12 **The first three pictures are depicting**
13 **the master bedroom closet with most of the female**
14 **items inside. The rest of the photos are upstairs**
15 **laundry room as well as there were two upstairs**
16 **bedrooms besides the master bedroom.**

17 **It's overall photos of those two**
18 **additional bedrooms upstairs.**

19 Q. Do those photos in state's approached
20 exhibits 77 through 90 fairly and accurately depict
21 the locations you just described as you observed
22 them on September 3, 2004?

23 A. **Yes.**

24 MR. TURNER: State would move to admit
25 state's proposed exhibits 77 through 90.

1 MR. REED: No objection.

2 THE COURT: Received.

3 BY MR. TURNER:

4 Q. Finally I'm showing you what have been
5 marked State's proposed exhibits 109 through 127.
6 Ask you to look through all those.

7 Let me know if you recognize all
8 those.

9 A. **This group of photos is my evidence I**
10 **photographed back at the crime lab and I recognize**
11 **it. I have my personnel number and my initials and**
12 **the handwriting is mine for the locations.**

13 Q. They fairly and accurately depict how
14 those particular items of evidence appeared when you
15 took them back to the crime lab and photographed
16 them?

17 A. **Yes.**

18 MR. TURNER: State moves to admit
19 state's proposed exhibits 109 through 127.

20 MR. REED: No objection.

21 THE COURT: Received.

22 MR. TURNER: I would move to publish
23 select photographs from what have been admitted.

24 THE COURT: You may.

25 MR. TURNER: Court's indulgence.

1 BY MR. TURNER:

2 Q. Ms. Dahn, what's depicted in this
3 exhibits, state's two.

4 A. **This is a picture of the front door of**
5 **the residence. The copy -- it was pointed out to me**
6 **by patrol officer Koval there was a small cigar tip**
7 **in the rocks there. I had put out a cone when I**
8 **took these photo.**

9 **That's what the copy is.**

10 Q. You don't know as you sit here today
11 if that has any relevance to this case; is that
12 correct?

13 A. **I had no idea at the time.**

14 Q. Did you collect that into evidence?

15 A. **Yes.**

16 Q. One of the reasons you also documented
17 it?

18 A. **Yes.**

19 Q. State's exhibit three is a close up of
20 that?

21 A. **Yes.**

22 Q. Tap on that screen so the jury can see
23 where it is. Double tap that off.

24 I'm showing you what has been admitted
25 Exhibit 4. I'm going to ask you if you can describe

1 the layout of this for the jury, what exactly they
2 are looking at here.

3 **A. This is a photograph. When you walk**
4 **in the front door one side of the house to the east**
5 **side is a formal living room and dining room. On**
6 **the west side of the house is the family room and**
7 **kitchen.**

8 **This is a view of right after you walk**
9 **in the front door at the entryway, if you look to**
10 **the right which would be to the west, there's this**
11 **small hallway that leads into the family room, as**
12 **well as it's the beginning of the staircase to the**
13 **upstairs area.**

14 **Q. What room are we looking into right**
15 **now if you're looking strictly into that picture?**

16 **A. If you look directly into that picture**
17 **you're looking into the family room.**

18 **Q. What piece of furniture is located**
19 **there?**

20 **A. I believe the couch in the family**
21 **room.**

22 **Q. What color is the couch?**

23 **A. That couch is a brownish color.**

24 **Q. I'm showing you what has been admitted**
25 **State's exhibit 5. What is that?**

1 **A. This is -- when you directly walk**
2 **straight into the front door this is that left side**
3 **or east side of the house. It's the formal living**
4 **room area into where the dining room would be.**

5 **Q. The first photograph is if you look to**
6 **the right this is a photograph if you look to the**
7 **left and straight ahead --**

8 **A. Yes.**

9 **Q. -- the stairwell is in the middle**
10 **going up; is that correct?**

11 **A. Yes.**

12 **Q. Showing you what has been admitted as**
13 **State's exhibit nine, and ask you to explain what's**
14 **depicted in that exhibit.**

15 **A. On the west side of the house is the**
16 **kitchen and the family room. This is a view from**
17 **the kitchen, looking into the family room.**

18 **Q. Showing you State's Exhibit 10, what**
19 **is that?**

20 **A. This would be the office, opposite**
21 **view. I stood over in the family room and took an**
22 **overall, took an overall photo into the kitchen.**

23 **Q. State's exhibit 12?**

24 **A. This is a view of the coffee table and**
25 **the corner group inside the family room.**

1 **Q. Do you recall why you documented this**
2 **particular couch?**

3 **A. I was taking overall photos at the**
4 **time when I went into the scene.**

5 **Q. Showing you State's Exhibit 16.**

6 **A. This is a view into what I was calling**
7 **tv room. It had some movie posters and this type of**
8 **thing. It's immediately adjacent to that family**
9 **room.**

10 **In fact there's some windows where you**
11 **can see from one room to the next. This door is**
12 **leading off of that family room.**

13 **Q. You were standing in the family room**
14 **when you took this photograph?**

15 **A. Yes.**

16 **Q. That's the family room with the dark**
17 **colored couch?**

18 **A. It has like a light colored do you**
19 **have, tan'ish couch with a tan pattern to it.**

20 **Q. Showing you State's Exhibit 19, what's**
21 **that?**

22 **A. This is a view inside that tv room.**

23 **The windows I talked about where you**
24 **could see through the windows into the family room**
25 **are just above that couch or that love seat.**

1 **Q. What was the evidentiary significance**
2 **of that particular couch?**

3 **A. When I walked -- was walked through by**
4 **Shane Womack, the detective, he had pointed out to**
5 **me that there may have been an attack of the female**
6 **victim on this couch.**

7 **I believe at that time they had**
8 **already noticed there was a dark colored hair on the**
9 **couch.**

10 **They wanted to bring it to my**
11 **attention.**

12 **Q. You documented that here?**

13 **A. Yes.**

14 **Q. Is that depicted in State's Exhibit**
15 **20?**

16 **A. Yes.**

17 **Q. What did do you with that here?**

18 **A. I impounded that into evidence.**

19 **Q. Showing you State's Exhibit 23, what's**
20 **depicted in that exhibit?**

21 **A. This is a pair of scissors, some cut**
22 **pieces of what appear to be a bathrobe tie and some**
23 **plastic masking type tape, clear plastic and several**
24 **pieces that are hooked together and appeared like**
25 **they had been cut.**

1 Q. What room was this in?
 2 A. This is inside a downstairs bedroom.
 3 When you first walk into the front
 4 door that picture where we were looking down the
 5 hall to the right there is a door there and there is
 6 a small extra bedroom right in there.
 7 In that -- this is in that bedroom.
 8 Q. Showing you State's Exhibit 28, is
 9 that looking out of the room?
 10 A. Yes.
 11 Q. Is that room looking into that area
 12 you said was off to the left when you first walked
 13 in?
 14 A. Yes.
 15 That's that small hallway that would
 16 lead from the front entryway into the family room.
 17 Q. Showing you State's Exhibit 32, what
 18 is depicted in that?
 19 A. This is after you ascend the stairwell
 20 there is a large landing area. This is a picture of
 21 of the landing.
 22 As you can see, the staircase is still
 23 there, just as you come into the, come up the top of
 24 the stairs.
 25 Q. Are there any items of evidentiary

1 significance that you located there?
 2 A. Immediately when we were doing the
 3 walk through I noticed an area with apparent blood.
 4 There was a green shirt wadded in the blood and as
 5 we walked through I saw a pair of handcuffs, cut
 6 pieces of what I later found out was like a Dell
 7 adapter cord.
 8 Q. Did you collect and impound that
 9 evidence?
 10 A. Yes.
 11 Q. State's exhibit 34, what angle is
 12 this?
 13 A. This is the angle from the north end
 14 looking south in that landing area upstairs.
 15 Q. Where is the master bedroom door in
 16 this exhibit?
 17 A. It's the door you see open at the end
 18 of the room.
 19 Q. Can you click on that?
 20 State's exhibit 35 -- double click
 21 it -- what angle is this?
 22 A. This is a more direct angle looking
 23 into that room.
 24 Q. Looking into the master bedroom?
 25 A. Yes.

1 Q. Did you document the inside of the
 2 master bedroom?
 3 A. Yes.
 4 Q. Showing you Exhibit 46, what is that?
 5 A. A view from the north end of the
 6 master bedroom looking across and up to where the
 7 bed is situated.
 8 Q. What room would be directly behind
 9 you?
 10 A. The room right behind this is the
 11 upstairs master bath and where the closet area is.
 12 Q. Is a portion of that depicted in
 13 exhibit 53?
 14 A. Yes. This is the other view of the
 15 other direction.
 16 Q. What was the condition of the house or
 17 all in terms of the dressers, that type of thing?
 18 Was the house in order; did it appear
 19 to be out of order?
 20 A. The upstairs master bedroom, the
 21 drawers were pulled out. The dresser drawer that
 22 you can see here in this photo, most all the drawers
 23 were pulled out and left out.
 24 The closet to the right which
 25 contained a lot of hand bags and boxes and that type

1 of thing appeared to be ransacked, as well as
 2 pictures in the master bath room that I took
 3 depicted drawers being opened, some ransacking that
 4 had taken place in that room as well.
 5 Q. State's 63, is that the condition of
 6 the master bathroom?
 7 A. Yes.
 8 Q. Showing you Exhibit 65, what is that?
 9 A. This is the bed in the master bedroom.
 10 Q. Did you collect any evidence from the
 11 bed?
 12 A. Yes, I did.
 13 Q. What was that?
 14 A. I was told by Detective Womack -- he
 15 was getting information from another detective, from
 16 the victim, so I was told at the scene there
 17 possibly could have been a sexual assault that
 18 occurred on this bed.
 19 I went ahead and did a search of the
 20 bed and found a pair of inside out trunks which are
 21 there in the -- blue trunks, and when I pulled back
 22 the sheet there was a light colored flex cuff, piece
 23 of plastic that winds into itself.
 24 I collected those two items as well as
 25 the top and fitted sheet of that bed.

1 Q. And impounded those into evidence?
 2 A. Yes.
 3 Q. State's 72, close up of the swim
 4 trunks?
 5 A. Yes.
 6 A. Yes, those are the trunks I impounded.
 7 Q. What is State's 74?
 8 A. That's that flex cuff I was talking
 9 about after I pulled back the top sheet, that was
 10 beneath.
 11 Q. Finally, state's 68, what's depicted
 12 in that?
 13 A. This is a robe that was on the side of
 14 the bed and it was -- I gathered the information
 15 that this belonged to the female victim.
 16 I did impound this and after I moved
 17 it out of the way there were couple of items
 18 beneath.
 19 I think I believe it was, I know there
 20 was a cut earphone under there as well as -- I'm not
 21 quite sure.
 22 There's quite a few of those. I see
 23 the picture.
 24 Q. State's 69?
 25 A. That's a small piece of the cut in of

1 one, it was an ear phone with a cord. This is like
 2 one of the sides of the ear would cut off.
 3 Q. Did you collect that evidence as well?
 4 A. Yes.
 5 Q. You indicated earlier in your
 6 testimony that you laid out items and photographed
 7 them at another location; is that correct?
 8 A. Yes.
 9 Q. Showing you Exhibit 109 --
 10 A. This is a picture in our crime lab
 11 garage. I laid out some butcher paper and basically
 12 separated the bindings and items of that nature that
 13 I had collected as well as the writing there, giving
 14 location and it's initialed by myself and has my
 15 personnel number on it.
 16 Q. By location you mean the location
 17 where you originally recovered it?
 18 A. Yes.
 19 Q. And, in fact, state's exhibits 110
 20 through 127, are those actual close ups of the
 21 various items that you collected?
 22 A. Yes.
 23 Q. I guess I should say one through 19.
 24 A. Yes. Quite a few in that stack at the
 25 beginning were close-up pictures.

1 Q. You indicated you also took separate
 2 photographs of the robe and bloody shirt; is that
 3 correct?
 4 A. Yes.
 5 Q. To summarize quickly, state's exhibits
 6 77 through 90 are of various other rooms inside the
 7 house; is that correct?
 8 A. Yes, they were. They depicted, the
 9 top three depict that master closet that I found to
 10 be ransacked.
 11 Q. That would be 77 through 80?
 12 A. Yes, those three pictures.
 13 Q. This was the bedroom, this was in the
 14 closet in the master bedroom?
 15 A. Yes.
 16 Q. That's another angle, 78 is another
 17 angle of that?
 18 A. Yes.
 19 Q. The same with 79?
 20 A. Yes.
 21 Q. And 80, which room is that?
 22 A. That's one of the upstairs rooms. It
 23 was being used as an office. That's one of the four
 24 corner views of that room.
 25 Q. And 81, is that another angle of the

1 same office?
 2 A. Yes.
 3 Q. Eighty-six, what's depicted in that?
 4 A. This is just a picture inside, there
 5 was one of the rooms that was being used for
 6 storage. There was a lot of like items.
 7 These appeared like possibly things
 8 bought for Christmas gifts to give to people and
 9 there was like a lot of items diagrammed in this
 10 room.
 11 I was taking an overall photo of that
 12 area of the room.
 13 Q. The two rooms you just described,
 14 those rooms were upstairs as well; is that correct?
 15 A. Yes.
 16 It was indicated to me those rooms
 17 weren't of really any significance as far as my
 18 concern for the crime scene from the information
 19 that was gathered.
 20 Q. After you documented the crime scene
 21 what did you do?
 22 A. After I finished the crime scene I
 23 ended up clearing that scene and going on to my next
 24 call.
 25 Then at the crime lab later I was able

1 **to get -- get that evidence to the lab, photograph**
2 **it and get it impounded into evidence.**

3 Q. You collected a number of items of
4 evidence; is that correct?

5 A. Yes.

6 Q. What procedures do you follow when you
7 collect items of evidence?

8 A. **There is a thing we call chain of**
9 **custody. Once I collect an item of evidence I don't**
10 **let it out of my custody.**

11 **The only time that I would would be to**
12 **have that locked in a secured locker back at the**
13 **crime lab.**

14 **We're issued keys. We're the only**
15 **ones that have the keys. We lock up the items.**

16 **In this case there were many items**
17 **that I wanted to process for fingerprints. I**
18 **believe that night I did not book the stuff into**
19 **evidence that night.**

20 **I secured it in my locker until I**
21 **could get to it the next day.**

22 Q. Would there be anything on the
23 packages that you impounded those items in that
24 would indicate in fact you processed them for latent
25 fingerprints?

1 A. Yes.

2 **It's protocol that we'll write a**
3 **latent print process so in case it's called up by**
4 **our forensics lab that they don't do double work on**
5 **the evidence if we've already processed it.**

6 Q. We're we're using the word latent
7 print. Explain to the jury what's a latent print?

8 A. It's -- a latent fingerprint is
9 generally invisible. It's left by anybody's finger.
10 If you have emitted any kind of perspiration at all
11 it will leave a pattern of ridge detail we have on
12 the pads of our fingers as well as like you touch
13 your forehead you can get oil on your hand and it
14 will leave that impression.

15 It will be invisible. For us, for me
16 as a Crime Scene Analyst, I try to figure out where
17 a person has been in a crime scene and I will go in
18 that area and will use latent fingerprint powder.

19 We can use chemicals to process these
20 items and we try to bring and develop the print in
21 order to find out who touched a certain item.

22 Q. Will an individual necessarily leave a
23 fingerprint behind if they touch something?

24 A. No.

25 **There are a lot of variables that are**

1 **dependent on whether a fingerprint is left between**
2 **pressure, the ambient temperature in the room, the**
3 **condition of somebody's hands.**

4 **If they have really rough, dry hands**
5 **due to some kind of a job they work, a bricklayer,**
6 **they will have very dry hands. May not leave good**
7 **fingerprints.**

8 **There's variables.**

9 Q. What if they are wearing gloves?

10 A. **If they are wearing gloves, no**
11 **fingerprints.**

12 Q. You testified that you processed a
13 number of the items you collected for latent
14 fingerprints; is that correct?

15 A. Yes.

16 Q. Were you able to recover any latent
17 fingerprints in this case?

18 A. No.

19 MR. TURNER: Approach the witness?

20 THE COURT: You may.

21 BY MR. TURNER:

22 Q. I apologize if these are going to be
23 out of order. I can guarantee you they will be.

24 Showing you what has been marked
25 proposed exhibit 131, what is that?

1 A. **This is one of my evidence packages.**
2 **It contains one cut piece of phone cord and cut ear**
3 **phones on a wire. I put a dash, master bedroom for**
4 **adjacent to the bed.**

5 Q. Before you impound these items into
6 evidence you will write out where it was located and
7 what's found, what it actually is on the outside of
8 it; is that correct?

9 A. Yes.

10 Q. You seal it up?

11 A. Yes.

12 Q. How do you seal the item up?

13 A. **We put them in these bags and it's the**
14 **rule of the evidence vault. We have to do a double**
15 **fold.**

16 **I stamp it and we use our evidence**
17 **tape, always initialing my initials and my personnel**
18 **number, 5947 here, and then the date that I sealed**
19 **this package.**

20 MR. TURNER: Publish that briefly.

21 BY MR. TURNER:

22 Q. If you could just show the jury what
23 it is you're referring to.

24 How do you know that you were the one
25 who filled this out?

1 A. My initials and P number in my
2 writing.

3 We used to have a policy where we
4 would seal it putting the date we took this item
5 into custody. This was four years ago.

6 This has been marked with the date I
7 took it into custody. You can see 9.3. As of about
8 six months ago we have a policy that if we take
9 something on a certain date when we seal it we'll
10 write that date.

11 I wanted to correct that. This is
12 when I took this into custody. That's my
13 handwriting. I wrote in the sharpy.

14 Q. You say your name and P number. What
15 is that?

16 A. That's my personnel number when I was
17 hired at Las Vegas Metro. They assign you a number
18 and it's your middle name with your regular full
19 name.

20 IFR, 5947 is my personnel number, and
21 then a D at the end for my last name, Dahn.

22 Q. Was there also -- do you also put
23 information regarding the event number on this as
24 well?

25 A. Yes.

1 Q. What was the events number that you
2 impounded this item under?

3 A. 040903-0152.

4 Q. From the time you collected those
5 items to the time that you put them in the sealed
6 bag were they in your sole care, custody and
7 control?

8 A. Yes.

9 Q. For every item we go through and
10 you're going to testify here today do you follow the
11 same procedures except for the ones you kept out
12 that you could process for fingerprints?

13 A. Yes.

14 Q. Is this in the same condition as it
15 was when you first sealed it?

16 A. No, it's not.

17 Q. What's the difference?

18 A. This bag has been cut on the side.

19 MR. TURNER: Judge, for the record my
20 understanding is it was opened up in Court in the
21 presence of your clerk.

22 MR. REED: That's correct.

23 THE COURT: Very good.

24 Proceed.

25 BY MR. TURNER:

1 Q. In fact you brought all these items in
2 on Monday and turned them over to the court clerk;
3 is that correct?

4 A. Yes.

5 Q. Would you remove the item contained
6 inside? What is that?

7 A. This is the ear phones, Dell ear
8 phones, with little earbuds on the end and a phone
9 cord.

10 Q. Where was that recovered from?

11 Is that the item that was indicated on
12 the outside of State's proposed Exhibit 131?

13 A. Yes, item eight written in my
14 handwriting with the event number and again that
15 identifier number for me which is my initials and
16 personnel number.

17 Q. Does that appear in the same condition
18 as it was when you first sealed it?

19 A. Yes.

20 MR. TURNER: State moves to admit
21 state's proposed exhibits 131 and 131A.

22 MR. REED: No objection.

23 THE COURT: Received.

24 BY MR. TURNER:

25 Q. Where was that item recovered inside

1 the residence?

2 A. This was recovered under the robe in
3 the master bedroom adjacent to the bed.

4 Q. Showing you State's proposed exhibit
5 134, what is that?

6 A. My description one partial roll of
7 clear packing tape and then I have the location,
8 hallway between master sitting room and master bath.

9 A. Again, that's from this particular
10 case?

11 A. Yes.

12 Q. How do you know that?

13 A. I'm looking at the event number,
14 040903-0152.

15 Q. That's unique to this case?

16 A. Yes, unique to this one case.

17 Q. You followed the same procedures in
18 ceiling this as you did with the previous one; is
19 that correct?

20 A. Yes.

21 Q. If you can remove the item contained
22 in there. Again, was this package in the same
23 condition as it was save and except for what was
24 opened in Court?

25 A. Yes, it is. It's in the same

1 **condition without the cut on the side.**

2 Q. What's 134A?

3 A. **This is a roll of clear packing tape**
4 **that I picked up in that hallway between the two has**
5 **master closets in between the sitting room and the**
6 **bathroom.**

7 Q. Is that in the same condition it was
8 at the time that you impounded it?

9 A. **Yes.**

10 Q. State's -- at this time the State
11 moves to admit proposed exhibit 134 and 134A.

12 MR. REED: No objection.

13 THE COURT: Received.

14 BY MR. TURNER:

15 Q. Word 134 an and 131, were these two
16 the items that you processed in an attempt to locate
17 latent fingerprints?

18 A. **Yes.**

19 Q. None were recovered?

20 A. **No.**

21 Q. Is that, in fact, indicated on the
22 State's exhibits 131 and 134?

23 A. **Yes.**

24 Q. You wrote out --

25 A. **I had written, in red writing,**

1 **fingerprint process.**

2 Q. That was done on all the items you
3 processed for latent fingerprints?

4 A. **Yes.**

5 Q. State's 136, what is that or proposed
6 exhibit?

7 A. This contains three items, the first
8 being one clear plastic binding apparently made from
9 numerous pieces of tape and I have the location
10 north bedroom, west of the bed, number four is one
11 knotted white belt from a robe near the bedroom west
12 of the bed and also in the same location north
13 bedroom west of the bed, the last items, one pair of
14 scissors with a black handle.

15 Q. Which bedroom was this that you
16 recovered these items from?

17 A. **The north bedroom. I should have**
18 **indicated the downstairs. This is that downstairs**
19 **bedroom to the right of the front entryway.**

20 Q. You documented that in the photographs
21 as well?

22 A. **Yes.**

23 Q. Does it appear to be in substantially
24 the same condition save and except for the cut made
25 in Court?

1 A. **Yes.**

2 Q. Your seal is intact?

3 A. **Yes.**

4 Q. Remove those items.

5 State's proposed exhibits 136A, B and
6 C, do they appear in substantially the same
7 condition as they were at the time you impounded?

8 A. **Yes.**

9 MR. TURNER: State moves to admit 136A
10 through C.

11 MR. REED: No objection.

12 THE COURT: Received.

13 BY MR. TURNER:

14 Q. Again, 136C, is that the scissors?

15 A. **Yes.**

16 Q. You have that wrapped up?

17 A. **I have that wrapped up because of the**
18 **sharp point to it.**

19 Q. State's proposed exhibit 140, what is
20 that?

21 A. **One size small, innermost brand**
22 **flowered robe found on in the north master floor**
23 **adjacent to bed.**

24 Q. That's the robe next to the bed?

25 A. **Yes.**

1 Q. Does that appear to be in the same
2 condition as it was in save and except for the cut
3 that was placed on it in Court?

4 A. **There's another seal there, chain of**
5 **custody, signature, Kathy Gunther, which I know her**
6 **to be one of our ladies that works over in DNA.**

7 **There is -- this is a forensic lab**
8 **seal here, the blue seal. It was opened before**
9 **court.**

10 Q. Save and except for that seal and the
11 cut made in Court does it appear to be in
12 substantially the same condition as it was?

13 A. **Yes.**

14 Q. If you can remove the items contained
15 in there.

16 State's proposed exhibit 140A, what is
17 that?

18 A. **It's my item 15 which we indicated is**
19 **the robe. I have item 15 here. This is the robe**
20 **and it's got my writing on the bag and the event**
21 **number.**

22 Q. Does that appear to be in
23 substantially the same condition?

24 A. **No.**

25 **I would have had this sealed with a**

1 staple. Looking in I'm seeing paper and it's closed
2 off by a forensic lab piece of tape.

3 That's probably why.

4 Q. That is consistent with the fact it
5 may have been examined by somebody at the crime lab?

6 A. Yes.

7 Q. Kathy Gunther?

8 A. Yes.

9 MR. TURNER: At this time the State
10 moves to admit state's proposed exhibits 140 and
11 140A.

12 MR. REED: No objection.

13 THE COURT: Received.

14 Counsel, how many more bags are there?

15 MR. TURNER: Several more.

16 THE COURT: We'll take our break here.
17 [Whereupon the Court admonished the
18 jury.]

19 [Recess taken.]

20 THE COURT: The continuation of
21 C212968, State of Nevada versus Joseph Alexander
22 Henderson.

23 Record reflects the presence of the
24 defendant, his counsel Mr. Reed and Ms. Radosta, Ms.
25 Kollins and Mr. Turner for the state.

1 Do counsel stipulate all members of
2 the jury are present and properly seated?

3 MR. TURNER: Yes.

4 MS. RADOSTA: Yes.

5 THE COURT: Ms. Dahn, I'll remind you
6 you're still under oath.

7 Proceed, please.

8 MR. TURNER: Counsel has been kind
9 enough to stipulate to the introduction of the
10 remaining items of evidence that I was going to go
11 through with Ms. Dahn.

12 They will stipulate that the items
13 before they were impounded from the time she
14 collected them to the time she impounded them into
15 evidence were in her sole care, custody and control
16 and they are in substantially the same condition as
17 they were save for what was opened in court or what
18 was opened at the crime lab.

19 MR. REED: That's correct.

20 THE COURT: Thank you very much.

21 MR. TURNER: For the record, I'll say
22 the particular item's numbers because there are
23 certain items we are not going to be introducing
24 into evidence.

25 THE COURT: Go ahead.

1 MR. TURNER: Those are State's exhibits
2 135, 137 and for the record 137 has a biohazard
3 sticker on it; is that correct, Ms. Dahn?

4 THE WITNESS: Yes.

5 MR. TURNER: That should not be opened
6 by the jury?

7 THE WITNESS: Yes.

8 MR. TURNER: 139, 141 also has a
9 biohazard sticker, 142, 132, 133, and 143. And in
10 fact judge, if I can make a brief record on this one
11 as well.

12 Ms. Dahn, 143, what is this item?

13 THE WITNESS: This is my item number
14 two, one fitted and top sheet, gray and white in
15 color.

16 MR. TURNER: The sheet you recovered
17 from the top of the master bedroom bed; is that
18 correct?

19 THE WITNESS: Yes.

20 MR. TURNER: Does this also have a seal
21 from the crime lab?

22 THE WITNESS: Yes, the blue seal at the
23 bottom.

24 MR. TURNER: There's no biohazard
25 sticker on this but technically there is potential

1 biohazard on this material; is that correct?

2 THE WITNESS: At the time I don't know
3 whether or not -- I didn't find anything dripping
4 from this. I probably should have put a sticker on
5 it.

6 MR. TURNER: Ask you to put a biohazard
7 sticker on. Ask that not be that not be opened.

8 With that I would pass the witness.

9 THE COURT: Very well. Cross?

10

11

12 EXAMINATION

13 BY MR. REED:

14 Q. Ms. Dahn, I'd like to ask the first
15 set of questions concerning the upstairs master
16 bedroom. This is Exhibit 70.

17 Is that a gun on the ground there?

18 A. **That was a water gun that was found in**
19 **that lower drawer and I just photographed it in the**
20 **room.**

21 Q. It was in the drawer when you arrived?

22 A. Yes.

23 Q. That was not impounded into evidence?

24 A. No.

25 I was -- discussed it with the

1 **detectives and it wasn't involved as far as we knew.**

2 Q. In looking in the master bedroom did
3 you find a towel at or around the bed?

4 A. **In the master?**

5 **I don't recall finding a towel to**
6 **impound in that room.**

7 Q. If you did, you would have impounded
8 it?

9 A. **Yes.**

10 Q. Did you find a cigarette butt at or
11 around the bed in the master bedroom?

12 A. **No.**

13 Q. Couple questions on fingerprints. A
14 bannister is a good source to leave fingerprints?

15 A. **Yes.**

16 Q. A telephone is a good source to leave
17 fingerprints?

18 A. **Yes.**

19 MR. REED: Pass the witness.

20 THE COURT: Anything further?

21 MR. TURNER: Nothing further.

22 THE COURT: Thank you.

23 Next, please.

24 MS. KOLLINS: State calls Kathy

25 Gunther.

1 KATHY GUNTHER,
2 called as a witness herein, was sworn by the court
3 clerk, was examined and testified as follows:

4
5
6 **EXAMINATION**

7 BY MS. KOLLINS:

8 Q. Can you state your full name and spell
9 your last for the record?

10 Q. Kathy Gunther, last name
11 G-u-n-t-h-e-r.

12 Q. How are you employed?

13 A. **I'm employed as a forensic scientist**
14 **at the Las Vegas Metropolitan Police Department.**

15 Q. Are you particularly -- are you
16 assigned to a particular division of that lab?

17 A. **Yes.**

18 **The section that I work in is called**
19 **the DNA -- biology DNA detail.**

20 Q. How long have you been so employed?

21 A. **Ten years.**

22 Q. Prior to working with Metro in that
23 capacity what did you do?

24 A. **Do you want me to go through my bio,**
25 **very briefly?**

1 Q. Please.

2 A. **I obtained a Bachelor's Degree in**
3 **Biology from Whittenberg University in Ohio.**

4 THE COURT: Slow enough so we can get a
5 record.

6 THE WITNESS: I obtained a Bachelor's
7 Degree in Biology from Whittenberg University in
8 Ohio, in 1972.

9 I obtained a Master's Degree in the
10 department of biological sciences at Miami
11 University of Ohio in 1974.

12 In 1975, I worked in the Biological
13 Sciences Division as a research associate at the
14 Ohio State University.

15 Then I began my career in forensic
16 science, in 1975, at the Ohio Bureau of Criminal
17 Identification where I worked for approximately four
18 and a half years.

19 I worked at the Florida department of
20 law enforcement, which is the state crime
21 laboratory, for the State of Florida for 18 and a
22 half years.

23 I retired from Florida and began my
24 career at Las Vegas Metro police.

25 BY MS. KOLLINS:

1 Q. The years of your career you've
2 outlined how many of those have involved the
3 analysis of DNA?

4 A. **I've been doing DNA testing since**
5 **1991.**

6 Q. Other than the education and the
7 career experience you've provided for us have you
8 participated in seminars and such to keep abreast of
9 evolvments in the DNA process?

10 A. **Certainly.**

11 **I've obtained specialized training in**
12 **forensic Biology and DNA all along through my**
13 **career.**

14 **We are required to maintain at least**
15 **40 hours of continuous training each year, but we've**
16 **attended many, many seminars in our progress through**
17 **DNA and the different types of DNA that DNA**
18 **techniques have applied in the forensic laboratory.**

19 **I've attended numerous meetings and**
20 **presentations in my field.**

21 Q. Including STR DNA typing?

22 A. **Yes.**

23 **Short Tandem Repeat testing is the**
24 **technique we use in the lab and is generally**
25 **accepted in the United States.**

1 Q. Have you testified as an expert
2 regarding DNA profiling analysis and comparison?

3 A. Yes.

4 Q. In what jurisdictions?

5 A. In the jurisdictions of Florida
6 circuit courts and in Clark County.

7 Q. How many times, if you had to
8 estimate?

9 A. Approximately 50 times in DNA.

10 Q. I'm going to turn your attention to a
11 case -- I'm going to refer to it now by event
12 number, if you will.

13 MR. REED: I don't mean to interrupt.

14 Can I Voir Dire on a couple of

15 questions regarding her qualifications?

16 THE COURT: Any problem with that?

17 MS. KOLLINS: Certainly.

18 THE COURT: Go ahead. Voir Dire.

19

20

21

22 VOIR DIRE EXAMINATION

23 BY MR. REED:

24 Q. Ms. Gunther, have you updated your
25 resume' since 2003?

1 A. Yes.

2 Q. The copy I have is dated in 2003.

3 A. We are required for our accreditation
4 to have our statement of qualifications.

5 That's available to you.

6 Q. Did you provided to the District
7 Attorney an updated copy of any training that you've
8 had since 2003 in the area of DNA analysis?

9 A. I believe that our clerical staff
10 maintains those records. That's the person
11 responsible for sending those out.

12 I don't personally prepare those.

13 MR. REED: Can I approach with a copy
14 of the resume' that I have?

15 THE COURT: Yes.

16 MR. REED: This was provided to me by
17 the District Attorney.

18 MS. KOLLINS: If there is a gap from
19 2003 to now that Mr. Reed would like to discuss, I'm
20 sure the witness can just describe that for us.

21 MR. REED: That's what I'm asking her
22 now.

23 THE COURT: Go ahead.

24 BY MR. REED:

25 Q. Is that a copy of the resume' for

1 2003?

2 A. Yes, appears to be a copy.

3 The dates stop in June 2003. I've
4 attended certainly probably at least a page, page
5 and a half more training sessions since then.

6 Q. Additionally, it looks like as far as
7 how many times you've qualified as an expert in DNA
8 analysis also has been significantly updated.

9 It shows that you had, prior to then,
10 not testified in the State of Nevada at all.

11 A. That needed to be updated.

12 MR. REED: With those additions we're
13 satisfied. Thank you.

14 THE COURT: Go ahead.

15

16

17

18 EXAMINATION [cont'd]

19 BY MS. KOLLINS:

20 Q. Ms. Gunther, I'm going to refer to
21 this matter by event number for right now.

22 Did you become involved in DNA
23 profiling under Metro event number 0409031502?

24 A. Yes, I did.

25 Q. Did your first involvement with that

1 come from a profile that was submitted by Dave Welch
2 from a crime scene of an unknown male?

3 A. That's correct.

4 MS. KOLLINS: Approach your clerk?

5 THE COURT: You may.

6 BY MS. KOLLINS:

7 Q. Showing you what has been marked and
8 admitted for purposes of identification as state's
9 155, you can look at it on your screen -- that would
10 have been the profile submitted to your division of
11 the laboratory in 2004, after its completion,
12 correct?

13 A. Yes.

14 Q. Part of your responsibilities in the
15 laboratory were to match unknown profiles?

16 A. To do a comparison of profiles, yes.

17 Q. When you received this profile in
18 November 2004 you had no idea or no indication of an
19 individual by the name of Joseph Henderson; is that
20 correct?

21 A. That's correct.

22 Q. All you had is the same information
23 Mr. Welch had in terms of having an unknown
24 suspect's profile of a male?

25 A. That's correct.

1 Q. In your responsibilities at the metro
2 lab you take those profiles and look for suspects;
3 is that correct?

4 A. **That's correct.**

5 Q. You do that with the assistance of
6 outside agencies; is that correct?

7 A. **That's correct.**

8 Q. In March 2005 or, excuse me, February
9 2005, were you provided a preliminary profile of
10 someone identified to you as Joseph Henderson?

11 A. **Yes.**

12 Q. Once you received that preliminary
13 profile did you discover that that was a numeric
14 match, a profile match to the crime scene profile
15 submitted to you by David Welch?

16 A. **Yes.**

17 Q. Once you did that was it your
18 responsibility to do a confirmatory match, in other
19 words, getting new -- in other words, get a new
20 sample from the suspect identified to you as Joseph
21 Henderson and do a new comparison?

22 A. **That's correct.**

23 Q. In order to get that sample from
24 Joseph Henderson was a buccal swab obtained by the
25 person identified as Joseph Alexander Henderson and

1 delivered to metropolitan forensic lab?

2 A. **That's correct.**

3 Q. And it came to you in the form of a
4 buccal swab?

5 A. **Yes, it was a buccal swab.**

6 Q. It came to you in a sealed condition?

7 A. **Yes.**

8 Q. What did you do in order to test that
9 buccal swab independent from the testing done by
10 David Welch and the profile provided to you by the
11 outside agency?

12 A. **Mr. Welch has probably already talked
13 about how DNA is extracted from cells, the scraping
14 of the mouth called the buccal swab.**

15 **That is a reference sample commonly
16 taken. It can be found from the blood, but we use
17 buccal swabs because it's very easy and a very DNA
18 rich sample.**

19 **We take that sample and a small
20 portion of the buccal swab is cut with a sterile
21 scalpel and put into a testing tube and reagents are
22 applied that will break open the cells and expose
23 the nucleus of the cell and then the proteins and
24 other components of the cell are taken away, are
25 washed away and we are left with the plain DNA.**

1 **The DNA goes through a lot of steps.**

2 **I won't go through all the boring steps of the DNA
3 process, but at the end we end up with a numeric
4 profile generated from our genetic analyzer.**

5 **I would have -- I did do that testing
6 in the mode of what we were using in the laboratory
7 at that time in March and obtained a genetic profile
8 and compared it to the profile that Mr. Welch had
9 previously developed.**

10 Q. And the -- I would ask you to speak
11 slowly so the reporter can get down everything that
12 we're saying.

13 A. **I'm sorry.**

14 Q. The type of profiling you used in
15 March of 2005 is STR?

16 A. **It's STR, but the DNA analysis
17 products that we're using are called profiler and
18 cofiler.**

19 **There are two types of DNA testing
20 chemicals. It's different than what we use now
21 which is a combination called difiler.**

22 **At that time we had profiler and
23 cofiler data which detects DNA at 13 locations.**

24 Q. At that point in time there were 13
25 locations in your match and now, in 2008, that has

1 actually gone up, correct?

2 A. **That's correct.**

3 Q. To 15?

4 A. **Fifteen, yes.**

5 Q. Plus the X, XY designator, male,
6 female?

7 A. **Yes.**

8 Q. When you took the known sample of
9 Joseph Henderson and compared it to the DNA analysis
10 profile conducted by David Welch back in November
11 2004, did you draw any conclusions when you matched
12 the known sample from the mouth of Joseph Henderson
13 with the profile concluded to by David Welch?

14 A. **Yes.**

15 **I did that comparison and at every
16 location the DNA matched or compared positively and
17 I could not exclude Joseph Henderson in any of the
18 locations.**

19 **If I was able to exclude him, that
20 would certainly be part of my report, but I could
21 not exclude him at any of the DNA locations.**

22 **Therefore, the samples matched each
23 other.**

24 Q. Did you memorialize that in a report?

25 A. **Yes, I did.**

1 Q. Did you produce a chart for me of that
2 memorialization for purposes of today?

3 A. **Yes, I did.**

4 MS. KOLLINS: Approach your clerk?

5 THE COURT: You may.

6 BY MS. KOLLINS:

7 Q. Showing you, Ms. Gunther, what has
8 been marked for purposes of identification as
9 state's 156, is that a memorialization of what we've
10 been discussing?

11 A. **Yes, it is.**

12 **The only changes that the profile**
13 **generated date would have been for this profile**
14 **which is the profiler/cofiler profile, would have**
15 **been March of 2005.**

16 Q. You're indicating the profiler/cofiler
17 of Joseph Henderson?

18 A. **Yes.**

19 THE COURT: Excuse me. One at a time.

20 The question is?

21 BY MR. REED:

22 Q. Are you indicating the
23 cofiler/profiler of Joseph Henderson?

24 A. **Yes.**

25 Q. On that screen you have the ability to

1 circle what you're discussing, if you can touch the
2 screen and it will show up for everyone.

3 A. **There it goes.**

4 Q. So down there on the chart you
5 provided me it says profile generated 7.25.05.
6 Is that a correct date of the known
7 profile of Joseph Henderson?

8 A. **No. The Joseph Henderson first**
9 **profile was March 19, 2005.**

10 Q. Is that typographical error then?

11 A. **Yes.**

12 MS. KOLLINS: May I approach the
13 witness and have her correct that on the exhibit?

14 THE COURT: You may.

15 BY MS. KOLLINS:

16 Q. I'm going to ask you to -- ask you to
17 draw through the 7.25.05 date that you corrected for
18 us and initial the same.

19 A. **[Witness complied.]**

20 Q. There was a time that you eventually
21 profiled Mr. Henderson a second time; is that
22 correct?

23 A. **That's true.**

24 Q. Not relating to this March analysis?

25 A. **That's correct.**

1 Q. The numbers in the center column, are
2 those numbers from the profile of David Welch from
3 the sexual assault kit?

4 A. **Yes.**

5 Q. You did not generate those numbers and
6 you did not generate that profile?

7 A. **That's correct.**

8 Q. You took that from David's report?

9 A. **That's correct.**

10 Q. His peer review report, correct?

11 A. **Correct.**

12 Q. You did conduct the profile in the
13 right-hand column just as we've discussed?

14 A. **Yes.**

15 Q. And going down in the 13 locations
16 what was your conclusion?

17 A. **My conclusion is that the DNA profile**
18 **that David Welch tested from the breast swab taken**
19 **from Julie Kim is the same as Joseph Henderson's**
20 **reference sample, the buccal swab, and that they**
21 **match.**

22 Q. There is a number reference, a
23 statistical reference at the bottom of your chart
24 that says less than one in six billion.

25 What does that number mean?

1 A. **The number at the bottom is less**
2 **than -- the left pointing arrow -- less than one in**
3 **six hundred billion.**

4 **That is a statistical threshold that**
5 **we set at the laboratory. There is a number, a**
6 **numeric fraction associated with every one of the**
7 **numbers in a forensic profile.**

8 **It's a fraction of the population.**

9 **I hope Mr. Welch explained what those**
10 **numbers were -- when you multiply all those**
11 **fractions together and divide them into one you get**
12 **one in a number.**

13 **We set a ceiling on that number of a**
14 **hundred times the world's population in 2004 when he**
15 **did that, or 2005, when I did the statistics. That**
16 **was about six billion people.**

17 **It's a hundred times the earth's**
18 **population at any given point. We set this**
19 **artificially high threshold for what we call the**
20 **identity threshold, meaning that this profile could**
21 **only have come from the source or that person's**
22 **identical sibling.**

23 Q. And to a reasonable degree of
24 scientific certainty, what does that say to you?

25 A. **That means that Joseph Henderson is**

1 the source of the DNA on the breast swab taken from

2 Julie Kim.

3 Q. Now, you testified in a previous
4 hearing in this case, correct?

5 A. That's correct.

6 Q. After that hearing a request was made
7 of you to take a look at some additional items of
8 evidence in this case; is that accurate?

9 A. That's correct.

10 Q. Were those specifically the sexual
11 assault kit, a robe and a bed sheet?

12 A. That's correct.

13 MS. KOLLINS: Approach your clerk?

14 THE COURT: You may.

15 MS. KOLLINS: Let's start with this
16 one, since I can't find the other one.

17 BY MS. KOLLINS:

18 Q. Showing you what has been marked and
19 admitted as state's 143, do you recognize that item?

20 A. Yes.

21 State's 143 is a bag identified as
22 containing one fitted and top sheet, grey and white,
23 in color. I have my identifying marks on the
24 evidence seal.

25 Q. And your identifying marks on that

1 evidence seal make you recognize the unique identity
2 of that item?

3 A. Yes.

4 Q. When was the last time you saw it?

5 A. The last time I saw it was when I
6 turned it into evidence in our evidence vault
7 system -- and I'm not sure -- I have to pore through
8 my notes to see that.

9 I know I sealed the package on July
10 20, 2005 at 9:00 am. That would have been the last
11 time I saw it.

12 Q. And if that had not come to you in a
13 sealed condition would you ever have tested it?

14 A. No.

15 Q. If it had not come to you intact and
16 sealed would you have annotated that or returned it
17 to the vault and called the detective?

18 What would have been your protocol?

19 A. It doesn't get that far.

20 When it goes to the vault and it's not
21 sealed they make sure it's sealed by the officer or
22 they have someone responsible for the sealing that
23 will initial it.

24 Q. It's your protocol if something
25 arrives to you not intact you would not test it?

1 A. That's correct.

2 Also you see the seal on the top is
3 the red seal of most likely the person who collected
4 it. We try not to break the original seal.

5 Henceforth, we have to cut it at a
6 different place.

7 Q. Thank you.

8 Showing you what has been marked and
9 admitted as State's 140, do you recognize that
10 evidence?

11 A. Yes.

12 State's 140 is a plain bag containing
13 an inner paper bag that has my identifying marks on
14 the seals and the bag contains a small flowered
15 robe, trademarked Innermost.

16 Q. And the last time you saw that would
17 have been about the same time of the bed sheet?

18 A. Right. My initials and date are July
19 20, 2005 at 8:00 o'clock a.m.

20 Q. And had it come to you in less than an
21 intact condition you would have made note of that or
22 not tested it?

23 A. That's correct.

24 Q. And again, we'll call it the third
25 testing in this case, because it was to have you

1 re-look at items of evidence after we already had
2 the initial profiles, correct?

3 A. That's correct.

4 Q. You also looked at a sexual assault
5 kit?

6 A. That's correct.

7 Q. And for your information, a
8 stipulation has been entered today that that SA kit
9 need not be present here in Court because it is
10 degradable and it needs to be maintained in a
11 refrigerated condition.

12 A. I see.

13 Q. Did that sexual assault kit also come
14 to you in a sealed condition?

15 A. Yes.

16 Q. What were you specifically requested
17 to do with these three items of evidence?

18 A. I was to examine each of the items of
19 evidence, the sexual assault kit, the robe and the
20 bed sheets, for the presence of biological fluids
21 and anything that could be foreign to the victim.

22 Q. Now, in terms of -- let's talk about
23 the sexual assault kit first.

24 In terms of the sexual assault kit,
25 David Welch had already looked at one of the vaginal

1 swabs; is that correct?

2 A. That's correct.

3 Q. He did not get a sufficient threshold
4 to have concluded that a certain DNA profile
5 existed.

6 Would that be accurate?

7 A. That's correct.

8 Q. In other words, because he didn't,
9 there wasn't what he felt was a sufficient sample
10 there because he did not find sperm in that semen,
11 then he did not get a profile?

12 A. That's correct.

13 Q. At the request of the prosecution,
14 because of the presence of semen, you were requested
15 to look at the vaginal swabs again?

16 A. That's correct.

17 Q. In your experience is there usually
18 more than one vaginal swab in a sexual assault kit?

19 A. Typically there are two containers of
20 vaginal swabs. One is called V or vaginal, the
21 other one one called V DNA.

22 They all contain cotton tipped swabs
23 from the vaginal area, two swabs in each carton.

24 Mr. Welch had used two swabs, one from
25 each box, so I took half of each of the remaining

1 two swabs and saving half of each for the remaining
2 two swabs for any further analysis to determine if
3 there was sufficient semen containing sperm from
4 which I could get a DNA profile, and I did that, and
5 I did find a small amount of sperm.

6 Q. First and foremost, you preserved
7 portions of those swabs available for re-testing; is
8 that correct?

9 A. That's correct.

10 Q. And those are maintained today?

11 A. That's correct.

12 Q. And you also did -- we talked earlier
13 about extractions, also extractions from your
14 analysis maintained in the lab; is that correct?

15 A. That's correct.

16 Q. Those are available?

17 A. Yes.

18 Q. Tell us what kind of typing you did
19 and what were your conclusions regarding the vaginal
20 swabs.

21 A. From the vaginal swabs one of the
22 steps of the extraction process is to separate out
23 the female portion of the vaginal swab from any male
24 sperm that would be there.

25 We do preliminary tests to determine

1 there's semen on the swabs and in this case that was
2 positive. It was not unexpected, since Mr. Welch
3 had already done that test.

4 I tested independently and went ahead
5 and extracted and found, microscopically, that there
6 were just a very low number of cells from that
7 preparation.

8 I went ahead and attempted DNA typing
9 on it.

10 Q. When you say low number of cells you
11 mean a low number of spermatozoa?

12 A. Yes.

13 Q. In your experience in testing DNA have
14 you tested sexual assault kits before?

15 A. Yes.

16 Q. And specifically vaginal swabs?

17 A. Yes.

18 Q. Is it unusual to have a mixture of the
19 female's DNA from inside the vagina with the semen
20 or sperm?

21 A. No, it is not unusual. It is to be
22 expected to see a mixture.

23 Q. When the examination is conducted the
24 swabbings are done from inside the vaginal cavity?

25 A. Right.

1 In the microscopic preparation you can
2 see the actual sperm cells. You can also see the
3 larger cells from the vaginal -- what is called the
4 epithelial or the lining of the inside of the body
5 cavity.

6 Q. Did you -- when you profiled -- I'm
7 sorry.

8 You separated what you believed to be
9 male DNA from female DNA from the vaginal swab?

10 A. Yes.

11 Q. Did you find a minor contributor in
12 the vaginal swab?

13 A. Yes.

14 Q. Were you able to obtain a profile from
15 that minor male contributor?

16 A. Yes.

17 Q. Did you document that?

18 A. Yes, I did.

19 MS. KOLLINS: Approach?

20 THE COURT: You may.

21 BY MS. KOLLINS:

22 Q. Showing you what has been marked for
23 purposes of identification as State's proposed 157,
24 do you recognize that?

25 A. Yes.

1 Q. How is it that you recognize that?
 2 A. **I recognize the chart with the event**
 3 **number and the DNA profiles that were generated.**
 4 Q. Within that chart is it -- is the
 5 profile of the minor male contributor outlined?
 6 A. **Yes.**
 7 Q. The one that you did in this case?
 8 A. **Yes.**
 9 Q. Now, in 2004 at the inception of this
 10 case you looked at 13 thresholds; is that correct?
 11 A. **That's correct.**
 12 Q. By the time that this vaginal swab was
 13 done in 2005 did you actually start looking at more
 14 places on the chromosome, if you will?
 15 A. **That's correct. We looked at two**
 16 **additional chromosomes' worth of material.**
 17 Q. I'd like to focus your attention to
 18 the second column on that chart.
 19 Is that the separated male profile
 20 from the vaginal swabs?
 21 A. **Yes.**
 22 Q. Hit exit at the bottom.
 23 The minor male contributor?
 24 A. **Right.**
 25 Q. I notice on there that the losi

1 labeled FGA is below threshold?
 2 A. **That's correct.**
 3 Q. What does that mean?
 4 A. **That means that the size of the DNA**
 5 **fragments we're looking at were below the validated**
 6 **threshold in our laboratory is 150 units.**
 7 **Those DNA presentations were too low**
 8 **and were not up to 150.**
 9 Q. So if they are not up to your lab
 10 standards you will not include that as part of your
 11 identification?
 12 A. **We will not include that in part of**
 13 **the identification, that's correct.**
 14 Q. I see the same designation blow
 15 threshold on the middle of the yellow column, ID
 16 1313517?
 17 A. **That's correct.**
 18 Q. Is that the same non-reportable
 19 amount?
 20 A. **That's correct.**
 21 Q. Below your lab's thresh hold?
 22 A. **Right.**
 23 Q. But again, in 2005 you are testing
 24 more areas, more losi, correct?
 25 A. **Exactly. The last two are the new**

1 **bits of data.**
 2 Q. This is the previous chart we looked
 3 at, state's 156. The new two locations are the
 4 bottom the right columns?
 5 A. **That's correct.**
 6 Q. Or rows, correct?
 7 A. **That's correct.**
 8 Q. Okay. I'm going to go through these
 9 and ask you about your conclusions.
 10 Q. I then requested or Mr. Turner and
 11 myself requested that you look at the bed sheet?
 12 A. **Yes.**
 13 Q. Actually let's dispense with the robe.
 14 Did you take a look at the robe?
 15 A. **Yes.**
 16 Q. Were you able to find anything of
 17 evidentiary value on the robe such that you could
 18 try to come up with a profile?
 19 A. **I examined the robe and I did not find**
 20 **any biological fluids or semen on the robe.**
 21 Q. No saliva, no semen, no human fluids
 22 subject to testing?
 23 A. **Correct.**
 24 Q. Did you do the same thing with the bed
 25 sheets at our request?

1 A. **Yes.**
 2 Q. Did you locate any biological fluids
 3 on the bed sheets?
 4 A. **Yes.**
 5 **I detected the presence of semen on**
 6 **two stains on the top bed sheet. I tested those**
 7 **and obtained DNA profiles from those.**
 8 Q. From two independent stains?
 9 A. **Two areas, yes.**
 10 Q. You said semen stains?
 11 A. **Yes.**
 12 Q. Sufficient spermatozoa for you to get
 13 a profile?
 14 A. **Yes, certainly.**
 15 Q. Did you document those findings as
 16 well?
 17 A. **Yes, I did.**
 18 Q. And again this was in July of 2005
 19 when you were looking at two more losi; is that
 20 correct?
 21 A. **That's correct.**
 22 Q. Prior to the -- to Dave Welch's
 23 initial crime scene screening and your initial
 24 comparison of the known DNA of Joseph Henderson?
 25 A. **That's correct.**

1 Q. Did you document those findings in
2 state's 157?
3 A. **Yes, I did.**
4 Q. What row are the bed sheet profiles
5 in?
6 A. **It's the third, third sample column.**
7 Q. The third from the left?
8 A. **The third sample column.**
9 Q. Now, did you re-profile Julie Kim in
10 July of '05?
11 A. **Yes.**
12 Q. So you added the two losi to her
13 analysis?
14 A. **That's correct.**
15 Q. That would be reflected in the first
16 column of this report?
17 A. **That's correct.**
18 **In order to get those additional losi**
19 **you have to do the whole process over again.**
20 Q. Then you looked at the vaginal swab?
21 A. **That's correct.**
22 Q. The two designations on the bed
23 sheets?
24 A. **That's correct.**
25 Q. And then you re-profiled a sample from

1 the known sample of Joseph Henderson in July of
2 2005?
3 A. **Yes, I re-profiled it.**
4 Q. That would account for the two
5 additional losi in this report as compared to how
6 the lab was running in 2004?
7 A. **That's correct.**
8 Q. Can you tell me what your conclusions
9 are as to the source of the minor male contributor
10 in the vaginal swab?
11 A. **The minor male contributor of the**
12 **vaginal, vaginal swab is the same profile as the DNA**
13 **profile developed from the buccal swab of Joseph**
14 **Henderson.**
15 Q. We discussed before. There is a
16 couple thresholds missing from there, yet your
17 number is still one in six hundred billion.
18 How is that?
19 A. **There are still numerous areas of the**
20 **DNA that cause the fraction to be a very high**
21 **number. So obviously it is rarer than one in six**
22 **hundred billion based on, once again, multiplying**
23 **all of those, so the loss of two areas did not cause**
24 **a change in the actual fraction.**
25 Q. If I can say it a little bit

1 differently so that I understand.
2 In truth and in fact, that permutation
3 of numbers is far lower or higher than one in six
4 hundred billion, isn't it?
5 A. **Yes. The rarity of it is far rarer**
6 **than one in six hundred billion.**
7 Q. If you take out two steps in the
8 analysis you're still far rarer than one in six
9 hundred billion?
10 A. **That's correct.**
11 Q. Would I be correct to say that the six
12 hundred billion number is an artificial number set
13 by the lab so you don't to have start talking in
14 quadrillions and those numbers that none of us
15 really know?
16 A. **That's correct.**
17 Q. To a reasonable degree of scientific
18 certainty, what is your conclusion regarding the
19 vaginal swab vis-a-vis the known profile of Joseph
20 Henderson re-profiled in July 2005?
21 A. **That the sperm DNA profile from the**
22 **vaginal swab, male portion, matches the DNA profile**
23 **from Joseph Henderson and Joseph Henderson is the**
24 **source of that DNA.**
25 Q. Moving on to the top bed sheet, and

1 just going down the line, visually, you have a 15,
2 17, in the first losi, 15, 17, 15, 19, 15, 19, 23,
3 27, 23, 27. Male contributor, 12, 12, and on down
4 through the rest of the losi; is that correct?
5 A. **That's correct.**
6 Q. There is a complete match?
7 A. **Yes.**
8 Q. And again, your number is rarer than
9 one in six hundred billion?
10 A. **Yes.**
11 Q. What was the earth's population in
12 2005?
13 A. **We estimated the earth's population**
14 **was six billion.**
15 Q. When I said 10 times the earth's
16 population I was in error. It's really a hundred
17 times?
18 A. **That's correct.**
19 Q. That's why I practice law and not
20 math.
21 So save and except an identical twin
22 there is no one else on the planet with that
23 profile?
24 A. **That's correct.**
25 Q. And to a reasonable degree of

1 scientific certainty, do you have an opinion as to
2 whether or not the source of the semen and sperm on
3 the bed sheet is Joseph Henderson's?

4 **A. I agree that the source of the semen**
5 **on the bed sheet is Joseph Henderson's.**

6 **MR. KOLLINS: Court's indulgence.**

7 BY MS. KOLLINS:

8 **Q.** Did you -- I apologize, Ms. Gunther.

9 I didn't ask you this. I need to go back.

10 Did you actually chart the minor
11 contributor on the vaginal swab?

12 We didn't put that -- include that on
13 this chart, did we?

14 **A. Yes, that's the minor male**
15 **contributor.**

16 **Q.** I'm sorry. As far as Julie Kim goes,
17 the major female contributor?

18 **A. No.**

19 **I did not chart the major female**
20 **contributor, which Julie Kim's profile was on her**
21 **own vaginal swabbing cells.**

22 **Q.** Did you document that somewhere, that
23 the major female contributor was consistent with her
24 profile?

25 **A. It is in my profile, but I did not**

1 **have it written succinctly like that in my**
2 **laboratory report.**

3 **Q.** You visually confirmed that?

4 **A. That's a visual confirmation, yes.**

5 MS. KOLLINS: Thank you. Pass the
6 witness.

7 THE COURT: Cross-examination.

8 MS. KOLLINS: You know, I don't think
9 I moved for the admission of those -- My
10 apologies -- of the two.

11 MR. REED: No objection

12 THE COURT: They will be received.

13
14
15

16 **EXAMINATION**

17 BY MR. REED:

18 **Q.** Be fair to say mistakes can happen in
19 Biology, though, right?

20 **A. Yes.**

21 **Q.** In fact, you had one happen right here
22 today on the date when this was done. This is
23 number 156.

24 You had the -- you had to correct the
25 date on when the profile was generated, right?

1 **A. Because it was the older technology.**

2 **Q.** Right, but that was the wrong date.

3 The same would be true on state's 157.

4 That wasn't 7.25 either, correct?

5 **A. The DNA profile since I re-profiled**
6 **all the same samples, yes.**

7 **Q.** The generation date would have been
8 back in March 2005?

9 **A. No, because you see the other -- the**
10 **addition of the D2 and D19, that was the July**
11 **working.**

12 **Q.** That one is right, but this date was
13 wrong?

14 **A. We corrected that.**

15 **Q.** Thank you.

16 Mr. Welch testified that there was
17 some judgment involved with analysis of DNA.
18 Do you concur in that opinion?

19 **A. Yes.**

20 **Q.** So it isn't the type of a situation
21 where every analyst will decide to interpret the
22 data the same way?

23 **A. That's correct.**

24 **Q.** I suppose that's one of the reasons
25 why that there is review of these matters?

1 **A. Review is a standard protocol for our**
2 **lab.**

3 **Q.** And when we talk about a technical
4 review it isn't a reanalysis of someone looking at
5 the numbers and making sure everything is correct
6 based on what the analyst provided to the tech
7 review?

8 **A. It is examination of the case file and**
9 **the electronic data also.**

10 **Q.** Now, counsel talked a little bit about
11 your chart. From that chart there was also -- there
12 is actual raw data you use to generate the chart?

13 **A. Well, there is raw data from the**
14 **instrument and there's analyzed data, yes.**

15 **Q.** When we talk about the analyzed data
16 there is what's known as RFU's, which is -- correct
17 me if I'm wrong -- layman's terms -- basically
18 measures the height of the peak, that is true?

19 **A. Yes.**

20 **The amount of the DNA is measured in**
21 **what's called relative fluorescent units because**
22 **it's a fluorescent chemical that's being detected.**

23 **Q.** And these peaks, this RFU, the amount
24 that you feel that the lab felt is a threshold has
25 changed somewhat over time; is that true?

1 A. **It changes with changes in technology,**
 2 **yes.**
 3 Q. So as technology has advanced the
 4 threshold or the number that you say is enough
 5 RFU's has gone down?
 6 A. **Um, well, it can go down or up,**
 7 **depending on the technology.**
 8 Q. For example, the lab standard for how
 9 many RFU's that you would consider enough was 150 at
 10 this time?
 11 A. **Yes.**
 12 Q. Is it now?
 13 MS. KOLLINS: For clarification,
 14 because there's 2004 and 2005 testing here, he said
 15 at this time.
 16 What are we talking about?
 17 MR. REED: I'm sorry.
 18 BY MR. REED:
 19 Q. At the time -- start at the time of
 20 the first testing.
 21 A. **Right, at the time of Mr. Welch's**
 22 **testing the RFU value was 150.**
 23 **At the time of my testing the RFU**
 24 **value was 150.**
 25 Q. Currently it is at what?

1 A. **Currently we're using a different type**
 2 **of instrumentation. Currently our threshold is now**
 3 **at 75.**
 4 Q. As of a year ago it was at a hundred?
 5 A. **It was at a hundred. The developments**
 6 **entailing are pretty amazing.**
 7 Q. The technology is getting better and
 8 more advanced at sensing the presence of and
 9 evaluating the DNA?
 10 A. **That's correct.**
 11 Q. The stuff you're using now is better
 12 than the stuff we had in 2004?
 13 A. **It is more sensitive now.**
 14 Q. Now, there are some anomalies is the
 15 right terminology that can occur when you're looking
 16 at the data, correct?
 17 A. **Yes.**
 18 Q. And these are the -- these anomalies,
 19 you have to look at them and as an analyst decide
 20 what is the significance of that anomaly?
 21 A. **Some of that is built into the**
 22 **software that is part of our genetic analyzer**
 23 **detection system. Some of it we have to do on our**
 24 **own.**
 25 Q. We're going to get into a couple of

1 these. An example of that would be a stutter?
 2 A. **Yes.**
 3 Q. Is that like a little maybe a small
 4 peak before a larger peak?
 5 A. **That's correct.**
 6 Q. Some of the other ones, anomalies that
 7 could come up are band splitting?
 8 A. **Now -- it used to be called band**
 9 **splitting. I don't know exactly.**
 10 **That's an older term.**
 11 Q. I'm an older guy.
 12 A. **There's an older technology of DNA**
 13 **where the term was called band splitting. This is**
 14 **sometimes called a speak shouldering or a peak**
 15 **splitting, but not band splitting anymore.**
 16 Q. Peak shouldering is a different
 17 terminology you're using now?
 18 A. **Yes.**
 19 Q. Room temperature can be a factor?
 20 A. **Can be, yes.**
 21 Q. Artificial peaks, I guess do they call
 22 that pull ups?
 23 A. **A pull up is an artifactual.**
 24 **If you have too much DNA the artifact**
 25 **is called a pull up due to the spectra of the dyes**

1 **that are used in the DNA process.**
 2 **It's totally artifactual and easily**
 3 **detected.**
 4 Q. Is that something that the analyst
 5 detects or that is something that the machine will
 6 detect?
 7 We're going to do that with the
 8 machine that was being used at the time the testing
 9 was done.
 10 A. **At the time the testing was done it is**
 11 **detected by humans and also verified by the**
 12 **software.**
 13 Q. Now, fair to say that as an analyst
 14 with the Las Vegas Metropolitan Police Department
 15 you still, nevertheless, are trying to be completely
 16 objective in making your conclusions?
 17 A. **We're trying to be, yes.**
 18 Q. Certainly you don't want to have any
 19 bias come into the judgment process when you're
 20 analyzing the data; fair to say?
 21 A. **Yes.**
 22 Q. There was an E-Mail that you received
 23 from a Ruth Gorcey. Do you recall receiving that
 24 back in --
 25 A. **Yes.**

1 Q. I won't read it in detail, but
2 basically it was something to the effect of that she
3 wanted to share the good news with you about the
4 match with Mr. Henderson, something to that effect?

5 A. **That is an E-Mail she sent to me.**

6 MS. KOLLINS: May we approach?

7 THE COURT: Come forward.

8 (DISCUSSION OFF THE RECORD)

9 THE COURT: Proceed.

10 BY MR. REED:

11 Q. Ms. Gunther, was it your decision to
12 do the re-testing on the vaginal swabs or was it the
13 district attorney's to do the re-testing on the
14 vaginal swabs?

15 A. **I questioned whether there was a need
16 for further testing of the vaginal swabs for reasons
17 that I detected that there might be some useful
18 information to either compare or exclude. We're not
19 really sure.**

20 **I consulted with Ms. Kollins at that
21 point.**

22 Q. You raised the subject and then the
23 District Attorney said go ahead and do the
24 re-testing?

25 A. **Yes.**

1 Q. Thank you.
2 I want to ask you some questions now
3 concerning your actual report. This one is the last
4 report. What's unusual is there is a number of
5 dates.

6 Your date is July 25, 2005?

7 A. **Yes.**

8 Q. That was the additional testing, the
9 results of the additional testing we just spoke
10 about?

11 A. **Yes.**

12 Q. In the body of your report there was
13 actually reference to a vaginal swab, KMG2. The bed
14 sheet sample KMG4.

15 Those were mixtures, right?

16 A. **The KMG2 is the vaginal swab. That
17 was a mixture. The KMG4 was not.**

18 Q. KMG4, the top sheet, is not a mixture?

19 A. **Well, the actual profiles were
20 developed from what we call the epithelial portion
21 which is always part of the process.**

22 **When we're trying to separate sperm
23 from any female component, so therefore in a semen
24 stain there might be some female DNA there also from
25 the vaginal cavity, therefore, those two separate**

1 **entities are part of the splitting of the DNA
2 sample.**

3 Q. My question is is KMG4 a mixture?

4 A. **It was a mixture, but I was able to
5 separate it into the epithelial portion and sperm
6 portion.**

7 Q. It started off as a mixture, correct?

8 A. **Yes.**

9 Q. And so did the vaginal swab, KMG2?

10 A. **Yes.**

11 Q. In the report, the body of the report
12 you don't specifically mention that either of those
13 are mixtures, correct?

14 A. **At the time that we generated these
15 reports we did not indicate that they were mixtures
16 of the current practice in our lab.**

17 **We do indicate that samples are
18 mixtures when there are those kind of samples. Back
19 at that time in 2005 it was not our protocol for
20 report writing to do that.**

21 Q. You didn't put that in the body of the
22 report, correct?

23 A. **That's correct.**

24 Q. There are two top sheet samples.

25 A. **Yes.**

1 Q. Doesn't the report indicate there's
2 one top sheet sample?

3 A. **I identified two stains on the top bed
4 sheet.**

5 Q. But it doesn't use that language,
6 though, does it?

7 A. **No. We talk about the source of the
8 semen detected in KMG4, the top bed sheet.**

9 Q. Right, not bed sheets or two different
10 samples?

11 A. **That's correct, but I do say semen was
12 detected in two stains on the top bed sheet.**

13 Q. You represent in there it says STR DNA
14 case profile, right?

15 A. **You're talking about the chart?**

16 Q. I think it's in the report, isn't it?

17 You present a single STR DNA case
18 profile.

19 A. We're talking about the estimate of
20 the DNA profile?

21 Q. Yes.

22 A. **The estimate of the DNA profile in the
23 population?**

24 Q. No. Let me ask you --

25 A. **I do have a chart attached to that**

1 report.

2 Q. Right, with the chart.

3 The chart is different information
4 than what's in the body of the report; fair to say?

5 A. That's correct.

6 Q. And as a -- for example, the chart
7 does not represent necessarily that there is a
8 mixture sample?

9 A. That's correct.

10 Q. I want to ask you some questions. I'm
11 going to ask you to review defense proposed A. I'll
12 let you look at it, but I think that you have it up
13 there.

14 This is going to be the raw data from
15 the vaginal swab samples. It goes to the charts
16 that are 156 and 157.

17 MR. REED: May I approach to make sure
18 we're going to be talking apples and apples?

19 THE COURT: Go ahead.

20 THE WITNESS: Okay.

21 MR. REED: What you just did is -- make
22 sure the jury understands -- you compared from your
23 file to make sure this photostatic copy of defense
24 proposed A; defense proposed A, looks like the raw
25 data that you have in yours; is that true?

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1 A. Actually we don't refer to this kind
2 of data as raw data. This is analyzed data.

3 Q. When you say analyzed data basically
4 this is what -- you use this analyzed data to make
5 the chart that we're referring to?

6 A. That's correct.

7 Q. Now, in the chart and this analyzed
8 data, let's look at D21. D21, if I move it over
9 I'll make it better -- let me see if I can zoom in a
10 little bit.

11 We can see better, right?

12 A. That's correct.

13 Q. On D21 we have -- tell the jury what
14 we see here in this first peak.

15 A. The first peak is a peak labeled 27.

16 Q. That number below it represents what?

17 A. The number below it is the size of the
18 peak or the RFU value.

19 Q. Then the number 30?

20 A. The number 30 is the second peak and
21 it is much larger, 16, 68.

22 Q. Now, tell the jury what is peak height
23 ratio?

24 A. A peak height ratio is one peak
25 divided by the other. You take the smaller peak

1 and divide it by the larger and get a ratio of
2 cells.

3 Q. Have you done the peak height ratios
4 on this?

5 A. I have not done the peak height ratios
6 on each and every one of these in numerical form to
7 show you.

8 Q. Can we do one? I'm approaching with a
9 calculator. Do that one for D21.

10 A. 44.6 percent.

11 Q. Now, what is the acceptable standard
12 in the lab for a peak height ratio in a mixture
13 sample?

14 A. When we're looking at DNA samples
15 there will always be a difference in size of peaks
16 from the first peak, which is a smaller DNA
17 fragment, to the second peak in a single source
18 sample, because smaller fragments amplify better
19 than the larger fragment.

20 There will be a slight difference.

21 The first peak of a person's sample -- say it's my
22 DNA -- the first peak will be a certain size.

23 The second peak can be 60 percent of
24 the first peak. That is what we might expect to see
25 in a sample.

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1 If I'm wrong my DNA and my sample is a
2 14, 15, that my 14 will be bigger to the extent that
3 the smaller peak is 60 percent of the larger peak.

4 That's just a standard method that has
5 been validated in our laboratory. When something is
6 smaller than that 60 percent it's an indication that
7 there might be a mixture.

8 You have to look at it little more
9 closely.

10 Q. Right. In fact, this is a mixture
11 that you're analyzing, right?

12 A. This sample is the sperm fraction of
13 the vaginal swab and you remember I talked about how
14 I found very little sperm?

15 In a sample like that from the human
16 vagina there will be an overwhelming amount of the
17 female contribution and a certain amount of the male
18 contribution.

19 Q. So make sure I got the right one,
20 would this be represented on 157, as S11 -- let me
21 get to the right section here -- back up a little
22 bit.

23 We have to back up a little bit to
24 make sure we can see.

25 On this, put my finger by S11, that's

1 the one we're talking about, right?

2 A. **D21, S11.**

3 Q. Is that correct?

4 A. **That's correct.**

5 Q. If we go across we see that you
6 determined that this was a 27, 27?

7 A. **The 27 actually it is -- it should be
8 a 27 by itself in this column.**

9 Q. Right.

10 A. **Twenty-seven, right.**

11 Q. In the right-hand column?

12 A. **In this column.**

13 Q. Right. Where you made the mark?

14 A. **Right.**

15 Q. Now, if we take Joseph Henderson's
16 sample out of the -- that you're lining up and
17 comparing against away for a moment, there was --
18 based on that mixture there was other possibilities
19 besides it being a 27, 27; is that correct?

20 A. **We have to consider that the major
21 contributor in the vaginal swab where I found very
22 little semen is -- the female was the major
23 contributor.**

24 **The larger peak that you're comparing
25 her DNA to would be the 30 peak.**

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1 Q. Correct.

2 A. **Correct.**

3 Q. But is it possible that because of
4 this mixture that it was not just a 2, 27, could
5 have been a 27, 30?

6 A. **27, 30.**

7 Q. Or other possibilities, true?

8 A. **Well, the victim -- excuse me.**

9 **Julie Kim herself is a 30 so anything
10 that isn't a 30 would be from the male source. It's
11 to -- so it's the 27. It could be a 27, 30, as we
12 have just said.**

13 Q. Rather than do all of these we're
14 going to do one or two more, if we can, as a for
15 example.

16 Let's do -- while we're back on this,
17 we talked about stutters.

18 That's not a stutter there, right?

19 A. **No. The stutter is way in front of
20 the peak, this little tiny blip here and this one
21 here.**

22 Q. That's not significant enough to show
23 a stutter?

24 A. **Those stutters are there but they are
25 caught by the electronic algorithm called a stutter**

1 filter.

2 Q. Now, we might be reaching -- go ahead
3 and touch the screen. There are several of the
4 sections -- can you touch that on the bottom left --
5 there are several -- this is an example, at this
6 position where you make some asterisks.

7 This is which one, TH?

8 A. **TH01.**

9 Q. At TH01 these asterisks now actually
10 have numerical value placed on your chart here,
11 correct?

12 A. **Correct.**

13 Q. What is the importance of those
14 asterisks with those represented data?

15 A. **At the time that this case was worked
16 we were required to mark anything that was
17 considered a minor profile with an asterisk.**

18 **It is not the same in our laboratory
19 now. An asterisk is used for something else because
20 we've changed, our sensitivities have changed.**

21 **Therefore, these peaks that you see,
22 the small eight and the small 9.3, are minor peaks
23 but we are required in our reporting on the chart to
24 put an asterisk just to designate them as too minor.**

25 Q. In these particular -- in this

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1 particular example it actually measured -- is that
2 the right terminology, on the machine, actually
3 there is a representative number in there as well?

4 A. **Yes. They are above the threshold
5 and they both have an RFU value greater than 150.**

6 Q. In fact, there's like an eight
7 sandwiched in between the seven and the nine?

8 A. **That's correct.**

9 Q. Now, let's go back one which would be
10 the D3. Tell the jury what we have represented in
11 D3.

12 A. **There it goes. In the D3 there are
13 three peaks, one of which is designated as a minor
14 peak, and before when I talked about that in a
15 person's DNA you can have a 60 percent lower value
16 for a peak, this is what I've interpreted in this
17 sample, is that in this vaginal swab there was very
18 little sperm.**

19 **There is still a high value for the
20 vaginal cell DNA that's still there. Therefore, the
21 smaller, the middle peak and the larger peak are
22 still considered a major profile and the one with
23 the asterisk is considered a minor.**

24 Q. Can you do the math for us on the
25 calculator to show what the peak height ratio is on

1 D3?

2 A. The peak height ratio of 16 to 15 is
3 67 percent.

4 Q. That's above the threshold?

5 A. That's above the threshold.

6 That indicates to me that, you know,
7 the 15 and 16, which happens also to match the
8 victim's own vaginal cell DNA, could represent her
9 15 and 16.

10 Q. When it's above the threshold like
11 that it is possible that the -- this is something
12 other than a 15, 17, correct?

13 A. Yes.

14 Excuse me, I'm trying to get the ratio
15 of the other one. The peak height ratio of the 17
16 to the 15 is only 28.7.

17 Q. Right.

18 A. Approximately 28.

19 Q. But as to the 15 to the 17 with our
20 little 16 sandwiched in the middle the peak height
21 ratio is above the threshold?

22 A. The peak height ratio is 28, from 17
23 to 15.

24 Q. From 15 to 17, I'm sorry.

25 A. Excuse me?

1 Q. From 15 to 17 it was above the 60
2 percent?

3 A. The ratio is from the 17 to the 15,
4 not from the 15 to the 17.

5 Q. And so there was something other
6 than -- you came to the conclusion this was a 15,
7 17, but there was another possibility that you later
8 ruled out of it being something other than a 15, 17?

9 A. In this particular locus, this is D3.
10 Because of the increased ratio above the six percent
11 I deemed that it could be a 15, 17.

12 Q. But there was other possibilities
13 besides a 15, 17?

14 A. Yes, certainly. If you took this by
15 itself there would be other possibilities.

16 Q. What are those other possibilities?

17 A. Say this was a sample, not the vaginal
18 swab, just assume for a moment it's not the vaginal
19 swab. It could be a 15 by itself which is called a
20 homozygot.

21 Did Mr. Welch explain to you we
22 inherit DNA from our mother and father, and that if
23 both of our parents had 15 we would only have a 15?

24 Likewise, for the 16 by itself,
25 likewise for the 17 by itself.

1 Then you could have a 15, 17, you
2 could have a 15, 16 and you could have a 16, 17.

3 Q. There's four possibilities of the
4 interpretation of D3 if it is a heterozygot, if it's
5 possible from two DNA's?

6 A. If it's a heterozygot?

7 Q. Yes.

8 A. There are three homozygots.

9 Q. Right.

10 A. Three heterozygots.

11 Q. Six possibilities total?

12 A. Yes.

13 THE COURT: With that said we'll
14 adjourn.

15 [Whereupon, the court admonished the
16 jury.]

21 ATTEST that this is a true and
22 complete transcript of the proceedings.

25 J. A. D'AMATO CCR17

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FILED

DISTRICT COURT

CLARK COUNTY, NEVADA

2008 NOV 25 A 8:24

THE STATE OF NEVADA,

Plaintiff,

vs.

JOSEPH A. HENDERSON,

Defendant.

CLERK OF THE COURT

No. C212968
Dept. XIV

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DONALD M. MOSLEYJune 23, 2008
1:30 p.m.
Department XIV

APPEARANCES:

For the State:

MS. STACY KOLLINS

MR. BRAD TURNER

Deputy District Attorneys

For the Defendant:

MS. VALERIE RADOSTA

MR. NORMAN REED

Deputy Public Defenders

Reported by:
Joseph A. D'Amato
Nevada CCR #17RECEIVED
NOV 25 2008
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)
)
Plaintiff,)
)
vs.) No. C212968
) Dept. XIV
JOSEPH A. HENDERSON,)
)
Defendant.)

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Reported by:
Joseph A. D'Amato
Nevada CCR #17

1 kidnapping and of sexual assault, all alleged to
2 have occurred with use of the a deadly weapon,
3 specifically a firearm.

4 These crimes are alleged to have
5 occurred in a residence located at 7833 Lonesome
6 Harbor Drive which is here in Las Vegas, Clark
7 County. It involves two alleged victims and the
8 date of the offense is September 3, 2004 at around
9 midnite.

10 The witnesses that the State may call
11 in its case include the two victim's, Julie Kim and
12 Eric Bernzweig, Matthew Joe Godka with the Las Vegas
13 Metropolitan Police Department, another police
14 officer with Metro, Kevin Koval, crime scene analyst
15 with Metro, Robbie Dahn, Dr. Selznick, Detective
16 Melissa Wild and Detective Michael Jeffries who are
17 both detectives with the detective bureau with the
18 Las Vegas Metropolitan Police Department, Linda
19 Ebbert, who is a nurse or at the time was a nurse at
20 UMC, Kathy Guinthe, David Welch and Kim Murga who
21 are all employed at the Metro crime lab.

22 THE COURT: Thank you.
23 Will the defense attorneys introduce
24 themselves and their client, please?

25 MS. RADOSTA: Thanks, judge.

1 THE COURT: Calling C212968, State
2 versus Joseph Alexander Henderson. Record reflect
3 the presence of the Defendant and his counsel, Mr.
4 Reed and Ms. Radosta. We have Ms. Kollins and Mr.
5 Turner for the State.

6 Ms. Clerk, will you call the roll of
7 our prospective jury panel, please?

8 COURT CLERK: Please answer hear when I
9 call your name.

10 [Whereupon, the Clerk of the Court
11 called the roll of the prospective jury panel.]

12 COURT CLERK: The panel is present,
13 Your Honor.

14 THE COURT: Very well.

15 Will the State's attorneys introduce
16 themselves and indicate the nature of the charges in
17 this case and list of witnesses you propose calling?

18 MR. TURNER: Good afternoon, Ladies
19 and Gentlemen. I'm with the Clark County District
20 Attorneys Office. I've been assigned to prosecute
21 this case along with my co-counsel, Stacy Kollins.

22 The Defendant is charged by way of an
23 Amended Information with multiple counts of
24 conspiracy, a count of burglary while in possession
25 of firearm, multiple counts of robbery, of

1 Good afternoon. My name is Violet
2 Radosta. Along with my co-counsel, Norm Reed, we
3 are representing Joseph Henderson.

4 THE COURT: Thank you.

5 Good afternoon, Ladies and Gentlemen.
6 I'm Judge Donald Mosley. You've been summoned to
7 Department XIV of the Eighth th Judicial District
8 Court to hear the matter of the State versus Joseph
9 Alexander Henderson.

10 Did you observe that's typically
11 shown?

12 [Affirmative indication.]

13 THE COURT: I'll not repeat what was
14 said in the film.

15 Ms. Clerk, will you administer the
16 oath to our prospective panel, please?

17 THE CLERK: Please stand and raise your
18 right hands.

19 [Whereupon, the Court Clerk swore in
20 the prospective panel.]

21 THE CLERK: Please be seated.

22 THE COURT: Ladies and Gentlemen, I'm
23 going to begin the Voir Dire or questioning process
24 by inquiring of you as a group. We can begin
25 somewhat informally.

1 By that I mean should I ask a question
2 that you feels needs some clarification or perhaps
3 you know something related in your judgement that
4 needs to be discussed, we can do that.

5 We can have a certain dialogue back
6 and forth.

7 The thinking is that it's preferable
8 to alleviate any misunderstanding or misconception
9 early on rather than have it dawn upon you halfway
10 through the trial that something should have been
11 discussed or perhaps a question should have been
12 asked.

13 I want you to feel comfortable in
14 raising your hand if you feel it's necessary.

15 When you raise your hand and when I
16 call on you if you would stand and indicate the name
17 and number of the badge they have given you I'd
18 appreciate it.

19 Let me begin by asking you if any of
20 you are acquainted with the Defendant in this case,
21 Mr. Henderson, in the light colored shirt?

22 [Negative response.]

23 THE COURT: Are any of you acquainted
24 with either of the Defense attorneys, Violet Radosta
25 or Norm Reed?

1 [Negative response.]

2 THE COURT: Are any of you acquainted
3 with either of the Deputy District Attorneys, Stacy
4 Kollins or Brad Turner?

5 [Negative response.]

6 THE COURT: Any of you acquainted with
7 any of the witnesses whose names were read to you by
8 Mr. Turner?

9 We can repeat the list. We can give
10 you something of a physical description of these
11 people.

12 We can work through it if any of those
13 names seem familiar, anyone.

14 [Negative response.]

15 I understand, Ladies and Gentlemen,
16 that you have very scant information as to what's
17 alleged in this case.

18 My question is does anyone believe
19 that they may have read or heard about this case
20 before coming to Court today?

21 I remind you it's alleged to have
22 occurred in September of 2004.

23 Does anything seem familiar?

24 [Negative response.]

25 THE COURT: Is there anyone that

1 believes, for whatever reason, you could not serve
2 as a fair juror in this particular case and that you
3 might be reassigned to another case, anyone?

4 [Negative response.]

5 THE COURT: This matter is
6 contemplated to last the week. We would begin court
7 at 1:30 typically. We'll be adjourning at five.

8 It is contemplated we can finish by
9 Friday.

10 There are some very antiquated bases
11 for excusal from jury duty set out by statute, such
12 things as -- these are very antiquated, too, of
13 course. Many of them are not current today.

14 For example, if you were a locomotive
15 engineer in the 1880's you were considered excused
16 from jury duty. It was a vital industry at the
17 time.

18 My question to you is simply this:
19 Would serving the next four afternoons, after this
20 afternoon, be an undue burden to any one of you in
21 that you feel you might fit within one of the
22 limited bases for excusal?

23 I can tell you that work
24 considerations are rarely considered vital, for what
25 it's worth.

1 Start at this side over here.

2 Yes, ma'am, stand and give me your
3 name and badge number.

4 A PROSPECTIVE JUROR: Becky
5 Gottschling, 793.

6 THE COURT: What is your situation?

7 A PROSPECTIVE JUROR: I'm a single
8 parent, sole provider for my daughter. Daycare for
9 the next four afternoons would be very difficult for
10 me.

11 THE COURT: How old is your daughter?

12 A PROSPECTIVE JUROR: She's five.

13 THE COURT: Having her watched for the
14 next few afternoons would be problem?

15 A PROSPECTIVE JUROR: Correct.

16 I would have to arrange for daycare.
17 The only alternative I would have is my parents.
18 They don't return until Monday.

19 THE COURT: As you might imagine,
20 generally speaking, having children would not be a
21 basis for excusal.

22 Is there no family members or friend
23 other than your parents?

24 A PROSPECTIVE JUROR: Just my parents.

25 My brother lives in Texas and is

1 getting ready to deploy.

2 THE COURT: Do you have a babysitter
3 from time to time?

4 A PROSPECTIVE JUROR: Generally my
5 mother. She quit work to stay at home. I pay her
6 daycare.

7 She won't be here.

8 THE COURT: Have a seat, please.

9 Yes?

10 A PROSPECTIVE JUROR: Patrick Diperno.

11 THE COURT: Last name is what?

12 A PROSPECTIVE JUROR: Diperno.

13 THE COURT: Yes, sir. What do you find
14 yourself in?

15 A PROSPECTIVE JUROR: I have a business
16 trip I'm scheduled to leave tomorrow for the rest of
17 the week.

18 THE COURT: Business trip?

19 A PROSPECTIVE JUROR: Yes.

20 THE COURT: Where are you headed?

21 A PROSPECTIVE JUROR: To Birmingham,
22 Alabama.

23 THE COURT: What's the nature of your
24 business?

25 A PROSPECTIVE JUROR: To see

1 prospective customers.

2 THE COURT: It can't be rescheduled in
3 any way?

4 A PROSPECTIVE JUROR: It could. We've
5 been waiting for this meeting for six months. It
6 could be.

7 THE COURT: Are these customers within
8 a given industry or are they consumers?

9 A PROSPECTIVE JUROR: They are
10 prospective new clients.

11 THE COURT: What kind of business are
12 you in?

13 A PROSPECTIVE JUROR: Import/export
14 business. Power tools, tools and equipment.

15 THE COURT: These are like Home Depots
16 or stores like that?

17 A PROSPECTIVE JUROR: Exactly.

18 THE COURT: Have a seat.

19 MS. RADOSTA: I missed his number.

20 THE COURT: I spoke over him.

21 A PROSPECTIVE JUROR: 0733.

22 THE CLERK: It's 100733.

23 THE COURT: Thank you.

24 Anyone else on this side? Yes, the
25 man in the red shirt.

1 A PROSPECTIVE JUROR: My name is Tom
2 Duran, badge 0799.

3 THE COURT: Duran your last name?

4 A PROSPECTIVE JUROR: D-u-r-a-n.

5 I'm a construction worker and I

6 haven't worked much this year. I'm the head of my
7 household.

8 Today I'm having to take a day without
9 pay. I won't be compensated for it. I have a
10 second job.

11 I'm a security officer and they won't
12 compensate me either. This would cause a hardship
13 on my family.

14 THE COURT: Let me see if I understand
15 this. You say you're not working very much but you
16 had to take off today?

17 A PROSPECTIVE JUROR: Yes.

18 I am employed at this time. I will
19 not be compensated for the time I'm off.

20 THE COURT: Mr. Duran, that's not
21 unusual. I realize it may be a hardship in your
22 case and that's worthy of consideration.

23 Most of the people here will be taking
24 a financial hit in a sense.

25 A PROSPECTIVE JUROR: I can't afford

1 that.

2 THE COURT: Have a seat, please.

3 Yes, ma'am?

4 A PROSPECTIVE JUROR: Maria Vasquez,
5 badge number 745.

6 THE COURT: Yes?

7 A PROSPECTIVE JUROR: My reason is I
8 have two kids and one is taking a summer class. I
9 have to take him and pick him up in the afternoon.

10 I also have a 10 year old that I

11 watch.

12 THE COURT: That's 10 year old child
13 you watch?

14 A PROSPECTIVE JUROR: Yes.

15 THE COURT: Not your child?

16 A PROSPECTIVE JUROR: No, my kid. I'm
17 a stay at home mom. I have to take -- pick up my
18 kids and plus understanding English is my problem.

19 THE COURT: Are your children in
20 school?

21 A PROSPECTIVE JUROR: My son is taking
22 a summer class. I have to take him 7:30 and pick
23 him up at 12:15 in the afternoon and also I have a
24 girl that's 10.

25 THE COURT: So in the afternoon when

1 both the children are home is there anyone to watch
2 =them?

3 A PROSPECTIVE JUROR: No.

4 THE COURT: No one at all?

5 A PROSPECTIVE JUROR: No.

6 THE COURT: You're not employed?

7 A PROSPECTIVE JUROR: No.

8 THE COURT: You don't have anybody that
9 comes in occasionally and watches the children?

10 A PROSPECTIVE JUROR: My husband is
11 working and my family is in the Phillipines. I
12 don't have anyone.

13 THE COURT: Have a seat.

14 Yes, ma'am?

15 A PROSPECTIVE JUROR: Julie Tracy.

16 My badge number is 170714. I own a
17 food business. This Thursday is the Board of Health
18 meeting. I have an agenda item on that, for that
19 board meeting.

20 THE COURT: What time of the day is the
21 meeting?

22 A PROSPECTIVE JUROR: It starts at 8:00
23 o'clock.

24 THE COURT: You don't have to be here
25 until 1:30.

1 A PROSPECTIVE JUROR: It's 8:30 is the
2 public portion. I have no idea how long it will
3 take after that.

4 I've only attended one meeting before
5 and it was over about two.

6 THE COURT: Who conducts these meeting?

7 A PROSPECTIVE JUROR: Southern Nevada
8 health district.

9 THE COURT: Is there a name that you
10 can tell me?

11 A PROSPECTIVE JUROR: Glen Savage is
12 the director of environmental health. That's who I
13 have the agenda item with.

14 We're proposing a new permit.

15 THE COURT: The last name is Savage?

16 A PROSPECTIVE JUROR: Yes.

17 THE COURT: What's the first?

18 A PROSPECTIVE JUROR: Glen.

19 THE COURT: Do you suppose you can --
20 your agenda item could be placed with some priority?

21 A PROSPECTIVE JUROR: Thursday is the
22 meeting. Fiscal year starts July 1. We're trying
23 to get it approved before July 1.

24 THE COURT: I'm saying do you think you
25 can put that on the agenda earlier than ordinarily

1 would be the case so you could have it handled and
2 be back here by 1:30?

3 A PROSPECTIVE JUROR: The public
4 portion of the meeting starts at 8:30. I have no
5 idea what other items --

6 THE COURT: Is this a public item that
7 you have?

8 A PROSPECTIVE JUROR: Yes.

9 THE COURT: Thank you.

10 This side of the room anyone else?

11 Over here, please, anyone?

12 In the very back, corner, young lady.

13 A PROSPECTIVE JUROR: Jodie Logan,
14 170790.

15 THE COURT: Last name what?

16 A PROSPECTIVE JUROR: Logan.

17 THE COURT: Yes, ma'am.

18 A PROSPECTIVE JUROR: I have a few
19 things. I'm the only one who works in my family. I
20 do hair on straight commission at the Red Rock.

21 I make good money in the day. If I
22 miss out on four days --

23 THE COURT: What is your shift?

24 A PROSPECTIVE JUROR: I work all day.
25 11 to seven and 12 to eight. I have four children

1 and my 10 year old has cerebral palsey.

2 That's why I'm the main one that
3 works.

4 THE COURT: Who watches the children
5 when you're at work?

6 A PROSPECTIVE JUROR: My husband.

7 THE COURT: He would be available?

8 A PROSPECTIVE JUROR: He would be
9 available. I'm very busy constantly and mentally I
10 wouldn't be so in tune. Been a lot of stress,
11 anxiety.

12 I have a big bunch of things
13 altogether. It wouldn't be a good thing.

14 THE COURT: This dizziness does not
15 preclude you from working?

16 A PROSPECTIVE JUROR: I have a hard
17 time sometimes. I went to a doctor last week, had
18 blood work done.

19 Most of the inner ear with the anxiety
20 it makes it worse. I have sinus going on and I have
21 to take allergy medicine at night. Been lingering
22 for the last two months. Right now I'm dizzy,
23 constantly.

24 THE COURT: Thank you.
25 Anyone else?

1 A PROSPECTIVE JUROR: John Ruiz, badge
2 851.
3 THE COURT: Go ahead.
4 A PROSPECTIVE JUROR: I don't have a
5 problem with Monday through Friday coming from 12 to
6 five.
7 I'm also a salesperson. If this
8 were -- if I were to be selected to continue on the
9 trial would create a burden. I'm the sole income
10 earner in the household.
11 THE COURT: Continue on. What do you
12 mean?
13 A PROSPECTIVE JUROR: This proceeding
14 for picking juries, I wouldn't be able --
15 financially, I wouldn't be able to continue.
16 THE COURT: Continue, you mean past
17 today?
18 A PROSPECTIVE JUROR: Past the end of
19 the week. I could stay the week or come for the
20 week.
21 If I'm selected and this trial
22 continues it would be a financial burden in the
23 household.
24 THE COURT: We're not contemplating the
25 matter lasting more than a week. I have another

1 trial scheduled next Monday, right, counsel?
2 Yes, in the back. The gentleman, I'll
3 call you next.
4 A PROSPECTIVE JUROR: Lonzo Murphy,
5 795. I actually have court in the morning.
6 THE COURT: What do you mean you have
7 court in the morning?
8 A PROSPECTIVE JUROR: I have a court
9 appearance in the morning.
10 THE COURT: Are you charged with
11 something?
12 A PROSPECTIVE JUROR: Yeah.
13 THE COURT: What's that?
14 A PROSPECTIVE JUROR: I think I got
15 something about being in a casino with the intent to
16 commit a crime. Conspiracy, I believe, to commit
17 burglary or something like that.
18 I'm not sure of all the charges.
19 THE COURT: What is the court
20 appearance tomorrow for?
21 THE COURT: Arraignment, preliminary
22 hearing, what?
23 A PROSPECTIVE JUROR: Me and my lawyer
24 will show up in the the morning.
25 THE COURT: Why are you showing up, do

1 you know what for?
2 A PROSPECTIVE JUROR: I believe it's
3 the first time me and my lawyer are showing up
4 together.
5 I was arrested a couple months ago.
6 THE COURT: Are you charged with
7 felonies?
8 A PROSPECTIVE JUROR: Yeah. Conspiracy
9 to commit burglary. I'm not sure what else.
10 THE COURT: Have a seat.
11 The young lady?
12 A PROSPECTIVE JUROR: Gilliard, badge
13 884.
14 THE COURT: Ramona --
15 A PROSPECTIVE JUROR: -- Gilliard.
16 THE COURT: Yes?
17 A PROSPECTIVE JUROR: I have a court
18 date on the 25th for a felony court case.
19 THE COURT: Do you have a particular
20 time you're supposed to be there?
21 A PROSPECTIVE JUROR: They said 10.
22 THE COURT: What court are you supposed
23 to be in?
24 A PROSPECTIVE JUROR: North Las Vegas
25 court, MLK and Carey.

1 THE COURT: What did you witness?
2 A PROSPECTIVE JUROR: Sexual assault
3 with minor under 14.
4 THE COURT: Is it a preliminary hearing
5 you're going to?
6 A PROSPECTIVE JUROR: Yes.
7 THE COURT: I'm sure we can arrange to
8 have you called before 1:30.
9 Anyone else?
10 A PROSPECTIVE JUROR: Martirosyan,
11 badge 1670778.
12 THE COURT: Last name again is what?
13 A PROSPECTIVE JUROR:
14 M-a-r-t-i-r-o-s-y-a-n.
15 THE COURT: Yes, ma'am.
16 A PROSPECTIVE JUROR: I'm having hard
17 time to understand.
18 THE COURT: You're having trouble
19 understanding me? I'm having trouble understanding
20 you. I'm sorry.
21 Slowly, now. You're having trouble
22 understanding?
23 A PROSPECTIVE JUROR: Yes.
24 THE COURT: Language problem?
25 A PROSPECTIVE JUROR: Yes. I do speak

1 English, but not really basically not really good.

2 = Hard to understand for me.

3 THE COURT: How long have you been in
4 this country?

5 A PROSPECTIVE JUROR: A long time, 15
6 years.

7 THE COURT: Do you think you'd miss
8 some of the things that are said?

9 A PROSPECTIVE JUROR: Yes.

10 When I'm speaking with person, that's
11 fine with me. When they speaking, I'm having hard
12 time to catch the words.

13 THE COURT: Would there be an
14 opposition to excluding this lady?

15 MS. RADOSTA: No, Your Honor.

16 MS. KOLLINS: No, Your Honor.

17 THE COURT: Go downstairs and tell the
18 Jury Commissioner because of the language problem
19 you're excused.

20 In the back again?

21 A PROSPECTIVE JUROR: I was going to
22 add I didn't realize it was all this week.

23 THE COURT: Stand up.

24 A PROSPECTIVE JUROR: I didn't realize
25 it was happening this week, to. I have bookings for

1 the rest of the week on the books.

2 THE COURT: To do people's hair?

3 A PROSPECTIVE JUROR: Exactly.

4 That's how they do it with all the
5 computers. Always prebooked, everything. They have
6 to call and cancel those people.

7 I'm the sole provided ever so that
8 would be a week's worth of no money.

9 THE COURT: Thank you.

10 Anyone else?

11 A PROSPECTIVE JUROR: Yes, Veles. My
12 badge number 170834.

13 I got a problem, my English is not
14 really good.

15 THE COURT: How long have you been in
16 this country?

17 A PROSPECTIVE JUROR: About 20 years.

18 THE COURT: Thirty?

19 A PROSPECTIVE JUROR: 20.

20 THE COURT: Twenty years.

21 You think you'd miss some of the
22 things that are said?

23 A PROSPECTIVE JUROR: Um, could be
24 sometimes. I'm not sure. Never been in this kind
25 of jury thing.

1 I don't don't know exactly how it

2 work.

3 THE COURT: You seem to me like you
4 have a pretty good command of the language.

5 Do you think you could raise your hand
6 and have repeated something you needed to
7 understand?

8 A PROSPECTIVE JUROR: Sure.

9 THE COURT: Thank you.

10 Anyone else?

11 [No response.]

12 Counsel approach the bench, please.

13 (DISCUSSION OFF THE RECORD)

14 THE COURT: Ladies and Gentlemen, as you
15 heard me mention earlier, excusal from jury duty is
16 governed by statute.

17 Candidly, it's very jealously guarded.

18 I don't mean to preach, Ladies and Gentlemen, but my
19 view of this over the last almost 30 years on the
20 bench is simply this:

21 We have, unfortunately as citizens, a
22 responsibility to do certain things in our society.

23 Paying taxes, for instance, that kind thing, which
24 is not a pleasant for me.

25 I don't now you look at it. Serving

1 on jury is one of those things.

2 While we try to avoid undue hardship
3 and we do make exceptions from time to time, we're
4 not at liberty just the cater to everyone's desires
5 and say go home and forget it, because we need the
6 people we have here, by and large.

7 It's a case that's going to require a
8 lengthy process of acquiring jurors.

9 With that said, as I told you, it's
10 governed by statute. I have concluded over the
11 years that as the judge in this particular
12 department, Department XIV, I have certain inherent
13 powers to reschedule.

14 I'm going to name the following
15 individuals that the attorneys and I have discussed
16 that will allow you to reschedule.

17 You can go down to the Commissioner
18 and work out a situation in two months, four months,
19 six months, whatever will suit you. If it's a
20 problem or whatever, children in or out of school,
21 maybe some of that can be overcome.

22 If there is a health concern hopefully
23 that will be overcome. The following individuals if
24 they wish to can go down and reschedule.

25 I say if you wish to. You might want

1 to stay in this matter which is going to be a five
2 afternoon situation rather than to come back next
3 November and be faced with a three-week trial, which
4 can happen as well.

5 Little bit of a decision to be made
6 there. The following individuals can go down and
7 reschedule if they care to. Ms. Gottschling,
8 Ms. Vasquez with the children and the summer school,
9 Ms. Logan, in the back, Mr. Murphy, and
10 Ms. Gilliard.

11 Where is Ms. Gilliard? You're the one
12 that's testifying. I think we've decided we'll work
13 around that. I'll ask you to stay. I'll call the
14 judge.

15 What's name of the judge over there?
16 A PROSPECTIVE JUROR: I don't know.

17 THE COURT: When are you supposed to
18 report?

19 A PROSPECTIVE JUROR: Tomorrow.

20 THE COURT: Tomorrow is Tuesday.

21 Bring the paperwork and I'll see if we
22 can't call over there and get something worked out
23 for you.

24 I indicated Gottschling, Vasques,
25 Logan and Murphy. You may go reschedule.

1 A PROSPECTIVE JUROR: I also like --

2 THE COURT: Stand up.

3 A PROSPECTIVE JUROR: If I have a
4 felony can I still do this?

5 THE COURT: No. You can go down and
6 reschedule. Thank you.

7 Ms. Clerk, call 12 names, please.

8 THE CLERK: Come forward when I call
9 your name. Badge 0851, John Ruiz, badge 0834,
10 Joaquin Veles, badge 0733, Marge Pentico, Patrick
11 Diperno, 0753 Mark Ferguson, 0909 Jonathan Parada,
12 0906 Raul Raygoza, 0898 Craig Elder, 0768, Balmore
13 Hernandez, 0788, Judy Francis, 0930, Thelma Berman,
14 0829, Eric Randall.

15 That's 12.

16 THE COURT: Very well.

17 Ladies and Gentlemen, you who have not
18 been called let me suggest that you follow along in
19 the questioning process as I inquire of these
20 individuals because our procedures are such it's
21 likely some of you will be asked to replace some of
22 the individuals who have been initially called.

23 Should that occur the questions I'm
24 asking them would be asked of you. You might
25 consider how you would respond.

1 Ladies and Gentlemen, again I'd like
2 to inquire of you as a group, initially.

3 Is there anyone that feels for
4 whatever reason you could not serve as a fair juror
5 in this particular case?

6 [No response.]

7 Have any of you served as jurors
8 before?

9 Mr. Duran, when was that, roughly?

10 A PROSPECTIVE JUROR: Roughly six years
11 ago, maybe.

12 THE COURT: In Clark County?

13 A PROSPECTIVE JUROR: Yes.

14 THE COURT: Civil or criminal case?

15 A PROSPECTIVE JUROR: Criminal case.

16 THE COURT: Without indicating what the
17 verdict was did you reach a verdict?

18 A PROSPECTIVE JUROR: Yes.

19 THE COURT: Were you the foreman of the
20 jury?

21 A PROSPECTIVE JUROR: No.

22 THE COURT: Anyone else?

23 Miss or Mrs. Berman?

24 A PROSPECTIVE JUROR: Mrs.

25 THE COURT: How long what go was it

1 that you served, roughly?

2 A PROSPECTIVE JUROR: It was in
3 California. I don't remember the year. It was
4 about maybe 10, 12 years ago.

5 THE COURT: Do you recall if it was a
6 civil or criminal case?

7 A PROSPECTIVE JUROR: Civil.

8 THE COURT: Did you reach a verdict?

9 A PROSPECTIVE JUROR: Yes.

10 THE COURT: Were you the foreman of the
11 jury?

12 A PROSPECTIVE JUROR: No.

13 THE COURT: Anyone else?

14 Mr. Diperno, how long ago?

15 A PROSPECTIVE JUROR: About 12 years.

16 THE COURT: In Clark County?

17 A PROSPECTIVE JUROR: It was in
18 California as well.

19 THE COURT: Do you recall if it was
20 civil or criminal?

21 A PROSPECTIVE JUROR: Civil.

22 THE COURT: Did you reach a verdict?

23 A PROSPECTIVE JUROR: Yes.

24 THE COURT: Were you the foreman of the
25 jury?

1 A PROSPECTIVE JUROR: No.
 2 THE COURT: Anyone else?
 3 [No response.]
 4 THE COURT: Mr. Diperno, Mrs. Berman and
 5 Mr. Duran do you think your prior jury service would
 6 in any inhibit your ability to fairly serve on this
 7 jury?
 8 Incidentally, Mr. Randall we're
 9 acquainted, are we not?
 10 A PROSPECTIVE JUROR: Yes.
 11 THE COURT: There's no prohibition
 12 against someone serving that might be acquainted
 13 with the judge.
 14 The judge is kind of a scorekeeper
 15 here. He doesn't have a stake in either side here.
 16 I would ask you would serving in my
 17 court be a detriment in any way or embarrassing or
 18 difficult for you?
 19 A PROSPECTIVE JUROR: It wouldn't. If
 20 it wouldn't be embarrassing for you it's fine with
 21 me.
 22 THE COURT: I wanted to make that clear
 23 for the record. We do know each other somewhat.
 24 Are you or any close friends or
 25 relatives involved in law enforcement or have you

1 been in the past, anyone?
 2 Mr. Randall?
 3 A PROSPECTIVE JUROR: My father was a
 4 cop.
 5 THE COURT: Locally?
 6 A PROSPECTIVE JUROR: No, back in West
 7 Virginia.
 8 THE COURT: How long was he working as
 9 a policeman?
 10 A PROSPECTIVE JUROR: He retired when
 11 he was 55. Most of his adult life.
 12 THE COURT: During the time you were in
 13 the home growing up?
 14 A PROSPECTIVE JUROR: Yes.
 15 THE COURT: Do you recall ever
 16 discussing his work with him from time to time?
 17 A PROSPECTIVE JUROR: Not really.
 18 He retired when I was fairly young and
 19 also passed away a few years after that.
 20 THE COURT: Do you think his occupation
 21 and your obvious relationship with him would color
 22 or affect your service in this case?
 23 A PROSPECTIVE JUROR: No.
 24 THE COURT: Do you think you can be a
 25 fair juror?

1 A PROSPECTIVE JUROR: Yes.
 2 THE COURT: Anyone else?
 3 I might take this opportunity using
 4 you, Mr. Randall as an example to make two points
 5 to everyone.
 6 Number one, there are no right or
 7 wrong answers to the questions I ask. I think
 8 sometimes prospective jurors think these are trick
 9 questions you're supposed to answer in a certain way
 10 or you'll get caught up in something.
 11 That's not true. All I want is a very
 12 honest response. I don't want you to anguish over
 13 the way you're going to respond to these questions.
 14 Just give me an honest answer.
 15 Secondly, the process of empaneling a
 16 jury which we will devote today and possibly a part
 17 of tomorrow trying to accomplish has one goal.
 18 That is to acquire 12 people to serve
 19 as jurors who are fair and objective in their point
 20 of view in approaching their duties as a juror.
 21 That is all these questions we're
 22 asking and all the dialogue we're having is geared
 23 to determine, if we have 12 people that are
 24 fair-minded.
 25 You may well hear at the end of my

1 questioning and whatnot the question I asked
 2 Mr. Randall. Can you be a fair juror?
 3 He said he could be.
 4 Only you can answer that question. My
 5 staff, the attorneys and I can't tell you whether
 6 you can be fair.
 7 What you have to do is a little soul
 8 searching really, apply the process of our next four
 9 or five days together, understanding we're going to
 10 call witnesses.
 11 You would be called upon to hear the
 12 testimony and ultimately discuss it and all that
 13 with your fellow jurors at the appropriate time.
 14 Can you go through the process
 15 notwithstanding whatever issue we might be
 16 discussing?
 17 In the case of Mr. Randall, his father
 18 was a policeman. He had to make that evaluation.
 19 Can I be fair to everybody concerned
 20 here, both sides, notwithstanding the fact I grew up
 21 in a home where my father was a policeman?
 22 I just want to bring your attention to
 23 that. That's what we're here for and ultimately the
 24 question would be asked.
 25 If it isn't asked, if you think you

1 cannot perhaps be fair you might want to volunteer
2 that.

3 Have you or close friends or family
4 members ever been the victim of crime, anyone?

5 Mr. Ferguson, tell us, please.

6 A PROSPECTIVE JUROR: My daughter was
7 raped about a year and a half ago.

8 THE COURT: Here in Clark County?

9 A PROSPECTIVE JUROR: Yes.

10 THE COURT: Was anyone caught?

11 A PROSPECTIVE JUROR: Nope.

12 THE COURT: Do you think the
13 authorities treated the matter appropriately?

14 A PROSPECTIVE JUROR: No.

15 THE COURT: In what way?

16 A PROSPECTIVE JUROR: I think they let
17 it drop.

18 THE COURT: No suspects to speak of?

19 A PROSPECTIVE JUROR: No.

20 THE COURT: Do you think that situation
21 would cause you to be biased one way or the other in
22 this case?

23 A PROSPECTIVE JUROR: No, I don't think
24 so.

25 THE COURT: You understand

1 notwithstanding the verdict you would never be
2 called on as a juror in this kind of case to do
3 anything in the way of sentencing a person?

4 A PROSPECTIVE JUROR: Right.

5 THE COURT: That aside, with that in
6 mind do you think you can be a fair juror?

7 A PROSPECTIVE JUROR: Yes.

8 THE COURT: Anyone else been the victim
9 of crime? Household burglaries, things like that?

10 Mr. Veles?

11 A PROSPECTIVE JUROR: My brother is in
12 jail in Florida.

13 THE COURT: That's a question I'll ask
14 a little later. Right now I'm talking about being a
15 victim of crime.

16 Have you had a crime committed against
17 you or family members, anything like that?

18 The next question contemplates jury
19 instruction. Near the end of the trial I will read
20 to you a lengthy group of instructions that would
21 give you the law that would apply to the facts as
22 you find those facts from the evidence.

23 The questions is this. Will you
24 follow all of the instructions of the Court on the
25 law even though they may differ from your personal

1 conceptions of what the law ought to be?

2 Does anyone feel they would be

3 inclined to embroider or add to or in some way
4 create their own law rather than follow the law I
5 would give you.

6 Does everyone feel they could follow
7 the law I would give you?

8 [Affirmative indication.]

9 A person accused of committing a crime
10 is presumed to be innocent in a criminal trial.

11 Does everyone understand and agree
12 with that concept?

13 [Affirmative indication.]

14 Does anyone not?

15 [Negative indication.]

16 Are you aware that the Defendant does
17 not to take the stand and testify or offer any
18 evidence if he chooses not to and you can still find
19 him not guilty and that's because the burden is on
20 the state to prove the defendant's guilt beyond a
21 reasonable doubt?

22 Does every one understand that?

23 [Affirmative indication.]

24 Does anyone not?

25 [Negative indication.]

1 Have you or close friends or family
2 ever been involved in the criminal justice process
3 either in prosecuting a case or as a witness or a
4 Defendant?

5 Mr. Veles, you mentioned your brother.
6 He was convicted of a crime?

7 A PROSPECTIVE JUROR: Yeah.

8 THE COURT: In Florida?

9 A PROSPECTIVE JUROR: Yes.

10 THE COURT: What was the crime?

11 A PROSPECTIVE JUROR: Drugs.

12 THE COURT: Sale of drugs?

13 A PROSPECTIVE JUROR: Something. I'm
14 not sure.

15 THE COURT: Did you live in Florida at
16 the time with him?

17 A PROSPECTIVE JUROR: No.

18 THE COURT: You know what somebody has
19 told you about it?

20 A PROSPECTIVE JUROR: Yeah. My
21 sister-in-law, she told me about it.

22 THE COURT: He's in custody in Florida?

23 A PROSPECTIVE JUROR: Yes.

24 THE COURT: From what you know of it do
25 you feel your brother was treated fairly or perhaps

1 not?

2 A PROSPECTIVE JUROR: Like I say, I
3 don't know. I never talk to him before.

4 THE COURT: Would this situation in
5 Florida create in your mind any kind of bias or
6 would it be a problem for you to serve as a juror
7 notwithstanding your brother's situation?

8 A PROSPECTIVE JUROR: No.

9 THE COURT: Do you think you can be a
10 fair juror?

11 A PROSPECTIVE JUROR: Yes.

12 THE COURT: Mr. Randall?

13 A PROSPECTIVE JUROR: You mentioned
14 about a witness. I don't know if my wife was a
15 witness, but this is prior to us being married.

16 She had -- her best friend was raped
17 and murdered down in California some years ago. She
18 may have very well been involved in the criminal
19 proceedings on that, but I don't know if that's the
20 case or not.

21 THE COURT: You don't recall discussing
22 it with her?

23 A PROSPECTIVE JUROR: No.

24 She told me one time about a good
25 friend of her's being raped and murdered. She may

38

1 have been involved in a criminal case. I don't
2 know.

3 THE COURT: The next question, have you
4 or close friends or family members ever been the
5 victim or accused of sexual assault?

6 Anyone?

7 [Negative indication.]

8 THE COURT: Let me repeat that. It's
9 hard to understand the first time.

10 Have you or close friends or family
11 members ever been the victim or accused of sexual
12 assault?

13 [Negative indication.]

14 THE COURT: Have you --

15 MS. RADOSTA: I'm sorry, judge. I
16 didn't mean to interrupt.

17 I thought I saw Mr. Ruiz's hand go up
18 on the last question.

19 A PROSPECTIVE JUROR: That's correct.

20 MS. RADOSTA: You didn't see him?

21 THE COURT: The victim of crime or
22 of --

23 A PROSPECTIVE JUROR: Do I know any
24 family members? My brother.

25 THE COURT: Was he charged with an

1 offense?

2 A PROSPECTIVE JUROR: Several of them.

3 THE COURT: Thank you, Ms. Radosta.

4 MS. RADOSTA: No problem.

5 THE COURT: Was that in Las Vegas?

6 A PROSPECTIVE JUROR: Northern
7 California.

8 THE COURT: What kind of crime are we
9 talking about?

10 A PROSPECTIVE JUROR: Drugs, auto
11 theft, burglary.

12 THE COURT: Did you live in the same
13 area during the time of these crimes --

14 A PROSPECTIVE JUROR: No. I lived in
15 Southern California. He lived in northern
16 California.

17 THE COURT: Based on what you know of
18 the situation do you have a sense as to whether or
19 not he was treated fairly or perhaps not?

20 A PROSPECTIVE JUROR: He was guilty, so
21 I guess he was treated fairly.

22 THE COURT: Is there anything about the
23 situation that would impact your view of this case?

24 A PROSPECTIVE JUROR: No.

25 THE COURT: Do you feel you can be a

40

1 fair juror?

2 A PROSPECTIVE JUROR: Sure.

3 THE COURT: All right. Mr. Reygosa,
4 tell us.

5 A PROSPECTIVE JUROR: My son was
6 convicted when he was a juvenile.

7 THE COURT: Your son was?

8 A PROSPECTIVE JUROR: Um-hum.

9 THE COURT: In Clark County?

10 A PROSPECTIVE JUROR: Yes.

11 THE COURT: What was he charged with?

12 A PROSPECTIVE JUROR: Petty larceny,
13 something like that. He paid community service and
14 all that stuff.

15 That was eight years ago.

16 THE COURT: How many years?

17 A PROSPECTIVE JUROR: Eight.

18 THE COURT: You said something about
19 Arizona?

20 A PROSPECTIVE JUROR: No. Here.

21 It was a petty larceny or something
22 like that.

23 THE COURT: What was the outcome of
24 that?

25 Did he have to go down to Child Haven?

1 A PROSPECTIVE JUROR: No.
 2 He just went to pay with community
 3 service and restitution. Things like that.
 4 THE COURT: Do you think he was treated
 5 fairly?
 6 A PROSPECTIVE JUROR: Yes.
 7 THE COURT: Do you think you can be a
 8 fair juror?
 9 A PROSPECTIVE JUROR: Yes.
 10 THE COURT: Anyone else whose had any
 11 member of a family or themself involved in a
 12 criminal justice process?
 13 [Negative indication.]
 14 THE COURT: Again, have you or close
 15 friends or family mommy ever been the victim or
 16 accused of sexual assault?
 17 [Negative indication.]
 18 THE COURT: Have you ever consulted
 19 with an expert another than a medical doctor?
 20 Has anyone ever hired or consulted an
 21 expert for an opinion?
 22 [Negative indication.]
 23 THE COURT: Do you have any specialized
 24 training in medicines, science or biology?
 25 [Negative indication.]

1 THE COURT: Does anyone have
 2 specialized training in medicine, science or
 3 biology?
 4 [Negative indication.]
 5 THE COURT: Will the nature of the
 6 charges create a situation where you cannot be fair
 7 and impartial?
 8 You heard a rendition on the charges
 9 from Mr. Turner, a list of charges.
 10 Would the nature of those charges
 11 create a situation where you don't think you can be
 12 fair?
 13 Does anyone feel that way?
 14 [Negative indication.]
 15 THE COURT: Let me begin the individual
 16 questioning if I might with Mr. Ruiz.
 17
 18
 19 VOIR DIRE EXAMINATION
 20 BY THE COURT:
 21 Q. Tell us of your current employment,
 22 marital status, the number of children you may have
 23 and how long you've lived in Clark County.
 24 A. **I'm an outside salesperson. I deal in**
 25 **lumber. Married with three kids. I've been here**

1 **for 10 years.**
 2 Q. How long have you been with your
 3 current employer?
 4 A. **For about a year and a half.**
 5 Q. What do you do there?
 6 A. **I'm an outside salesperson.**
 7 Q. Selling lumber?
 8 A. **Lumber, raw materials, produce this**
 9 **kind of product here.**
 10 Q. Before working at your current
 11 employment where did you work?
 12 A. **Austin Hardwoods.**
 13 Q. Same sort of thing?
 14 A. **A competitor.**
 15 Q. Any other kinds of work in Clark
 16 County?
 17 A. **No.**
 18 Q. Is your wife employed outside the
 19 home?
 20 A. **Yes.**
 21 Q. How so?
 22 A. **She works at Ross.**
 23 Q. Store?
 24 A. **Dress for Less.**
 25 Q. Any other kinds of work on her part

1 the last 10 years?
 2 A. **She's worked at Target, WalMart,**
 3 **Mandalay Bay.**
 4 Q. What did she do at Mandalay Bay?
 5 A. **Working in the sportsbook.**
 6 Q. Approximate ages of your three
 7 children?
 8 A. **28, 21 and 19.**
 9 Q. Are any of those children or their
 10 spouses involved in a law-related occupation?
 11 A. **No.**
 12 Q. Where did you move from when you came
 13 here?
 14 A. **Northern California.**
 15 Q. What town?
 16 A. **Gilroy.**
 17 Q. Were you working there?
 18 A. **I was.**
 19 Q. What did you do there?
 20 A. **I was working at Master Service**
 21 **Corporation. I was an assistant in operations.**
 22 Q. What kind of business?
 23 A. **A screw company.**
 24 Q. Built and made screws?
 25 A. **Screws, we sold that Hewlitt Packard,**

1 **military spec screws, washers, nuts and bolts.**

2 Q. How long did you work there?

3 A. **Worked there for eight years.**

4 Q. Any employment before that?

5 A. **Yes.**

6 Q. What was that?

7 A. **Golden world produce.**

8 Q. How long were you involved with that?

9 A. **Four years.**

10 Q. Any other employment as an adult?

11 A. **Several restaurants, prior to.**

12 Q. Were you ever in the military?

13 A. **No.**

14 Q. Where are you from originally?

15 A. **Born in northern California, San Jose,**
16 **California.**

17 Q. The next question I always give a
18 little explanation of. It's difficult.

19 The question is do you have any
20 prejudice as to the charges in this case?

21 By way of explanation -- I'd like
22 everyone to hear this because you may be asked, all
23 of you, this question in some way. When I say
24 prejudice, I'm talking about an emotional reaction
25 to the various charges.

1 By way of example, let's assume that
2 we have a charge of possession of marijuana. You
3 probably heard people espouse that marijuana should
4 be legalized.

5 You have heard that, have you not?

6 A. **Sure.**

7 Q. Let's assume you believe marijuana
8 should be legalized and you're on the jury. The
9 charge is possession of -- illegal possession of
10 marijuana.

11 You can see the nature of the charge
12 might well dictate your feeling in the matter. Do
13 you follow me?

14 A. **Yeah.**

15 Q. On the other end of the spectrum you
16 might have a situation where an infant is found in a
17 dumpster. Something you can't believe people are
18 capable of and you're infuriated by it.

19 You're going to strike a blow for
20 justice, again your emotion taking over because of
21 the nature of the charge.

22 Do you follow me?

23 A. **I do.**

24 Q. These charges were explained and I
25 won't go through the entire number of counts, but

1 burglary while in possession of firearm, conspiracy

2 to commit burglary, conspiracy to commit kidnapping,

3 sexual assault with use of deadly weapon, these

4 kinds of things.

5 Do you have any prejudice as to those
6 charges?

7 A. **They are all very serious. It would**
8 **depend on what the evidence comes out as to how I**
9 **would feel about it.**

10 **As far as I'm concerned, the charges**
11 **are very strong.**

12 Q. Well, you're correct, if I understand
13 what you're saying in part at least.

14 You should reserve any judgment until
15 you hear all the evidence.

16 A. **Sure.**

17 Q. And then confer with your fellow
18 jurors.

19 My question to you would be do those
20 charges create any emotional feeling that would
21 be -- that would cause you to be something other
22 than objective in your approach to your duties as a
23 juror?

24 A. **At this time I don't know that he did**
25 **it without having the evidence. Yes, I could be**

1 **objective.**

2 Q. I guess what I'm saying is the nature
3 of the charges themselves, would that be an
4 impediment to your being objective?

5 A. **No.**

6 **Here again, the charges are so severe,**
7 **that as you hear it, yes, it could be -- I could be**
8 **swayed to go a hundred percent wrong direction, I**
9 **guess is my response, as opposed to, um, depending I**
10 **guess on what the penalties are.**

11 Q. You'll be instructed at the proper
12 time you're not supposed to consider the punishment.
13 I understand what you're saying.

14 You don't know the facts.

15 A. **Sure.**

16 Q. Again I probably am overcomplicating
17 the issue. I'm saying do the nature of the charges
18 themselves create a situation in you that you don't
19 think you can be fair?

20 A. **No.**

21 Q. Do you know any of the other
22 prospective jurors?

23 A. **No.**

24 Q. Do you have any racial prejudice?

25 A. **No.**

1 Q. Do you understand an Information is
2 a -- I should tell you this document I read from a
3 moment ago is entitled an Information. In this
4 instance, an amended information. That's what they
5 call this piece of paper.

6 The question is do you understand that
7 an Information is a mere accusation and not evidence
8 of what it contains, that the Defendant is presumed
9 to be innocent until proven guilty and that the
10 state has the burden of proving the defendant's
11 guilt beyond a reasonable doubt?

12 A. I do.

13 Q. If you were charged with offenses
14 similar to the ones in this case or if you were
15 prosecuting this case would you want 12 individuals
16 such as yourself to be on your jury?

17 A. Yeah.

18 Q. Do you know of any reason at all why
19 you can't be completely fair and impartial in
20 hearing this case?

21 A. No.

22 THE COURT: Questions from the state?

23 MS. KOLLINS: Very briefly, judge.

24
25

1 VOIR DIRE EXAMINATION

2 BY MS. KOLLINS:

3 Q. Good afternoon. How long ago was your
4 brother prosecuted?

5 A. Depends on which one it was, yeah.
6 He's institutionalized. He's been in and out of
7 jail from his childhood all the way up.

8 Q. In California?

9 A. Yes.

10 Q. Did you go through the system with
11 him, go through the Criminal Justice System with
12 him?

13 A. I visited him on several occasions.

14 Q. Did you attend the court dates with
15 him?

16 A. No.

17 Q. Anything about the way law enforcement
18 or the prosecuting office handled his matter that
19 might bleed over for you into this trial?

20 A. No.

21 I wasn't privy to anything other than
22 when he was in I visited him.

23 MS. KOLLINS: Pass for cause.

24 THE COURT: Defense counsel?

25 MR. REED: Can we approach the bench?

1 THE COURT: You wish to approach the
2 bench?

3 MR. REED: Yes, please.

4 (DISCUSSION OFF THE RECORD)

5 THE COURT: Again inquiring of you as a
6 group, does any one of you have any particular
7 interest or knowledge in DNA science or evidence?

8 [Negative indication.]

9 THE COURT: DNA being the genetic
10 makeup, does anyone have any particular interest or
11 knowledge in that area?

12 [Negative indication.]

13 THE COURT: They indicated in the
14 negative.

15 Further questions?

16 MS. RADOSTA: Not on that particular.

17 THE COURT: Any further questions?

18 MS. RADOSTA: For Mr. Ruiz or just on
19 that topic?

20 THE COURT: On the individual.

21 MS. RADOSTA: Thank you.

22

23

24 VOIR DIRE EXAMINATION

25 BY MS. RADOSTA:

1 Q. Mr. Ruiz, I wanted to follow up on a
2 couple of questions the judge asked you. He asked
3 would you want 12 people like yourself on your jury.
4 You indicated yes.

5 Why?

6 THE COURT: Counsel approach the bench,
7 please.

8 (DISCUSSION OFF THE RECORD)

9 THE COURT: You may proceed.

10 BY MS. RADOSTA:

11 Q. Mr. Ruiz, when the judge was asking
12 you about the different charges and if the charges
13 themselves would impact you.

14 I believe one thing you said is the
15 charges were strong. I'm curious what you meant by
16 the words strong.

17 A. Well, robbery, kidnapping, those are
18 pretty severe allegations.

19 Q. But you do understand they are
20 allegations at this point?

21 A. I do.

22 Q. My concern was was with the word
23 strong. You appreciate the fact that at this point
24 in time no evidence has been presented yet; is that
25 correct?

- 1 A. **Correct.**
 2 Q. And that you think you can keep an
 3 open mind even though you have heard the charges?
 4 A. **Sure.**
 5 Q. Additionally, there were a couple
 6 other charges that are in the charging document.
 7 Kidnapping, robbery, in addition to some of the
 8 other ones that the judge mentioned.
 9 Do those have any impact on you other
 10 than, other than what you've already stated?
 11 A. **No.**
 12 MS. RADOSTA: Pass for cause, judge.
 13 THE COURT: Very good.

VOIR DIRE EXAMINATION

BY THE COURT:

- 18 Q. Mr. Veles, tell us please of your
 19 current employment, your marital status, how long
 20 you've lived in Clark County and the number of
 21 children you have.
 22 A. **I have five children. I'm in**
 23 **landscaping. I work for the Wynn Las Vegas.**
 24 **I've been here for about nine years.**
 25 Q. You are married?

- 1 A. **Yes.**
 2 Q. How long have you worked at the Wynn?
 3 A. **For three years.**
 4 Q. Before that?
 5 A. **Companies, more companies, all**
 6 **landscaping.**
 7 Q. That's the kind of work you've done
 8 exclusively in Clark County?
 9 A. **Yes.**
 10 Q. Is your wife employed outside the
 11 home?
 12 A. **She works at a casino.**
 13 Q. What does she do there?
 14 A. **Housekeeping.**
 15 Q. The ages of your children, roughly?
 16 A. **24, 22, 19, 15 and 12, 13.**
 17 Q. Are any of the older children or their
 18 spouses involved in a law-related occupation?
 19 A. **No.**
 20 Q. Where did you move from?
 21 A. **From San Jose, California.**
 22 Q. Where?
 23 A. **San Jose.**
 24 Q. Employed there?
 25 A. **Yes.**

- 1 Q. How were you employed there?
 2 A. **It was same thing, landscaping.**
 3 Q. Were you ever in the military?
 4 A. **No.**
 5 Q. Did you grow up in California?
 6 A. **No, I'm from Mexico.**
 7 Q. I'm sorry?
 8 A. **I'm from Mexico.**
 9 Q. What city?
 10 A. **Mazatlan, small town by Puerto**
 11 **Vallarta.**
 12 Q. How old were you when you came to this
 13 country?
 14 A. **About 20, 22 maybe.**
 15 Q. Do you have any prejudice as to the
 16 charges in this case?
 17 A. **I didn't understand that word.**
 18 Q. As I asked Mr. Ruiz earlier, you
 19 understand the nature of the charges, what kind of
 20 charges we have here?
 21 A. **Yes.**
 22 Q. Do you have any prejudice about these
 23 charges?
 24 In other words, do you have any strong
 25 feeling about the charges that would prevent you

- 1 from being fair as a juror?
 2 A. **No.**
 3 Q. Do you know any of the other
 4 prospective jurors?
 5 A. **No.**
 6 Q. Do you have any racial prejudice?
 7 A. **No.**
 8 Q. Do you understand that the information
 9 is a mere formal method of accusing a person as a
 10 crime -- it's not evidence of his guilt -- that the
 11 Defendant is presumed to be innocent until proven
 12 guilty and the State has the burden of proving the
 13 Defendant's guilt beyond a reasonable doubt?
 14 A. **Yes.**
 15 Q. If you were charged with offenses
 16 similar to the ones alleged in this case or if you
 17 were prosecuting this case would you want 12
 18 individuals such as yourself to be on your jury?
 19 A. **Um, yes.**
 20 Q. Do you know of any reason at all why
 21 you can't be completely fair and impartial in
 22 hearing this case?
 23 A. **Um, none.**
 24 THE COURT: Questions from the State.
 25 MS. KOLLINS: Pass for cause.

1 THE COURT: Defense counsel?
2 MS. RADOSTA: Just one, I guess.

6 VOIRE DIRE EXAMINATION

7 BY MS. RADOSTA:

8 Q. Mr. Veles, you hesitated for a second
9 on whether you could be fair and impartial. You can
10 understand and appreciate because of the nature of
11 the charges we need people to be absolutely certain
12 about their fairness to both sides.

13 Do you appreciate that?

14 A. Yes.

15 Q. That hesitation causes me concern.
16 Can you tell me why you hesitated in
17 that answer?

18 A. Like I didn't understand the question
19 the way.

20 Q. Do you understand what the question is
21 now?

22 A. Yes.

23 Q. Now that you've talked with the judge
24 and us a little bit more have you been able to
25 understand all the the questions that have been

58

1 asked of you?

2 A. Yes.

3 MS. RADOSTA: Thank you. We'll pass
4 for cause.

5 THE COURT: Very good.

8 VOIR DIRE EXAMINATION

9 BY THE COURT:

10 Q. Miss or Mrs. Pentico, tell us of your
11 current employment, the number of children you may
12 have and how long you've lived in Clark County.

13 A. I've lived in Clark County since 1963.
14 I'm married, I have one child.

15 Q. Are you employed outside the home?

16 A. No. I'm retired.

17 Q. What did you retire from?

18 A. Accounts payable clerk at Sunrise
19 Hospital.

20 Q. How long were you employed with the
21 hospital?

22 A. Thirteen years.

23 Q. Is your husband employed?

24 A. No, he's retired.

25 Q. What did he retire from?

1 A. He was operating engineer at Sunrise
2 Hospital.

3 Q. What other work on your part and his
4 over the years?

5 A. I've been a cashier, I cleaned houses.
6 That's it.

7 Q. Your husband has been an --

8 A. Operating engineer.

9 Q. -- throughout.
10 You have one child?

11 A. Yes.

12 Q. Boy or girl?

13 A. A son.

14 Q. Is he married?

15 A. Not at the present time.

16 Q. Is he or perhaps his ex-spouse if he
17 has one ever been involved in a law-related
18 occupation?

19 A. No.

20 Q. Where did you move from?

21 A. Iowa.

22 Q. What city?

23 A. Dennison.

24 Q. That's where you're from originally?

25 A. Um-hum.

60

1 Q. Do you have any prejudice as to the
2 charges in this case?

3 A. No.

4 Q. Do you know any of the other
5 prospective jurors?

6 A. No.

7 Q. Do you have any racial prejudice?

8 A. No.

9 Q. Do you understand an Information is a
10 mere accusation and not evidence, that the defendant
11 is presumed to be innocent until proven guilty and
12 the state has the burden of proving the defendant's
13 guilt beyond a reasonable doubt?

14 A. Yes.

15 Q. If you were charged with offenses
16 similar ones alleged in this case or if you were
17 prosecuting this case would you want 12 individuals
18 such as yourself to be on your jury?

19 A. Yes.

20 Q. Do you know of any reason at all why
21 you can't be completely fair and impartial in
22 hearing this case?

23 A. No.

24 THE COURT: Questions from the State,
25 please?

MS. KOLLINS: Very briefly.

VOIR DIRE EXAMINATION

BY MS. KOLLINS:

Q. Did you say accounts receivable clerk?

A. **Accounts payable.**

Q. Did you have interaction with any of the medical staff at Sunrise?

A. **No. We paid the hospital's bills.**

Q. You wouldn't have had interaction with any of the sexual assault nurse team or any of those type people?

A. **No.**

MS. KOLLINS: Pass for cause.

THE COURT: Defense counsel, do you have any questions?

VOIR DIRE EXAMINATION

BY MS. RADOSTA:

Q. Ms. Pentico, i don't understand what your husband does or did. He was an operating engineer?

A. **Maintenance.**

Q. That was at Sunrise Hospital?

A. **Yes. He was a welder before that.**

Q. How many years before?

A. **He was the welder at Sunrise Hospital.**

Q. Do you have any idea -- as part of that did he ever come in contact with any of the doctors or nurses at Sunrise?

A. **When they needed repair in surgery or anywhere he would possibly see them but not much interaction.**

Q. Not much interaction beyond if they happened to be in the room when he was in there?

A. **Right.**

MS. RADOSTA: Nothing further. Thank you. Pass for cause.

VOIR DIRE EXAMINATION

BY THE COURT:

Q. Mr. Diperno, tell us please of your employment, marital status, the number of children you may have and how long you've been in Clark County.

A. **I'm employed as a vice-president of sales and marketing at JS Products in Las Vegas. I**

have one child seven years old, married.

Q. You've lived here how long?

A. **Going on eight years, almost eight.**

Q. JS Products?

A. **JS Products.**

Q. That's an import business?

A. **Yeah.**

Q. Have you been involved with that exclusively during the last eight years or so or have you had other employment?

A. **Since I've been in Las Vegas, yes, exclusively there.**

Q. Is your wife employed?

A. **Yes.**

Q. What does she do?

A. **She's an admissions representative at Cordon Bleu college of culinary arts.**

Q. Is she involved in the teaching or admissions?

A. **Admissions, so she works with the students that are coming into the school.**

Q. Any other work on her part during the time you've lived in Clark County?

A. **Yes.**

She was a recruiter, executive

recruiter head hunter, finds people for jobs.

Q. Any particular kind of jobs?

A. **With consumer products jobs, anything that's sold in a grocery store and packaged. Consumer products person.**

Q. Where did you move from?

A. **Colorado Springs.**

Q. What kind of work were you doing there?

A. **Similar. I worked for a division of Emerson Electric. I was in Colorado Springs for two years.**

Q. You say similar.

A. **Sales and marketing for hardware type of products.**

Q. Your wife at the time was doing what?

A. **She was pregnant. She wasn't doing anything.**

Q. I don't know if she would appreciate that. Before Colorado Springs where did you live?

A. **Southern California.**

Q. Were you employed there?

A. **Yes.**

Q. How so?

A. **Worked for the Scott's miracle grow**

1 **company, lawn and garden, plant food.**

2 Q. Sales again?

3 A. **Sales.**

4 Q. Where are you from originally?

5 A. **Rochester, New York.**

6 Q. Grew up there?

7 A. **Until I was 10, yes.**

8 Q. Ever in the military?

9 A. **No.**

10 Q. Do you have any prejudice as to the
11 charges in this case?

12 A. **No.**

13 Q. Do you know any of the other
14 prospective jurors?

15 A. **No.**

16 Q. Do you have any racial prejudice?

17 A. **No.**

18 Q. Do you understand an Information is a
19 mere accusation and not evidence, that the defendant
20 is presumed innocent until proven guilty and that
21 the burden is on the state to prove the defendant's
22 guilt beyond a reasonable doubt?

23 A. **Yes.**

24 Q. If you were charged with offenses
25 similar to the ones alleged in this case or if you

1 situation where you might have to refrain from

2 making a judgment until you hear all the evidence?

3 A. **Yes.**

4 Q. Now everybody has opinions, I'm sure.

5 Would you be willing to listen to the
6 other jurors' opinions regarding the evidence when
7 you go back to deliberate?

8 A. **Sure.**

9 Q. You don't necessarily have to be
10 persuaded by that, but you're willing to hear their
11 opinions and judge them and listen to them?

12 A. **Sure.**

13 Q. Would you also be willing to share
14 your opinions of the evidence once you get to that
15 point?

16 A. **Absolutely.**

17 Q. I guess the final question is, I think
18 it's a normal human reaction probably to making snap
19 judgements.

20 You understand that the rules will
21 require you to hold back on that judgment?

22 A. **Yes.**

23 Q. And is that where you were a little
24 concerned about your ability there?

25 A. **Yeah, I would -- I wouldn't want to**

1 were prosecuting this case would you want 12
2 individuals such as yourself to be on your jury?

3 A. **I think so.**

4 Q. Do you know of any reason at all why
5 you can't be completely fair and impartial in
6 hearing this case?

7 A. **No.**

8 THE COURT: Questions from the State?

9 MR. TURNER: Court's indulgence.

10 Pass for cause.

11 THE COURT: Defense counsel, questions?

12 MS. RADOSTA: Yes, thanks.

13

14

15 VOIR DIRE EXAMINATION

16 BY MS. RADOSTA:

17 Q. I guess I asked Mr. Veles the same
18 kind of thing. You said about the fair and
19 impartial, I think so. That what causes me some
20 concern.

21 A. **No. I think I'm a fair and impartial
22 person. However, my job requires me to make
23 judgements and decisions all day long. I'm very
24 opinionated. Paid to make quick, snap judgements.**

25 Q. Would you be comfortable in a

1 **be sitting in that chair, I guess, having to face
2 all the prospective jurors, because of the
3 consequences.**

4 Q. I think the judge even asked the
5 question that would you -- if you were either with
6 the State or with the defense would you want someone
7 of your mind sitting in judgment of yourself and I
8 think you said yes to that?

9 A. **I do.**

10 Q. It sounds as you might be changing
11 your opinion.

12 A. **No, no, no.**

13 Q. All right.

14 MS. RADOSTA: I think that covers it.

15 Appreciate it. Pass for cause.

16 THE COURT: Very good.

17

18

19 VOIR DIRE EXAMINATION

20 BY THE COURT:

21 Q. Mr. Ferguson, tells of your current
22 employment, marital status, the number of children
23 you may have and how long you've lived in Clark
24 County.

25 A. **I'm a project superintendent for a**

1 local construction company here Las Vegas. I'm
2 married, I have two adults children that are a son
3 33 and daughter 28.

4 I've been in Clark County eight and a
5 half years.

6 Q. Been involved in the same occupation
7 the eight and a half years?

8 A. Yes.

9 Q. Is your wife employed outside the
10 home?

11 A. Yes.

12 Q. What does she do?

13 A. She's currently an office manager for
14 a property management company.

15 Q. Are either of your children or their
16 spouses involved in a law related occupation?

17 A. No.

18 Q. What sort of things do you build?

19 A. Pretty much anything they put me in.
20 CostCo's, movie theatres. Currently I'm doing a
21 project down at McCarran Airport, baggage claim
22 remodeling.

23 Q. Where did you move from when you came
24 here?

25 A. Washington State, Longview.

1 Q. Why employment there?

2 A. Similar.

3 Q. Your wife, was she employed there?

4 A. In Washington?

5 Q. Yes.

6 A. Yes.

7 Q. What did she do there?

8 A. Cashier for a minimart down there.

9 Q. How long did you live in that
10 vicinity?

11 A. Thirty years, 35.

12 Q. Where are you from originally?

13 A. Washington State.

14 Q. Grew up there?

15 A. Yes.

16 Q. Ever in the military?

17 A. Yes, United States Marine Corps.

18 Q. What was your area of responsibility
19 in the Marines?

20 A. Ground pounder, infantry, Viet Nam
21 vet.

22 Q. Do you have any prejudice as to the
23 charges in this case?

24 A. No.

25 Q. Do you know any of the other

1 prospective juror

2 A. No.

3 Q. Do you have any racial prejudice?

4 A. No.

5 Q. Do you understand an Information is a
6 mere accusation and that the defendant is presumed
7 innocent until proven guilty?

8 A. I do.

9 Q. If you were charged with offenses
10 similar to the ones alleged in this case or if you
11 were prosecuting this case would you want 12
12 individuals such as yourself to be on your jury?

13 A. Absolutely.

14 Q. Do you know of any reason at why you
15 can't be completely fair and impartial in hearing
16 this case?

17 A. I can think of no reason.

18 THE COURT: Questions from the State?

19 MS. KOLLINS: Very briefly.

22 VOIR DIRE EXAMINATION

23 BY MS. KOLLINS:

24 Q. Good afternoon, Mr. Ferguson. I want
25 to talk to you about your daughter's case for just a

1 moment. I don't want to make you uncomfortable.

2 Did that happen here in Clark County?

3 A. Yes.

4 Q. Was it a stranger or was it someone
5 she knew?

6 A. A stranger.

7 Q. Did it happen in her home or did it
8 happen --

9 A. Yeah.

10 Q. Happened in her home?

11 A. Yes.

12 Q. You mentioned that you thought the
13 authorities didn't do everything they could do.

14 What do you think they left
15 incomplete?

16 A. I just thought it ran its course,
17 we've been about six weeks, you know, nothing going
18 on.

19 Q. But she didn't -- doesn't have a name
20 for them or an identity of who committed the crime?

21 A. No.

22 Q. Are you still hopeful that someone
23 will be prosecuted?

24 A. Yes.

25 Q. Anything in the -- anything in the way

1 the police handled interacting with you other than
2 what you feel is lacking in the investigation that
3 would cause you any heartburn in this case?

4 A. No.

5 Q. You'll be listening to police officers
6 testify and people that work for Metro.

7 A. Correct.

8 Q. You won't hold anything against them
9 from what has transpired in your daughter's case?

10 A. They couldn't find any evidence.
11 That's the way it is.

12 MS. KOLLINS: Thank you for your time.
13 Pass for cause.

14 THE COURT: Defense counsel?

15 VOIR DIRE EXAMINATION

16 BY MS. RADOSTA:

17 Q. Mr. Ferguson, I need to talk to you
18 about the same topic.

19 Have you talked to your daughter at
20 all about, in any detail about the events?

21 A. About what?

22 Q. About that particular event?

23 A. Absolutely.

1 Q. So you have no details beyond just
2 that she was raped?

3 A. Yes.

4 Q. Did she talk to you at all about the
5 investigation with the police?

6 A. Yes.

7 Q. And what happened and the hours, days
8 weeks afterward?

9 A. Yes.

10 Q. They were not able to collect any
11 evidence in this particular case?

12 A. They collected some DNA evidence but
13 they could not match it to anybody. I mean, they
14 did their job.

15 You know, it's a matter of I felt that
16 it wasn't pursued. I'm her dad.

17 Q. Absolutely. That's perfectly fair.

18 A. I would like to find him and take care
19 of it myself, but I prefer the law to take care of
20 it.

21 Q. The fact that this has been about a
22 year and a half ago, the fact that my client is
23 charged with a sexual assault and what you just said
24 right now, that you'd like to find that person and
25 take care of it yourself, do you think having my

1 client charged with similar crimes sitting in front
2 of you, do you think you would have the inclination
3 to want to take out your frustration out on my
4 client?

5 A. No.

6 Q. Do you think at all -- while testimony
7 is going on in this case you'll be asked to pay
8 attention.

9 A. Correct.

10 Q. Do you think that perhaps the subject
11 matter will cause you maybe to think about your
12 daughter or think about what she told you and maybe
13 be distracted at times such as the police officers
14 in my daughter's case didn't do that. I need to
15 call somebody and ask them why they don't do that?

16 A. No.

17 Q. You don't think -- you think you'll be
18 able to stay focused?

19 A. Absolutely.

20 MS. RADOSTA: Court's indulgence.
21 Nothing further. Pass for cause.

1 VOIR DIRE EXAMINATION

2 BY THE COURT:

3 Q. Mr. Parada, will you tell us of your
4 current employment, your marital status, the number
5 of children you may have and how long you've lived
6 in Las Vegas?

7 A. I'm currently unemployed. I'm a student.
8 I'm going to all night classes to become a dog
9 groomer.

10 Q. A dog groomer.

11 A. Yes.

12 Q. Where are you going to school?

13 A. In Foster, they have several programs
14 like trades.

15 Q. Are you married?

16 A. I'm not.

17 Q. No children?

18 A. No.

19 Q. How long have you lived in Clark
20 County?

21 A. Been here about three years.

22 Q. What sort of work have you had here?

23 A. I've had like restaurant jobs,
24 bussing. I'm working -- worked in several pet
25 stores.

1 Q. Where did you move from?
 2 A. **I'm from Houston, Texas.**
 3 Q. Were you working in Houston?
 4 A. **No. I was, graduated 2003. Going to**
 5 **school at the time.**
 6 Q. Is that where you're from originally?
 7 A. **Yes.**
 8 Q. Never been in the military?
 9 A. **No, sir.**
 10 Q. And you've not been married?
 11 A. **No.**
 12 Q. Do you have any prejudice as to the
 13 charges in this case?
 14 A. **No, sir.**
 15 Q. Do you know any of the other
 16 prospective jurors?
 17 A. **No, sir.**
 18 Q. Do you have any racial prejudice?
 19 A. **No, sir.**
 20 Q. Do you understand an Information is a
 21 mere accusation and not evidence, that the defendant
 22 is presumed innocent until proven guilty and that
 23 the burden is on the state to prove the defendant's
 24 guilt beyond a reasonable doubt?
 25 A. **Yes.**

1 Q. If were charged with offenses similar
 2 to the ones alleged in this case or if you were
 3 prosecuting this case would you want 12 individuals
 4 such as yourself to be on your jury?
 5 A. Yes, I would.
 6 Q. Do you know of any reason at all why
 7 you can't be completely fair and impartial in
 8 hearing this case?
 9 A. **No.**
 10 THE COURT: Questions from the State?
 11 MR. TURNER: Pass for cause.
 12 THE COURT: Defense counsel?
 13 MS. RADOSTA: Pass for cause.
 14
 15 VOIR DIRE EXAMINATION
 16 BY THE COURT:
 17 Q. Mr. Reygosa, tell us please of your
 18 current employment, marital status, the number of
 19 children you may have and how long you've been in
 20 Las Vegas.
 21 A. **I've worked for the Clark County**
 22 **School District. Been here for about 11 years. I'm**
 23 **married, I have three kids. And I'm from Mexico.**
 24 Q. What do you do for the school

1 district?
 2 A. **I work in the environment department.**
 3 **Asbestos, wall, lead,, all environmental situations**
 4 **involving the school district.**
 5 Q. How long have you worked for the
 6 school district?
 7 A. **Eleven years.**
 8 Q. The entire time you've lived here?
 9 A. **Um-hum.**
 10 Q. Is your wife employed outside the
 11 home?
 12 A. **She works at the Venetian.**
 13 Q. What does she do?
 14 A. **She's in the stewarding department.**
 15 Q. What does she do?
 16 A. **Banquets.**
 17 Q. How old are your children?
 18 A. **26, 23 and 19.**
 19 Q. Are any of your children or their
 20 spouses involved in a law-related occupation?
 21 A. **No.**
 22 Q. You say you were born in Mexico?
 23 A. **Yes.**
 24 Q. How old were when you came here, sir?
 25 A. **I was like 30 year's old.**

1 Q. **Did you ever serve in the military?**
 2 A. **No.**
 3 Q. Do you have any prejudice as to the
 4 charges in this case?
 5 A. **No.**
 6 Q. Do you know any of the other
 7 prospective jurors?
 8 A. **I notice a person like is not familiar**
 9 **with me but I think I saw somewhere.**
 10 Q. Someone here you think you recognize?
 11 A. **Yeah.**
 12 Q. Who is that?
 13 A. **Her, in the back.**
 14 THE COURT: What is your name?
 15 A PROSPECTIVE JUROR: She works for a
 16 doctor. I'm not sure.
 17 THE COURT: Stand, please. What is
 18 your name?
 19 A PROSPECTIVE JUROR: Leslie Marcus.
 20 THE COURT: Do you recognize this
 21 gentleman?
 22 A PROSPECTIVE JUROR: I believe so,
 23 yes.
 24 THE COURT: You work at a doctor's
 25 office?

1 A PROSPECTIVE JUROR: Yes.

2 THE COURT: It's kind of a chance
3 meeting?

4 A PROSPECTIVE JUROR: Yes.

5 THE COURT: You can have your seat.

6 There's no prohibition against people
7 who are acquainted serving as jurors together. The
8 only difficulty that occurs occasionally is if one
9 person has particular sway of the other.

10 In other words where one kind of
11 dominates the other, such as employer or employee or
12 something of that nature.

13 There's not that problem here?

14 A PROSPECTIVE JUROR: No.

15 BY THE COURT:

16 Q. If you were charged with offenses
17 similar to the ones alleged in this case or if you
18 were prosecuting this case would you want 12
19 individuals such as yourself to be on your jury?

20 A. Yes.

21 Q. Do you know of any reason at all why
22 you can't be completely fair and impartial in
23 hearing this case?

24 A. No.

25 Q. I don't know if I discussed if you

1 understood that an Information was a mere accusation
2 and not evidence.

3 Did I ask you about that?

4 A. Yes.

5 Q. You also understand the Defendant is
6 presumed innocent and that the state has the burden
7 of proving the defendant's guilt beyond a reasonable
8 doubt?

9 A. Yes, I understand.

10 THE COURT: Questions from the State?

11 MS. KOLLINS: Briefly.

12
13
14 VOIR DIRE EXAMINATION

15 BY MS. KOLLINS:

16 Q. Your son's juvenile case was in Las
17 Vegas?

18 A. Yes.

19 Q. So it was prosecuted by the Clark
20 County District Attorney's Office, the juvenile
21 division?

22 A. Yes.

23 Q. Do you think he was treated fairly?

24 A. Yes.

25 Q. Anything about the way law enforcement

1 or that division of the District Attorney's Office
2 handled the case that causes you any angst towards
3 law enforcement and the District Attorney's Office?

4 A. No.

5 Q. You can separate that case from
6 whatever goes on here?

7 A. Yes.

8 MS. KOLLINS: Pass for cause.

9 THE COURT: Defense counsel?

10 MS. RADOSTA: Pass for cause, judge.

11

12

13 VOIR DIRE EXAMINATION

14 BY THE COURT:

15 Q. Mr. Elder, tell is of your current
16 employment, your marital status, the number of
17 children you may have and how long you've been in
18 Las Vegas.

19 A. I'm a cashier. I work at the Rio.

20 I'm married, no kids.

21 Q. You have lived here how long?

22 A. 18 years.

23 Q. How long have you worked at the Rio?

24 A. Three.

25 Q. Prior to that were you employed?

1 A. Yes.

2 Q. How so?

3 A. I worked at an arcade.

4 Q. Circus Circus or what sort of place?

5 A. Also at the Rio.

6 Q. Before the arcade where did you work?

7 A. I didn't. That was my first job.

8 Q. Is your wife employed?

9 A. Yes.

10 Q. What does she do?

11 A. She's a teacher's aide. Works at a
12 daycare.

13 Q. You have lived here some 18years. How
14 old are you now?

15 A. I'm 25.

16 Q. Where did you move from with your
17 family?

18 A. Last place was Germany.

19 Q. Was your father in the military?

20 A. Yes.

21 Q. So you traveled around quite a bit
22 when you were younger?

23 A. Little bit.

24 Q. You have been in the military?

25 A. No.

1 Q. Do you have any prejudice as to the
2 charges in this case?
3 A. No.
4 Q. Do you know any of the other
5 prospective jurors?
6 A. No.
7 Q. Do you have any racial prejudice?
8 A. No.
9 Q. Do you understand an Information is a
10 mere accusation and not evidence, that the defendant
11 is presumed innocent until proven guilty and that
12 the burden is on the state to prove the defendant's
13 guilt beyond a reasonable doubt?
14 A. Yes.
15 Q. If you were charged with offenses
16 similar to the ones alleged in this case or if you
17 were prosecuting this case would you want 12
18 individuals such as yourself to be on your jury?
19 A. Yes.
20 Q. Do you know of any reason at all why
21 you can't be completely fair and impartial in
22 hearing this case?
23 A. No.
24 THE COURT: Questions from the State?
25 MR. TURNER: Pass for cause.

1 THE COURT: Defense counsel?
2 MS. RADOSTA: Pass for cause.
3
4
5 VOIR DIRE EXAMINATION
6 BY THE COURT:
7 Q. Mr. Hernandez, tell us please of your
8 employment, your marital status, the number of
9 children you may have and how long you've lived in
10 Las Vegas.
11 A. I'm currently employed with Las Vegas
12 Paving, four kids, twenty-one, 17, five years old.
13 Wife is employed with Harrah's Entertainment.
14 She's a clerk, accounts payable clerk.
15 Q. She works in the accounting office at
16 the hotel?
17 A. Yes.
18 Q. How long have you lived here?
19 A. On and off, 20 years.
20 Q. When you say on an off --
21 A. I was eight years in the service.
22 Q. Were you you in the Air Force?
23 A. Army.
24 Q. You lived here 20 or 25 years, which?
25 A. Plus. I moved back here in '95 from

1 the service and have been here since, which is 10,
2 12 years. I lived here before.
3 I came here in 1978 any.
4 Q. You were in the Army for four years?
5 A. Eight.
6 Q. Stationed different places?
7 A. Yes.
8 Q. You had your wife with you during this
9 period, your children?
10 A. Ex-wife, at that time.
11 Q. Was she employed?
12 A. Yes.
13 Q. What did she do?
14 A. She just worked -- I guess as a
15 waitress.
16 Q. Your current wife works at the casino.
17 What other employment has she had over
18 the years?
19 A. Same thing.
20 She worked the same thing. She worked
21 at Caesars and it got bought out so she's still with
22 the same company.
23 Q. You mentioned you have one older
24 child, I guess.
25 Are any of your children or their

1 spouses involved in a law related occupation?
2 A. No.
3 Q. Tell us where did you move from when
4 you came here the first time?
5 A. El Salvador.
6 Q. Where you're from?
7 A. Yes.
8 Q. How old were you when you came here?
9 A. 12.
10 Q. Have you ever served in the military?
11 A. Yes.
12 Q. You were in eight years.
13 What was your area of responsibility
14 in the Army?
15 A. Mechanic.
16 Q. Automobile, trucks, that kind of
17 thing?
18 A. Trailers, generators.
19 Q. Do you have any prejudice as to the
20 charges in the case?
21 A. No.
22 Q. Do you know any of the other
23 prospective jurors?
24 A. No.
25 Q. Do you have any racial prejudice?

1 A. **No.**

2 Q. Do you understand an Information is a
3 mere accusation and not evidence, that the defendant
4 is presumed innocent until proven guilty and the
5 state has the burden of proving the defendant's
6 guilt beyond a reasonable doubt?

7 A. **Yes.**

8 Q. If you were charged with offenses
9 similar to the ones alleged in this case or if you
10 were prosecuting this case would you want 12 people
11 like yourself to be on your jury?

12 A. **Yes.**

13 Q. Do you know of any reason at all why
14 you can't be completely fair and impartial in
15 hearing this case?

16 A. **No.**

17 THE COURT: Questions from the State?
18 MS. KOLLINS: Briefly.

19

20

21 VOIR DIRE EXAMINATION

22 BY MS. KOLLINS:

23 Q. Mr. Hernandez, if you don't mind me
24 asking why did you leave the Army?

25 A. **Ex-wife doing things. I had to take**

1 **care of my children.**

2 Q. How old were you when you left the
3 Army?

4 A. **About 30 plus.**

5 Q. Did you ever have chance to
6 participate in court martial proceedings with anyone
7 you knew or called as a witness, anything like that?

8 A. **No.**

9 MS. KOLLINS: Pass for cause.

10 THE COURT: Defense?

11 MS. RADOSTA: Thank you.

12

13

14 VOIR DIRE EXAMINATION

15 BY MS. RADOSTA:

16 Q. Mr. Hernandez, were you ever involved
17 in any military police work?

18 Did you ever do any military police
19 work?

20 A. **Yes.**

21 Q. Tell us about that.

22 A. **I was assigned to a watch patrol type
23 of deal. Extra duties they gave you, just watching
24 people while incarcerated.**

25 Q. Did you ever get involved in the

1 prosecution of someone while you were in the
2 military police?

3 A. **No.**

4 Q. More of a watching type of thing?

5 A. **Yes.**

6 Q. Did you ever undergo any special
7 police type training?

8 A. **No.**

9 MS. RADOSTA: Pass for cause.

10

11

12 VOIR DIRE EXAMINATION

13 BY THE COURT:

14 Q. Is it Miss or Mrs. Francis?

15 A. **Mrs.**

16 Q. Tell us please of your current
17 employment, the number of children you may have,
18 your marital status and how long you've lived in Las
19 Vegas.

20 A. **I'm unemployed. I've been married,
21 married -- how long?**

22 Q. Tell me.

23 A. **100 years -- no. 43 years.**

24 Q. How long have you lived in Clark
25 County?

1 A. **Eight years.**

2 Q. Do you have children?

3 A. **Yes, three boys.**

4 Q. What are their ages, roughly?

5 A. **One is 41, 40 and 37.**

6 Q. Are any of those boys or their wives
7 involved in a law-related occupation?

8 A. **No.**

9 Q. You're unemployed currently.
10 Have you worked in the past?

11 A. **Yes.**

12 Q. What have you done?

13 A. **When I first came out here I worked
14 for a mortgage company. Before we left Michigan to
15 come here I worked for Hallmark about eight years.
16 I worked at a catalogue company in
17 Michigan, still. The only type of work I've had out
18 here is at at mortgage company.**

19 Q. Is your husband employed?

20 A. **No, he lost his job recently. We're
21 having a hard time. He just had a heart attack.**

22 **We're going through bankruptcy. Lost
23 our house, our car. We're not doing real good right
24 now.**

25 Q. What job did he have?

1 A. He was a assistant superintendent for
2 William Wyatt Homes in the building department.
3 They did tract homes.

4 Q. Is that the kind of work he has done
5 throughout the time you've lived in Las Vegas?

6 A. Yes.

7 Q. You came from what city?

8 A. Battle Creek, Michigan.

9 Q. You mentioned some of your employment
10 there.

11 Was your husband employed there?

12 A. Yes.

13 Q. How so?

14 A. He's always been employed. He's been
15 in construction. In Michigan he worked for a
16 contractor. They did ceilings and drywall,
17 plastering.

18 Q. Is that where you're from originally,
19 Michigan?

20 A. Yes.

21 Q. Do you have any prejudice as to the
22 charges in the case?

23 A. No.

24 Q. Do you know any of the other
25 prospective jurors?

1 A. No.

2 Q. Do you have any racial prejudice?

3 A. No.

4 Q. Do you understand an Information is a
5 mere accusation and not evidence, that the defendant
6 is presumed innocent until proven guilty and that
7 the burden is on the state to prove the defendant's
8 guilt beyond a reasonable doubt?

9 A. Yes.

10 Q. If you were charged with offenses
11 similar to the ones alleged in this case or if you
12 were prosecuting this case would you want 12 people
13 like yourself to be on your jury?

14 A. Um-hum, yes.

15 Q. Do you know of any reason at all why
16 you can't be completely fair and impartial in
17 hearing this case?

18 A. No.

19 THE COURT: Questions from the State?
20 MR. TURNER: Briefly.

23 VOIR DIRE EXAMINATION

24 BY MR. TURNER:

25 Q. I understand you can be fair and

1 impartial. You have a lot of stuff going on in your
2 life.

3 Do you you understand you have to pay
4 close attention to all the witnesses in this case?

5 Do you think you can do that?

6 A. Yeah, yes, I do.

7 MR. TURNER: Pass for cause.

8 THE COURT: Defense counsel?

11 VOIR DIRE EXAMINATION

12 BY MS. RADOSTA:

13 Q. You said your husband had just
14 recently suffered a heart attack; is that correct?

15 A. Yes.

16 Q. How is his health right now?

17 A. He's doing good now.

18 Q. Is he at home?

19 A. Yes.

20 Q. He doesn't need you to be there to
21 help him out or anything while he's there?

22 A. No.

23 Q. You said you've been in Clark County
24 for the last eight years. I'm not sure if the judge
25 asked you this but what brought you out to Clark

1 County if you lived your whole life in Michigan?

2 A. Would believe the weather? It's the
3 truth.

4 Q. I'm from Minnesota, so I understand
5 that.

6 A PROSPECTIVE JUROR: That is why. I
7 did have a cousin that lived out here, too.

8 Q. Was basically a change in life?

9 A. Yes, wanted a change.

10 Q. Obviously a lot of things going on in
11 your life within the last couple months up to
12 probably about a year ago.

13 You're hesitating every time we get
14 near the subject of do you really think that you can
15 direct your attention to the matter at hand in the
16 court room for next couple of days?

17 A. Yeah, I think I can.

18 I mean I know I have a lot going on,
19 but it's completely different than what I've been
20 thinking about, too.

21 Q. Maybe actually a break from what
22 you're dealing with?

23 A. Yeah, maybe, yeah. It's a different
24 thing.

25 MS. RADOSTA: Thank you. Pass for

1 cause.

2

3

4 VOIR DIRE EXAMINATION

5 BY THE COURT:

6 Q. Mrs. Berman, tell us of your current
7 employment, your marital status, the number of
8 children you may have and how long you've lived in
9 Las Vegas.

10 A. **I'm a medical transcriber. I've lived**
11 **here since 1999. Moved here from California.**

12 **I'm married, I have two children.**
13 **They are adult children.**

14 Q. Is your husband employed?

15 A. **Yes.**

16 Q. What's he do?

17 A. He's also self-employed. He does
18 transportation, a broker.

19 Q. Transportation broker?

20 A. **Um-hum.**

21 Q. What does that mean?

22 A. **He works out loads with people and**
23 **trucks and trains.**

24 Q. 18 wheelers, that sort of thing?

25 A. **Yes.**

1 Q. How long has he been involved in that
2 work?

3 A. **All our married life.**

4 Q. How long have you been involved with
5 your work?

6 A. **All of my married life also.**

7 Q. How old are your children?

8 A. **33 and 31.**

9 Q. Are either of your children or their
10 spouses engaged in a law related occupation?

11 A. **No.**

12 Q. Where did you move from?

13 A. **From California.**

14 Q. What city?

15 A. **Mission Viejo.**

16 Q. Were you employed there in the same
17 thing you're doing now?

18 A. **Yes.**

19 Q. Your husband was there with you?

20 A. **Yes.**

21 Q. Where are you from originally?

22 A. **South Africa.**

23 Q. What city?

24 A. **Capetown.**

25 Q. Grew up there?

1 A. **Yes. I came to this country when I**
2 **was 18.**

3 Q. Do you have any prejudice as to the
4 charges in this case?

5 A. **No.**

6 Q. Do you know any of the other
7 prospective jurors?

8 A. **No.**

9 Q. Do you have any racial prejudice?

10 A. **No.**

11 Q. Do you understand an Information is a
12 mere accusation and not evidence and that the
13 defendant is presumed innocent until proven guilty?

14 A. **Yes.**

15 Q. If were charged with offenses similar
16 to the ones alleged in this case or if you were
17 prosecuting this case would you want 12 people like
18 yourself to be on your jury?

19 A. **Yes.**

20 Q. Do you know of any reason at all why
21 you can't be completely fair and impartial in
22 hearing this case?

23 A. **No.**

24 THE COURT: Questions from the State?
25 MS. KOLLINS: State passes for cause.

1 THE COURT: Defense counsel?

2 MS. RADOSTA: Yes, thank you.

3

4

5 VOIR DIRE EXAMINATION

6 BY MS. RADOSTA:

7 Q. Mrs. Berman, you said you were a
8 medical transcriber. Do you do that as an
9 independent consultant or do you work for a doctor?

10 A. **I work for several clients. Several**
11 **doctors, a chiropractor, physical therapy, speech**
12 **therapy.**

13 Q. Is it the process there they dictate
14 it orally and you type out the reports and notes
15 that go in to the file?

16 A. **Yes, on a dictaphone.**

17 Q. You also -- let me ask this. There
18 was a doctor or two mentioned.

19 No familiarity with any of the doctors
20 that have been mentioned?

21 A. **No.**

22 Q. You mentioned you were from South
23 Africa. Quite a bit of difference in the legal
24 field or the legal standards, I should say, in South
25 Africa than the United States?

1 A. **Right.**

2 Q. You won't have any problem with the
3 differences in all the constitutional protections
4 afforded an individual here in the United States
5 that may not exist in South Africa?

6 A. **Right. I've been here so long, as a
7 child.**

8 Q. You're an American?

9 A. **Right.**

10 MS. RADOSTA: Pass for cause.

11 THE COURT: Very good.

12
13
14 VOIR DIRE EXAMINATION

15 BY THE COURT:

16 Q. Mr. Randall, please tell us of your
17 occupation, your marital status, the number of
18 children you may have and how long you've been in
19 Las Vegas.

20 A. **I'm currently working as a corporate
21 public spokesperson for Consolidated Resorts. I've
22 been in Clark County 28 years.**

23 **I'm married. No kids, four dogs.**

24 Q. Okay. How long have you been with
25 your current employer?

1 A. **About two and a half years.**

2 Q. Is your wife employed?

3 A. **Yes.**

4 Q. What's she do?

5 A. **She works for Vons corporation. She's
6 a checker.**

7 Q. Prior to your current employment what
8 were you involved with?

9 A. **I was an actor over at the Star Trek
10 Experience at the Las Vegas Hilton and prior to that
11 a weatherman in Las Vegas for 14 years.**

12 Q. On television?

13 A. **Yes. Television, acting.**

14 Q. Any other work on the part of your
15 wife during this period?

16 A. **She's been working for Vons for almost
17 30 years. She's in the process of trying to get out
18 on a disability.**

19 **She's had a lot of medical problems.
20 At this time she's still employed.**

21 Q. Where did you move from?

22 A. **West Virginia.**

23 Q. West Virginia?

24 A. **West Virginia.**

25 Q. What city?

1 A. All over. My dad was a state police
2 officer. We moved around a lot. He got promotion.

3 Most of my life was spent in a little
4 town called Grafton, south of Morgantown, West
5 Virginia, which is where West Virginia university
6 is.

7 Q. Were you ever in the military?

8 A. **No.**

9 Q. Do you have any prejudice as to the
10 charges in this case?

11 A. **No.**

12 Q. Do you know any of the other
13 prospective jurors?

14 A. **No.**

15 Q. Do you have any racial prejudice?

16 A. **No.**

17 Q. Do you understand an Information is a
18 mere accusation and not evidence, that the defendant
19 is presumed innocent until proven guilty and that
20 the burden is on the state to prove the defendant's
21 guilt beyond a reasonable doubt?

22 A. **Yes.**

23 Q. If you were charged with offenses
24 similar to the ones alleged in this case would you
25 want 12 people like yourself to be on your jury?

1 A. **Yes.**

2 Q. Do you know of any reason at all why
3 you can't be completely fair and impartial in
4 hearing this case?

5 A. **No.**

6 THE COURT: Questions from the State?

7 MR. TURNER: Pass for cause.

8 THE COURT: Defense counsel?

9 MR. REED: Thank you.

10

11

12

VOIR DIRE EXAMINATION

13 BY MR. REED:

14 Q. You mentioned earlier that back -- I
15 think you said it was before you knew your wife her
16 best friend had been raped and murdered.

17 A. **Yes.**

18 Q. You've been married to your wife for?

19 A. **18 years.**

20 Q. Do you know how old your wife's friend
21 was when that happened?

22 A. **She was over 21 year's old, I'm pretty
23 sure. She was fairly young. I don't know the
24 particulars. She mentioned it in passing a couple
25 of times when we were talking about other things.**

1 Q. Assume that you would be chosen to be
2 on this jury and you would be instructed by the
3 judge not to discuss the case during the course of
4 the trial with anyone.

5 Would you have a problem abiding by
6 that?

7 A. **No, it's no problem. She never**
8 **listens to me anyway.**

9 Q. Let's say that at the close of the
10 case after a verdict comes back if that verdict
11 would be not guilty would you have any difficulty
12 going back and talking to your wife about it or
13 telling her a not guilty verdict came back and the
14 jury sat on a sexual assault case?

15 A. **No, I wouldn't have any problem with**
16 **that.**

17 Q. Would you hesitate to tell her that?

18 A. **No, no. She would want to know when**
19 **it was all over what it was about and everything**
20 **that happened.**

21 I would tell her.

22 MR. REED: No further questions. Pass
23 for cause.

24 THE COURT: Very good.

25 Ladies and Gentlemen, we have come to

1 a point in the proceedings where counsel may
2 exercise in turn that is known as a peremptory
3 challenge whereby you would be replaced by one of
4 the other prospective jurors.

5 Please understand if you're challenged
6 it does not mean you're ill-suited or unfit as a
7 juror.

8 It merely means in the estimation of
9 counsel another individual who would take your place
10 might be more receptive to their point of view of
11 the case than perhaps you are. That's all it
12 amounts to.

13 Ask the State if they wish to exercise
14 there first.

15 MS. KOLLINS: Yes.

16 The state would thank and excuse juror
17 909, Mr. Parada

18 THE COURT: Thank you very much.
19 You're excused.

20 Ms. Clerk, please call a name.

21 COURT CLERK: Badge 0919, Douglas Abel.

22

23

24

25

VOIR DIRE EXAMINATION

2 BY THE COURT:

3 Q. Mr. Abel, is there any reason that you
4 know of why you couldn't serve as a far juror in
5 this case.

6 A. **No, there's not.**

7 Q. Have you served as juror before?

8 A. **No.**

9 Q. Are you or any close friends or
10 relatives involved in law enforcement or have you
11 been in the past?

12 A. **No.**

13 Q. Have you or close friends or family
14 member ever been the victim of crime?

15 A. **I was a victim of a break-in two**
16 **months ago, vehicle break-in.**

17 Q. Reported?

18 A. **Yes, sir.**

19 Q. No one caught?

20 A. **No.**

21 Q. Did the authorities treat the matter
22 appropriately, in your judgement?

23 A. **I believe they did.**

24 Q. Is there anything about the incident
25 that would affect your view of this case?

1 A. **No.**

2 Q. **Will you follow all of the**
3 **instructions of the Court on the law even though**
4 **they may differ from your personal conceptions of**
5 **what the law ought to be?**

6 A. **Yes, sir.**

7 Q. A person accused of committing a crime
8 crime is presumed to be innocent.

9 Do you understand and agree with that?

10 A. **Yes.**

11 Q. Are you aware that the Defendant does
12 not have to take the stand and testify or offer any
13 evidence if chooses not to and you can still find
14 him not guilty?

15 That's because the burden is on the
16 state to prove the defendant's guilt beyond a
17 reasonable doubt.

18 A. **Yes.**

19 Q. Have you or close friends or family
20 ever bee involved in the criminal justice process
21 either in prosecuting a case or as a witness or a
22 defendant?

23 A. **No.**

24 Q. Have you or close friends or family
25 members ever been the victim or accused of sexual

1 assault?

2 A. **No, sir.**

3 Q. Do you have any particular knowledge
4 of DNA, science or evidence of DNA?

5 A. **No.**

6 Q. Have you ever consulted with an expert
7 other than a medical doctor?

8 A. **No.**

9 Q. Do you have any specialized training
10 in medicine, science or biology?

11 A. **No, I don't.**

12 Q. Will the nature of the charges create
13 a situation where you cannot be fair or impartial?

14 A. **No, Your Honor.**

15 Q. Tell us of your current employment,
16 your marital status, the number of children you may
17 have and how long you've lived in Clark County.

18 A. **I've lived in Clark County since 2001.**
19 **Currently employed by Pratt Whitney aircraft**
20 **engines, military customer at Nellis Air Force Base.**
21 **I'm single.**

22 Q. Are you building engines? That is
23 your work?

24 A. **We maintain them.**

25 Q. Jets?

1 A. **We do maintenance on jet engines.**

2 Q. How long have you been with that, with
3 that work?

4 A. **Pratt & Whitney since 2005. 21 years**
5 **with the Air Force.**

6 Q. You came here 2001?

7 A. **Yes.**

8 Q. You began work at Pratt Whitney in
9 2005?

10 A. **Yes.**

11 Q. What did you do before that?

12 A. **I was active duty with the Air Force.**

13 Q. What was your area of responsibility?

14 A. **Aircraft maintenance, plans and**
15 **scheduling.**

16 Q. Have you been married in the past?

17 A. **No.**

18 Q. During your stint I assume you've been
19 stationed at various places?

20 A. **Yes.**

21 Q. Where were you living when you joined
22 the Air Force?

23 A. **Living in New Jersey.**

24 Q. What city?

25 A. **Rockaway, 35 miles west of New York.**

1 Q. Were you employed?

2 A. **I was.**

3 Q. What did you do?

4 A. **Security guard.**

5 Q. Were you at the time a 19, 20 year old
6 recruit?

7 A. **Yes.**

8 Q. You grew up in New Jersey?

9 A. **Since the age of about eight.**

10 Q. Do you have any prejudice as to the
11 charges in this matter?

12 A. **No.**

13 Q. Do you know any of the other
14 prospective jurors?

15 A. **No.**

16 Q. Do you have any racial prejudice?

17 A. **No.**

18 Q. Do you understand an Information is a
19 mere accusation and not evidence, that the defendant
20 is presumed innocent until proven guilty and the
21 state has the burden of proving the defendant's
22 guilt beyond a reasonable doubt?

23 A. **I do.**

24 Q. If you were charged with offenses
25 similar to the ones alleged in this case would you

1 want 12 individuals such as yourself to be on your
2 jury?

3 A. **I would.**

4 Q. Do you know of any reason at all why
5 you can't be completely fair and impartial in
6 hearing this case?

7 A. **No, I don't.**

8 Q. Questions from the State?
9 MS. KOLLINS: Briefly.

10

11

12 VOIR DIRE EXAMINATION

13 BY MS. KOLLINS:

14 Q. What else did you do in the Air Force?

15 A. **That was my specialty my entire**
16 **career.**

17 Q. Any further involvement with the
18 military?

19 A. **No.**

20 Q. How about courts martial experience at
21 all?

22 A. **I did do one character witness**
23 **statement for an individual.**

24 Q. Related to what kind of case?

25 A. **It was a drug charge.**

1 Q. On behalf of the accused or on behalf
2 of the prosecution?

3 A. **Behalf of accused.**

4 MS. KOLLINS: Pass for cause.

5 THE COURT: Counsel?

6 MS. RADOSTA: Good afternoon.

9 VOIR DIRE EXAMINATION

10 BY MS. RADOSTA:

11 Q. You said you did some security guard
12 work. Was that before or after the military?

13 A. **Before.**

14 Q. Did you have any formalized training?

15 A. **No. It was a very basic just watching**
16 **a complex.**

17 Q. Were you involved at all in reporting
18 any crime, crimes that resulted in arrest and went
19 to court?

20 A. **No.**

21 MS. RADOSTA: Thank you. Pass for
22 cause.

23 THE COURT: Very well. Defense counsel
24 may exercise their first peremptory challenge.

25 MS. RADOSTA: Defense would thank and

1 excuse juror 733, Mr. DiPerno.

2 COURT CLERK: 0772, Pierre Bautista.

6 VOIR DIRE EXAMINATION

7 BY THE COURT:

8 Q. Mr. Bautista, you know of any reason
9 why you could not serve as a fair juror in this
10 case?

11 A. **Um --**

12 Q. Do you understand me?

13 A. **Not really.**

14 Q. Are you having trouble understanding
15 English?

16 A. **Little bit.**

17 Q. Do you think you would miss some of
18 the testimony?

19 A. **No.**

20 Q. **You don't think you'd miss any of the**
21 **testimony?**

22 A. **Some of it.**

23 Q. Well, if you have a problem with the
24 English language we perhaps should excuse you and
25 let you come back another time when you are a little

1 more proficient.

2 Would that be good?

3 A. **Good.**

4 THE COURT: Counsel, any problem?

5 MS. KOLLINS: No.

6 MS. RADOSTA: No, judge.

7 THE COURT: I'll excuse you at this
8 time. Thank you.

9 COURT CLERK: 889, Elizabeth Houston.

13 VOIR DIRE EXAMINATION

14 BY THE COURT:

15 Q. Is it miss or Mrs.?

16 A. **Mrs.**

17 Q. Mrs. Houston, like the city of
18 Houston?

19 A. **Yes.**

20 Q. Do you know of any reason why you
21 couldn't serve as a fair juror?

22 A. **No.**

23 Q. Have you served as juror before?

24 A. **No.**

25 Q. Are you or any close friends or

1 relatives involved in law enforcement or have you
2 been in the past?

3 A. **I have some friends that are in law**
4 **enforcement. Not close.**

5 Q. Locally?

6 A. **Yes.**

7 Q. Go ahead tell me.

8 A. **Just friends that go to my church.**

9 Q. Is that how you know them, in church?

10 A. **Yes.**

11 Q. You've not met with them, socialized
12 with them outside church?

13 A. **We might have lunch on a Sunday,**
14 **that's it.**

15 Q. How many people are we talking about
16 here?

17 A. **One of them is a Henderson Police**
18 **officer and one of them is a CSI.**

19 Q. For metro?

20 A. **Yes.**

21 Q. You're talking about two people?

22 A. **Um-hum.**

23 Q. Male or female?

24 A. **Men.**

25 Q. How often do you see them?

1 A. **Two times a week -- well, only at**
 2 **church.**
 3 Q. You go to church twice a week?
 4 A. **Um-hum.**
 5 Q. They are there about every time?
 6 A. **Yes.**
 7 Q. When you next would have a chance to
 8 speak to them do you think you'd feel a compunction
 9 to explain or justify your verdict to them?
 10 A. **No.**
 11 Q. Do you think you can be an objective
 12 juror notwithstanding your relationship to these
 13 people in law enforcement?
 14 Q. Yes.
 15 Q. On balance, do you think you can be a
 16 fair juror?
 17 A. **Yes.**
 18 Q. Have you or close friends or family
 19 members ever been the victim of crime?
 20 A. **No.**
 21 Q. Will you follow all of the
 22 instructions of the Court on the law even though may
 23 may differ from your personal conceptions of what
 24 the law ought to be?
 25 A. **Yes.**

1 Q. A person accused of committing a crime
 2 is presumed to be innocent in a criminal trial.
 3 Do you understand and agree?
 4 A. **Are you aware that the Defendant does**
 5 **not have to take the stand and testify or offer any**
 6 **evidence if he chooses not to and you can still find**
 7 **him not guilty?**
 8 **That's because the burden is on the**
 9 **state to prove the defendant's guilt beyond a**
 10 **reasonable doubt.**
 11 A. **Yes.**
 12 Q. Have you or close friends or family
 13 ever been involved in the criminal justice process,
 14 either in prosecuting a case or as a witness or
 15 Defendant?
 16 A. **No.**
 17 Q. Have you or close friends or family
 18 members ever been the victim or accused of sexual
 19 assault?
 20 A. **No.**
 21 Q. Do you have any particular knowledge
 22 of DNA science or evidence?
 23 A. **No.**
 24 Q. Have you ever consulted with an expert
 25 other than a medical doctor?

1 A. **No.**
 2 Q. Do you have any specialized training
 3 in medicine, science or biology?
 4 A. **No.**
 5 Q. Will the nature of the charges create
 6 a situation where you cannot be fair and impartial?
 7 A. **No.**
 8 Q. Please tell us of your current
 9 employment, number of children you may have and how
 10 long you've lived in Clark County.
 11 A. **I work at an insurance agency. I have**
 12 **two children. I've lived in Clark County my entire**
 13 **life.**
 14 Q. How old are your children?
 15 A. **Three and one.**
 16 Q. You've worked for an insurance
 17 company?
 18 A. **Yes.**
 19 Q. Has that been the work you've done
 20 exclusively or have you done other things?
 21 A. **Before I had my first child I worked**
 22 **for Godiva chocolate store.**
 23 Q. Did you sell, make chocolate or sell
 24 it?
 25 A. **Both.**

1 Q. Is your husband employed?
 2 A. **Yes. He's in construction.**
 3 Q. Has that been the thing he's done
 4 throughout the time you've known him?
 5 A. **He was a teenager already worked at**
 6 **Vons.**
 7 Q. Do you have any prejudice as to the
 8 charges?
 9 A. **No.**
 10 Q. Do you know any of the other
 11 prospective jurors?
 12 A. **No.**
 13 Q. Do you have any racial prejudice?
 14 A. **No.**
 15 Q. You understand that an Information is
 16 a mere accusation and not evidence and that the
 17 defendant is presumed innocent until proven guilty
 18 beyond a reasonable doubt?
 19 A. **Yes.**
 20 Q. If you were charged with offenses
 21 similar to the ones that are alleged in the case or
 22 if were prosecuting this case would you want 12
 23 individuals such as yourself to be on your jury?
 24 A. **Yes.**
 25 Q. Do you know of any reason at all why

1 you can't be completely fair and impartial in
2 hearing this case?

3 A. **No.**

4 THE COURT: Questions from the State?

5 MR. TURNER: Yes, Your Honor.

6

7

8 VOIR DIRE EXAMINATION

9 BY MR. TURNER:

10 Q. Mrs. Houston, I believe you said you
11 were a CSR; is that right?

12 A. **Yes, I'm an account manager.**

13 Q. What are your responsibilities as an
14 account manager?

15 A. **When we get a new client I have to set
16 up a file for them or when they are new I set up a
17 file.**

18 MR. TURNER: **Pass for cause.**

19 THE COURT: Defense counsel?

20

21

22 VOIR DIRE EXAMINATION

23 BY MS. RADOSTA:

24 Q. Good afternoon. A couple questions.

25 One of the friends that you said you

1 see at church was a crime scene person?

2 A. **Crime scene analyst.**

3 Q. You said you only see the person at
4 church?

5 A. **Yeah, we don't hang out.**

6 Q. But you do know, is it male or female?

7 A. **A male.**

8 Q. You know what he does for a living?

9 A. **Yes.**

10 Q. How did you learn what he does?

11 A. **Um, he's one of the deacons at our
12 church. It's just knowing that.**

13 Q. That was for metro or for --

14 A. **Metro.**

15 Q. Beyond being a deacon at your church
16 have you ever had any conversations with him about
17 the specifics of this job?

18 A. **No.**

19 Q. About how he would gather evidence or
20 anything like that, in that nature?

21 A. **No.**

22 Q. The only other thing I wanted to ask
23 you about is the judge discussed if you had any
24 specialized knowledge about DNA and you laughed.

25 A. **Yeah.**

1 Q. And why did you laugh?

2 A. **I don't know. I thought it was -- I
3 don't know much, so.**

4 Q. So no real interest or anything like
5 that in DNA evidence or --

6 A. **No.**

7 Q. -- no classes at school or anything
8 about that?

9 A. **No.**

10 MS. RADOSTA: Thank you. Pass for
11 cause.

12 THE COURT: Very well. State's second
13 peremptory challenge.

14 MS. KOLLINS: Court's indulgence.
15 Please.

16 State would thank and excuse juror
17 898, Mr. Elder.

18 THE COURT: Thank you very much.
19 You're excused at this time.

20 COURT CLERK: 0833, John Coleman.

21

22

23 VOIR DIRE EXAMINATION

24 BY THE COURT:

25 Q. Mr. Coleman, do you know of any reason

1 why you can't serve as a fair juror in this case?

2 A. **Yes.**

3 Q. What would that be?

4 A. **I've been assaulted three times. I
5 stopped an assault a couple times.**

6 Q. Assaulted?

7 A. **I've been robbed.**

8 Q. Was that in Clark County?

9 A. **Yeah.**

10 Q. Why would that create a situation
11 where you couldn't be fair in this case?

12 A. **Um, I'm prejudiced.**

13 Q. In what regard?

14 A. **I deliver pizza.**

15 Q. All right.

16 The fact that you have been been a
17 victim of crime which you're saying you are, that
18 doesn't necessarily mean that anyone is guilty or
19 innocent in this case, does it?

20 A. **No.**

21 Q. So I'm not quite sure I understand why
22 you couldn't be fair as a juror in this case?

23 A. **I don't think I could be.**

24 Q. Because of your past experiences?

25 A. **Um-hum.**

1 THE COURT: Counsel wish to inquire
2 further?
3 MS. RADOSTA: No. We'd challenge
4 Mr. Coleman.
5 MR. TURNER: No, judge.
6 THE COURT: You'll be excused. Thank
7 you.
8 COURT CLERK: 0814, George Madden.

9
10
11
12 VOIR DIRE EXAMINATION

13 BY THE COURT:

14 Q. Mr. Madden, do you know of any reason
15 why you couldn't serve as a fair juror in this case?

16 A. **No reason.**

17 Q. Have you served as a juror before?

18 A. **No, sir.**

19 Q. Are you or any close friends or
20 relatives involved in law-enforcement or have you
21 been in the past?

22 A. **My father was in corrections.**

23 Q. In Clark County?

24 A. **Yes.**

25 Q. He's no longer employed?

1 A. **No, not with them.**

2 Q. How long did he work in corrections?

3 A. **I think just below a year.**

4 Q. Was that in the local jail or in the
5 prison system?

6 A. **State prison.**

7 Q. At Indian Springs?

8 A. **Yes.**

9 Q. He had -- you had occasion to discuss
10 his work with him from time to time?

11 A. **He did.**

12 Q. What's he doing now?

13 A. **School bus driver and also working at**
14 **UMC.**

15 Q. Do you think his stint as a
16 corrections officer would influence you in any way
17 as a juror?

18 A. **No.**

19 Q. Do you think you can be a fair juror?

20 A. **Yes.**

21 Q. Have you or close friends or family
22 members ever been the victim of crime?

23 A. **Next door neighbor was robbed.**

24 Q. Was robbed or burglarized?

25 A. **Burglarized.**

1 Q. How long ago was that?

2 A. **Two months ago.**

3 Q. **Was it reported?**

4 A. **Yes.**

5 Q. Anybody caught?

6 A. **No.**

7 Q. Do you have any idea was to whether or
8 not the authorities treated the matter
9 appropriately?

10 A. **They treated it fairly.**

11 Q. Anything about the situation that
12 would impact your view of this case?

13 A. **No.**

14 Q. Will you follow all of instructions of
15 the Court on the law even though they may differ
16 from your personal conceptions of what the law ought
17 to be?

18 A. **Yes.**

19 Q. A person accused of committing a crime
20 is presumed to be innocent in a criminal trial.

21 Do you understand and agree?

22 A. **Yes.**

23 Q. Are you aware that the Defendant does
24 not have to take the stand and testify or offer any
25 evidence if he chooses not to and you can still find

1 him not guilty?

2 That's because the burden is on the
3 state to prove the defendant's guilt beyond a
4 reasonable doubt?

5 A. **Yes.**

6 Q. Have you close friends or family
7 members ever been involved in the criminal justice
8 process either in prosecuting a case or as a witness
9 or a defendant, other than the neighbor you
10 mentioned?

11 A. **I believe my dad has an ongoing case**
12 **against the State.**

13 Q. That wouldn't be a criminal matter,
14 would it?

15 A. **I don't know. I don't know the whole**
16 **situation.**

17 Q. Is your dad suing the State?

18 A. **Yeah.**

19 Q. That would be a civil matter.

20 A. **Sorry.**

21 Q. Have you or close friends or family
22 members ever been the victim or accused of sexual
23 assault?

24 A. **No.**

25 Q. Do you have any particular knowledge

1 of DNA science or evidence?

2 A. **No.**

3 Q. Have you ever consulted with an expert
4 other than a medical doctor?

5 A. **No, sir.**

6 Q. Do you have any specialized training
7 in medicine science or biology?

8 A. **No, sir.**

9 Q. Will the nature of the charges in this
10 case create a situation where you cannot be fair or
11 impartial?

12 A. **No, sir.**

13 Q. Tell us of your current employment,
14 your marital status, the number of children you may
15 have and how long you've lived in Clark County.

16 A. **I'm a security officer, Security USA.
17 Been in Nevada eight, nine years, single, no kids.**

18 Q. Other than being a security officer
19 what work have you had in Clark County?

20 A. **Jack in the Box, Del Taco.**

21 Q. You've never been married?

22 A. **No.**

23 Q. Did you move here with your family?

24 A. **Yes.**

25 Q. Ever been in the military?

1 A. **No, sir.**

2 Q. Where did you move from?

3 A. **Guam.**

4 Q. How long did you live there?

5 A. **Since one to 16 years.**

6 Q. You weren't born there. Where were
7 you born?

8 A. **Born in Guam.**

9 Q. Your father was in the military?

10 A. **Navy.**

11 Q. That's how you got to be born in Guam?

12 A. **Yes.**

13 Q. Do you have any prejudice as to the
14 charges in this case?

15 A. **No.**

16 Q. Do you know any of the other
17 prospective jurors?

18 A. **No, sir.**

19 Q. Do you have any racial prejudice?

20 A. **No, sir.**

21 Q. Do you understand an Information is a
22 mere accusation and not evidence and that the
23 defendant is presumed innocent until proven guilty
24 beyond a reasonable doubt?

25 A. **Yes.**

1 Q. If you were charged with offenses

2 similar to the ones alleged in this case or if you

3 were prosecuting this case would you want 12

4 individuals such as yourself to be on your jury?

5 A. **Yes.**

6 Q. Do you know of any reason at all why
7 you can't be completely fair and impartial in
8 hearing this case?

9 A. **No, sir.**

10 THE COURT: Questions from the State?

11 MS. KOLLINS: Briefly.

12

13

14

15 VOIR DIRE EXAMINATOIN

16 BY MS. KOLLINS:

17 Q. Mr. Madden, what kind of properties

18 are you assigned to in your job as a security

19 officer?

20 A. **Harrahs Condos, place like that.**

21 Q. In that job you interact with law
22 enforcement?

23 A. **Occasionally. Usually AMR,
24 firefighters. Once in a blue moon maybe Metro comes
25 through.**

1 Q. Have you had occasion to have to help
2 someone, a victim, report a crime to a police
3 officer?

4 A. **No.**

5 MS. KOLLINS: Thank you. Pass for
6 cause.

7 THE COURT: Defense counsel?

8 MS. RADOSTA: Thank you.

9

10

11 VOIR DIRE EXAMINATION

12 BY MS. RADOSTA:

13 Q. Do you have any formalized training in
14 security?

15 A. **Pretty much like what I said before.**

16 Q. Unarmed but not anything? --

17 A. Customer service skills, you know, calm,
18 courteous, polite.

19 Q. That's training.

20 A. **Yes.**

21 Q. You said your father was involved in
22 some kind of lawsuit.

23 Are you at all knowledgeable what the
24 basis of the lawsuit is?

25 A. **It was a girl's thing he brought**

1 **charges against the prison.**

2 **Q.** Anything about that that would cause
3 you prejudice to one sides or the other?

4 **A. No.**

5 MS. RADOSTA: Thank you. Pass for
6 cause.

7 THE COURT: Okay. Counsel approach the
8 bench, please.

9 (DISCUSSION OFF THE RECORD)

10 THE COURT: The defense counsel may
11 exercise their second peremptory challenge -- the
12 prosecution's second.

13 MS. RADOSTA: It's ours.

14 MS. KOLLINS: We exercised our second.

15 THE COURT: Defense counsel, please.

16 MS. RADOSTA: Court's indulgence.

17 Defense would thank and excuse juror
18 781, Mrs. Pentico.

19 THE COURT: Thank you very much, ma'am.
20 You're excused.

21 Ladies and Gentlemen, we're going to
22 break here shortly. I invited counsel up a moment
23 ago to discuss the question of our remaining
24 prospective jurors.

25 It looks like we have just a few more

1 than we're going to actually need. I recall that
2 there were three individuals that we elected not to
3 excuse because we were concerned about the numbers,
4 but if we still have Ms. Gilliard a reasonable
5 doubt, the lady from North Las Vegas and Ms. Tracey
6 yes, and Mr. Duran, you three folks can go down and
7 reschedule. We won't need you. We appreciate your
8 willingness to be here.

9 As to the remaining individuals, all
10 present, let me read the following admonition.

11 A PROSPECTIVE JUROR: Your Honor, I
12 wouldn't like to reschedule. My situation would
13 still be the same.

14 If I'm chosen on this panel, I'll
15 serve.

16 THE COURT: Thank you.

17 A PROSPECTIVE JUROR: I wouldn't want
18 to reschedule either.

19 THE COURT: Have a seat, remain.

20 Bring me the information tomorrow that
21 we need to help you over there in North Las Vegas.
22 [Whereupon, the court admonished the
23 jury.]

24 THE COURT: As I indicated, I must read
25 this every time we recess. It's that important.

1 It's not to say you can't be friendly
2 with one another, go to lunch tomorrow perhaps
3 together before come in, whatever it might be.

4 It does mean you're not to discuss
5 these proceedings.

6 What I like to suggest to people is if
7 it happened in this room it probably shouldn't be
8 discussed. That seems a little extreme.

9 It's amazing how quickly you can go to
10 something totally innocuous that something we have a
11 problem with that we have to try to undo.

12 It can create a real problem. If it's
13 a major problem we have the start all over. We
14 would have to get another jury panel and I would
15 have to start the whole process all over again.

16 I also suggest when you go home your
17 spouse, your children, neighbor may ask you what
18 happened in court.

19 It's a natural question. You don't
20 come to court every day. You're likely to be asked.
21 Please refrain in discussing it.

22 Not only is it very definitely the
23 law, but perhaps more importantly just basic
24 fairness, if you'll think about it.

25 The State and the Defendant are

1 deserving of your opinion based on what happens in
2 Court, not what your neighbor thinks or your teenage
3 son or husband. Very shortly you can discuss it
4 with anyone you'd care to. Ask you to be back here
5 tomorrow at promptly 1:30 tomorrow.

6 If counsel has anything we need to do
7 procedurally we'll discuss it in chambers.

8 Court is adjourned.

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ATTEST that this is a true and
complete transcript of the proceedings held.


J. A. D'AMATO CCR17

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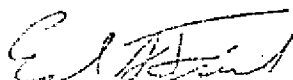
THE STATE OF NEVADA,

Plaintiff,

vs.

JOSEPH A. HENDERSON,

Defendant.


 CLERK OF THE COURT

No. C212968

Dept. XIV

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DONALD M. MOSLEY

June 27, 2008
 1:30 p.m.
 Department XIV

APPEARANCES:

For the State:

MR. STACY KOLLINS

MR. BRADFORD TURNER

Deputy District Attorneys

For the Defendant:

MS. VALERIE RADOSTA

MR. NORMAN REED

Deputy Public Defenders

Reported by:
 Joseph A. D'Amato
 Nevada CCR #17

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 CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)
Plaintiff,)
vs.) No. C212968
JOSEPH A. HENDERSON,) Dept. XIV
Defendant.)

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MR. NORMAN REED
Deputy Public Defenders

Reported by:
Joseph A. D'Amato
Nevada CCR #17

THE COURT: The continuation of
C212968, State versus Joseph Alexander Henderson.
Record reflect the presence of the Defendant with
his counsel, Mr. Reed and Ms. Radosta, Ms. Kollins
and Mr. Turner present for the State.

Ms. Clerk, will you call the roll of
the jury, please?

[Whereupon, the court clerk called the
roll of the jury.]

THE CLERK: The panel is present, Your
Honor.

THE COURT: Very good. Good afternoon,
Ladies and Gentlemen.

Ms. Gunther, let me admonish you
you're still under oath.

Proceed, please.

MR. REED: Yes, Your Honor.

EXAMINATION [cont'd.]

BY MR. REED:

Q. Ms. Gunther, what I'd like to do is
pick up where we left off yesterday evening. In
doing that what I'd like to do is have you remind
the jury that we started into a line of questioning

concerning heterozygot and homozygot.

Can you explain to the jury the
difference between the difference between the two as
easily as we can?

THE WITNESS: Before I get into that
may I make a correction to an answer I made
yesterday?

THE COURT: Yes.

THE WITNESS: One of the questions Mr.
Reed had for me was whether or not the semen sustain
on the bed sheet was a mixture.

I had said yes.

The correct answer is no, it was not a
mixture.

BY MR. REED:

Q. That's reflected in your report?

A. Yes.

Q. That it is not a mixture?

A. I identified semen, yes.

Q. I want to make sure we're clear.

Your report is, correctly identifies
it as no, not a mistake. You just misspoke
yesterday.

It was a mixture versus a single
source?

A. Yes, and today I have corrected
myself.

Q. Back to today's question, heterozygot
and homozygot.

A. There are several forms of DNA at each
of the locations. They all have different numbers
based on the number of repeated units.

I don't know if Mr. Welch had
explained that difference to you, but we inherit our
DNA from our parents obviously.

We could have two different forms of
DNA if our parents were different at a particular
location like on the screen it's D2, and that's a
location on chromosome two.

Our parents could have either
differing locatoin's or we could have the same
location.

If the parents, mother and father --
if it's my DNA and my mother and father have the
same DNA at that location will have a single spike
or peak, we call them peaks and it will be what's
called a homozygot. Homo meaning the same, both
parents having the same.

If it's different, like say if the 17
and -- if the 17 and 20 go together that's a

1 heterozygot meaning they are different, two
2 different types.

3 Q. Now, you don't automatically know
4 whether it's going to be a homo or heterozygote; is
5 that a fair statement?

6 A. Well, you're talking about a single
7 source sample or a mixture sample.

8 Q. In a mixture sample?

9 A. In a mixture sample you're evaluating
10 the individual loci, meaning 2, D2, the individual
11 chromosome and you're also going to be looking at
12 the entire spread of all the different DNA types of
13 the 16 locations.

14 Q. Is D2 an example out of the many that
15 are represented here in defense proposed A in which
16 there could be the presence of a heterozygote?

17 A. In as much as this sample, this is the
18 vaginal swab and what we call the E2 portion or the
19 portion that contains cells and sperm, um, inasmuch
20 as this is a vaginal swab we will have a
21 contribution of the person's own vagina, I mean
22 that's kind of an expected thing and yes, we do have
23 an expectation knowing Julie Kim's type that we
24 expect to see a heterozygote in the mixture.

25 Q. But using D2 as an example, the

1 mixture what would be the possible combinations in
2 D2 if it is a heterozygote?

3 A. We're talking about a sample that is a
4 vaginal swab where we expect to see the female
5 contributor's type and in this case I've previously
6 mentioned that I had very few sperm in the sample,
7 so the minor contributor is going to be the lower
8 level person.

9 In this instance we're seeing a
10 mixture of types attributable to Julie Kim. Julie
11 Kim's known sample is a heterozygote, 17, 24.

12 Then there is -- the minor contributor
13 is a 20.

14 Q. I guess my question was this: If
15 you're making that analysis based on your comparison
16 with Joseph Henderson's sample; is that correct?

17 A. That is correct.

18 Q. Right.

19 If we remove Joseph Henderson's sample
20 for a minute there's other possibilities concerning
21 the heterozygote; is that also correct?

22 A. We have to take into account Julie
23 Kim's own DNA profile type which is the major type,
24 so we're going to be seeing the 20 as could be a
25 homozygote or could be combined with the 24.

1 The 24 peak is taller than the 17.

2 Q. That is the peak height ratio
3 information that you testified to yesterday on
4 cross-examination?

5 A. Yes.

6 It gets a bit complicated with all the
7 calculations, but you can see that the 24 is higher
8 than the 17 which indicates to me that there is a
9 source, other source of 24 in that mixture.

10 Q. That other signatures of 24 could then
11 be, make it a 20, 24, 20, 20, correct?

12 A. If this were not a vaginal swab --
13 let's just say that this is a vaginal swab that
14 comes from Julie Kim.

15 Her type is the dominant type.

16 Q. Right. As far as the minor profile?

17 A. A minor profile definitely has the 20
18 and because the 24 is enhanced above the 17, it's
19 taller, I would say that there is a contribution of
20 a 24 in there.

21 Q. Right. But there also is the
22 potential for the contribution for the 20, correct?

23 A. The 20, yes.

24 Q. You said -- we started to talk about
25 complicated formula, but the actual peak height

1 ratio itself is not complicated to do, right?

2 A. No, it is not.

3 Q. In fact, can you do that for the jury
4 as to the peak height ratio between the 24 and the
5 20? The calculator is there on your right side.

6 A. The sheer ratio is -- basically when
7 we do a ratio it's going to be a comparison of the
8 lower peak to the higher peak, and so the ratio of
9 20 to 24 is 36.6 percent.

10 Q. Thank you.

11 You also -- you didn't have to in this
12 case, but you also could do that same, could you not
13 also, between the 17 and the 20?

14 A. You could do that between all of them,
15 yes.

16 Q. If we were to strip away the analysis
17 with the 24, you would in fact look at that?

18 Let me ask it this way.

19 That was a very poorly worded
20 question.

21 Regardless of what we see in D2 you're
22 going to look at the differences in the peak between
23 the 17 and the 20, correct?

24 A. Yes.

25 In looking at the numbers actually you

1 can visualize that that is, it's 39 percent.

2 Q. You can actually see there's --

3 A. Right. You can actually pretty much
4 do that calculation in your head.

5 Q. Right.

6 On the right-hand side, while we're
7 talking about it, too, is this RFU level that we
8 were testifying about yesterday?

9 A. Yes.

10 Within the graph printouts there is a
11 general scale showing just a relative peak height so
12 this one that's 1,010, it's just a little bit above
13 this marker over on this side that's 1,000.

14 Q. If we look at this now we know that in
15 your analytical data, obviously this left hand peak
16 is the 17, the center peak is the 20, the right hand
17 peak is the 24, and we know that the 17 and the 24
18 are relatively similar in peaks; is that correct?

19 They are about the same height?

20 A. Well, they are.

21 If you think back to one of my first
22 statements is that whenever you have -- and we know
23 Julie Kim's type at that location is a 17, 24 -- we
24 know that the smaller DNA fragment amplifies higher
25 than the smaller fragment, then we'll expect that

10

1 Julie Kim's 24 is going to be less than that 944
2 which indicates to me that this 1,010 is higher than
3 that 944, so there's something else going on in the
4 peak height.

5 Q. Right.

6 You have to look at that peak height
7 still in relation to the 20 in doing the analysis
8 that you did?

9 A. The companion -- if there were a
10 companion peak to the 020 it would be at least 60
11 percent of that 370.

12 That's where I said that the
13 calculation gets a little complicated, because we're
14 adding other things in now.

15 Q. Now, let me see if we can do this in a
16 more abbreviated version. In looking -- maybe I'll
17 bring it up to you. It might help.

18 There are some representations of
19 stutters in the data that's on defense proposed A.

20 If I bring them you to you can you
21 point out which ones those are or can you look at
22 your notes and indicate where there is a presence of
23 a stutter?

24 A. A presence of a stutter, a peak, would
25 be the prior, the little bump.

1 Q. Right.

2 A. You can see that there. We've seen
3 some of those. It's hard. It's highly apparent
4 there.

5 Q. When a stutter gets above a certain
6 amount it's something that you have to actually take
7 notice of?

8 A. That's correct.

9 Q. What is that amount?

10 A. Each location on the DNA has a stutter
11 percent and stutter filter can be as high as one or
12 20 percent, depending on the ratio, so at that point
13 we have to look at that carefully.

14 Q. Can you point to the jury an example
15 of where there was a 17 to 20 percent stutter
16 somewhere on this chart?

17 A. The stutter filter has taken the
18 stutter out. There are actual peaks above stutter
19 at CSF1PO.

20 Q. Hold on. Let me see if I can move it.

21 A. Right above the D2.

22 Q. Can you touch the screen there?

23 A. Doesn't clear -- there it goes. There
24 is a 10, 11, 12.

25 Q. And, in fact, you put down, you looked

12

1 at this because you even put the percentage there of
2 22. That's the stutter percentage?

3 A. That is a true peek in a stutter
4 position.

5 Q. So sometimes you'll see stutters like
6 we have seen in some of the other samples here where
7 there is a smaller, little peak.

8 This one you determined to be an
9 actual representation of a potential DNA?

10 A. Correct.

11 MR. REED: I'd move for the admission
12 of defense proposed A.

13 THE COURT: Any objection?

14 MS. KOLLINS: No objection.

15 THE COURT: Received.

16 BY MR. REED:

17 Q. All right. We're going to shift gears
18 off the technical stuff for a minute, if we can.

19 You had, I think, testified that you
20 went over to where all the evidence is kept and you
21 removed the bed sheets out and did the extractions;
22 is that correct?

23 A. Yes, I did the examination of the bed
24 sheet and the robe.

25 Q. When you go over there you pulled out

1 anywhere where there might be the presence of DNA
2 and brought it back to the lab to see what you could
3 find out?

4 A. **No. Make a correction to your**
5 **question.**

6 **As far as going over to where the**
7 **evidence -- the evidence is brought to the forensic**
8 **lab through our chain of custody process.**

9 **We have an examination room where it**
10 **has a big table where you can spread out a large**
11 **item like a bed sheet.**

12 Q. So you have all the items of evidence
13 then you go through them and see if there's anything
14 of any -- where you can maybe get some samples?

15 A. **Yes. We do a visual examination.**

16 Q. Did you ever -- back up a second. You
17 talked about what is good quality DNA.

18 Is a hair sample a potential good
19 quality of DNA?

20 A. **A hair sample could be a good source**
21 **of DNA, depends how many hair sheath cells are**
22 **attached to that hair. It has to be evaluated.**

23 **Basically it has to be consumed in**
24 **testing.**

25 Q. Did you do an evaluation of the hair

14

1 sample in this case?

2 A. **No, I did not.**

3 Q. Now, if I -- is sweat a good source of
4 DNA?

5 A. **Sweat is not a good source of DNA.**

6 Q. Is it something you might look at?

7 A. **A sweat sample, as you all know, is**
8 **mostly dried water, so it would have -- you would**
9 **have to consume an entire huge area.**

10 **It would take a very laborious process**
11 **to get any DNA out of a sweat sample.**

12 Q. How about a cigarette butt?

13 A. **Can be a good source.**

14 Q. Because of the potential of having
15 your lips on the cigarette and there could be a
16 sloughing of skin cells?

17 A. **Yes.**

18 Q. The area I wanted to ask you about was
19 on the vaginal swab I think you had testified -- I
20 don't want to misspeak on this -- there was very
21 little?

22 A. **That's correct.**

23 Q. There's an actual report that looks
24 like you indicate there might have only been
25 actually one head of sperm on the vaginal swab?

1 A. **I did have that in my note.**

2 **When we do a microscopic examination**
3 **of a portion of the sample that contains sperm, I'm**
4 **only taking out what's called a microliter, which is**
5 **a very, very tiny droplet.**

6 **Within that droplet I make a**
7 **preparation on the microscope slide. I'm only**
8 **taking 1/50th of the sample that I've extracted.**

9 **I'm making a microscope preparation.**
10 **I still have 49 parts left in my tube. If I find,**
11 **say, one sperm in that, I'm going to proceed and**
12 **follow the extraction through to see if I can get**
13 **more information out of that sample.**

14 **There is a potential.**

15 **At that point I want to proceed very**
16 **carefully and because I did get a male profile from**
17 **the vaginal swab it indicates to me there is more**
18 **sperm in the 49 parts that remained.**

19 Q. But you did the vaginal swab had the
20 one -- had one sperm?

21 A. **In the single microliter preparation**
22 **that I did.**

23 Q. Before you extracted out and do the
24 rest of the test?

25 A. **Before I did the rest of the testing.**

16

1 Q. Correct.

2 Now, is it true that the more sperm
3 that is present the better the chance of you getting
4 an accurate DNA profile?

5 A. **A complete profile instead of saying**
6 **accurate. It is accurate, but a more complete**
7 **profile.**

8 MR. REED: Pass the witness.

9 THE COURT: Cross-examination or
10 re-direct?

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RE-EXAMINATION

BY MS. KOLLINS:

Q. Good afternoon, Ms. Gunther.

A. **Good afternoon.**Q. I want to go over a couple of things
as briefly as I can.I want to make sure we have this as
straightforward as we can.Mr. Reed concentrated his
cross-examination of the vaginal swab.A. **Yes.**Q. That was the only mixture in all the
analyses that you performed in this case; is that

1 correct?

2 A. **Correct.**

3 Q. At the time you conducted your
4 examination you had a known DNA sample of -- the
5 person identified to you as Julie Kim?

6 A. **Yes, I did.**

7 Q. So when we went through the isolated
8 questions about, isolated questions about each one
9 of those peaks you can't look at that isolation, can
10 you?

11 You have to look at that as an TR
12 profile. You can't look other than just one peak at
13 a time?

14 A. **That's correct.**

15 Q. It's the combination of knowing Julie
16 Kim's profile, a known individual, and then looking
17 for the minor contributor?

18 A. **That's correct.**

19 Q. When Mr. Reed talked to you about --
20 I'm going to use, for example, not going through
21 each one of the peaks he went through with you, but
22 when he talked to you about I believe it was --
23 indulge me for a second.

24 Is D3 the last one he was asking you
25 about?

18

1 MR. REED: D2.

2 BY MS. KOLLINS:

3 Q. D2?

4 A. **Yes.**

5 MS. KOLLINS: Approach your clerk?

6 THE COURT: You may.

7 BY MS. KOLLINS:

8 Q. When he was going through -- excuse me
9 -- I can't quite get it right.

10 When he was going through D2 with you
11 is that D2 up here or D2 down at the bottom?

12 A. **The bottom D2.**

13 Q. You knew that Julie Kim's numbers were
14 17, 24, correct?

15 A. **Yes.**

16 Q. Knowing that that was 17, 24 any other
17 number that came up in that designation, what would
18 that suggest to you?

19 A. **Because I did detect the presence of**
20 **sperm and we do have what's called a milligenin TY**
21 **[phonetic], which indicates there was male DNA**
22 **there, because it's from sperm, then anything that**
23 **wasn't a 17 or a 24 would be from the foreign source**
24 **and then anything that was in excess of the ratio of**
25 **17 to 24 could be from the contributor also.**

1 Q. Can you look at -- I want to

2 articulate this question and not make it more
3 confusing than it is to me -- can you look at that
4 single location and when you look at that
5 contributor can you look at that isolated location
6 and tell whether it's male or female?

7 A. **No.**

8 Q. You can only tell it in combination
9 with everything else?

10 A. **Well, if we were thinking about a**
11 **vaginal swab where we know we have sperm, then we**
12 **know we have more than one contributor there, and**
13 **knowing what the female's type is we would say well,**
14 **the type that isn't her's has to come from the male**
15 **contributor.**

16 Q. In other words, then there is no
17 reason to come up with different combinations of
18 those numbers at that site if you know what the
19 female's numbers are?

20 A. **That's correct.**

21 Q. As far as testing a hair sample what
22 kind of DNA do you generally get from a hair sample?

23 A. **A hair sample has to have a lot of**
24 **cells from its root. It has to be pulled out.**

25 **If I would pull on my hair and pull**

20

1 **hair out I might be able to get enough DNA for a**
2 **test.**

3 **Hair analysis was not typically done**
4 **in our laboratory at that time. I'm sure that there**
5 **would be qualifying tests that you would have to**
6 **take.**

7 Q. Is it a different type of analysis
8 than what was performed here?

9 A. **It is a little bit different**
10 **extraction procedure.**

11 Q. As far as testing a cigarette you
12 would be looking for saliva cells?

13 A. **Actually the cells from the lining of**
14 **the mouth, yes.**

15 Q. Epithelial cells contained within
16 saliva, certainly?

17 Q. The same kind of epithelial cells that
18 saliva on a breast might leave?

19 A. **Yes.**

20 Q. **And I know you clarified this earlier**
21 **when you first took the witness stand, but to make**
22 **sure the mixture, when you testified yesterday that**
23 **there was a mixture on the bed sheet that was in**
24 **error?**

25 A. **That was in error.**

1 Q. The bed sheet testing was a single
2 source test, correct?

3 A. **That was a single source, a male**
4 **profile.**

5 Q. As well as the saliva from the breast,
6 that was also single source?

7 A. **Yes.**

8 Q. Ma'am, in your professional opinion,
9 to a reasonable degree of scientific certainty, who
10 was the contributor?

11 A. **The male contributor is Joseph**
12 **Henderson.**

13 Q. On the bed sheet?

14 A. **On the bed sheet.**

15 Q. In the vaginal, from the vaginal swab?

16 A. **Sperm from the vaginal swabs.**

17 Q. And as to the breast swabbing?

18 A. **The breast swabbing, yes.**

19 MS. KOLLINS: No more questions.

20 THE COURT: Anything further?

21 MR. REED: Nothing else, judge.

22 THE COURT: You're excused. Thank you.

23 Next, please.

24 MS. KOLLINS: State calls Kim Murga.

25 MR. REED: Approach, judge.

1 THE COURT: Yes.

2 (DISCUSSION OFF THE RECORD)

3

4 KIM MURGA,

5 called as a witness herein, was sworn by the court
6 clerk, was examined and testified as follows:

7

8 EXAMINATION

9 BY MS. KOLLINS:

10 Q. Good afternoon. Can you state your
11 full name and spell your last for the record?

12 A. **My name is Kimberly M-u-r-g-a.**

13 Q. Ms. Murga, how are you employed?

14 A. **I'm currently the DNA laboratory**
15 **manager for the Las Vegas Metropolitan Police**
16 **Department, crime laboratory.**

17 Q. How long have you been the laboratory
18 manager for Metro?

19 A. **I've been the DNA laboratory manager**
20 **since February of 2008.**

21 Q. Prior to February 2008 where were you
22 employed?

23 A. **I was employed by the Las Vegas Metro**
24 **Police crime laboratory and I was the DNA technical**
25 **leader.**

1 Q. For how long were you employed in that
2 capacity?

3 A. **I began with Las Vegas in July of**
4 **2007.**

5 Q. Prior to your career here in Las Vegas
6 as both a technical leader and the manager of the
7 DNA lab how were you employed?

8 A. **I was previously employed by the Armed**
9 **Forces DNA identification laboratory in Rockville,**
10 **Maryland, for 11 years prior to that.**

11 Q. And prior to that did you hold any
12 positions in this type of field?

13 A. **No, I did not.**

14 Q. What training and education qualifies
15 you to perform as the DNA lab manager as well as the
16 technical leader here at Metro?

17 A. **I have a Bachelor of Science from**
18 **Shawmanaug University in criminal justice and a**
19 **Bachelor of Arts in balling from Shawmanaug**
20 **[phonetic] University of Honolulu and I also have a**
21 **Master of Science, master of forensic science, in**
22 **forensic sciences from the George Washington**
23 **University in D.C.**

24 Q. Can you tell can you tell us have you
25 testified as an expert before?

1 A. **I have.**

2 Q. In the specific field of DNA profiling
3 and analysis?

4 A. **Yes, I have.**

5 Q. Which courts have you testified?

6 A. **I testified in military courts,**
7 **several times, and I've also testified in Federal**
8 **Court here in Las Vegas.**

9 Q. What kind of DNA profiling
10 investigations have you involved yourself in?

11 A. **I've been qualified in autoselmo**
12 **STR's, currently the type of case we're trying.**
13 **I've also been qualified in YST analysis and**
14 **mitochondrial analysis and I have been involved in**
15 **doing thousands of cases to identify remains that**
16 **are diseased from military conflicts such as**
17 **Operation Iraqi Freedom, Enduring Freeddom, plus**
18 **military conflicts such as the Viet Nam War, Korean**
19 **War.**

20 **I've been involved in a number of**
21 **plane crashes, as well as DNA analysis in terrorist**
22 **attacks such as the Pentagon plane crash, Sommerset**
23 **plane crash, as well as identification of a number**
24 **of high profile terrorists such as Saddam Hussein,**
25 **Uday and Usay Hussein, thousands of cases prior to**

1 my arrival at Las Vegas Metropolitan Police crime
2 laboratory.

3 Q. I'd like to draw your attention to a
4 case under Metro Police event number 03409030152
5 involving the victimization of a female by name of
6 Julie Kim.

7 Are you familiar with that case?

8 A. I am familiar with that case.

9 Q. Did you personally conduct any of the
10 testing on that case?

11 A. I did not conduct any of the analysis
12 on that case.

13 Q. Is part of your job as the laboratory
14 manager to sit in and do a peer review of cases?

15 A. Yes.

16 Q. And do you routinely review work and
17 reports that go in and out of the laboratory?

18 A. I do.

19 Q. This particular case, its inception
20 was prior to you being at the crime lab; is that
21 correct?

22 A. That is correct.

23 Q. Did you go back and review all the
24 case work that was conducted in this case?

25 A. I did.

1 Q. I'd like to take you back to the -- if
2 I could very briefly -- the sexual assault kit that
3 was initially examined by David Welch wherein at the
4 time there was no known suspect.

5 Are you familiar with that work on
6 this case?

7 A. I am familiar with that.

8 Q. Did you review Mr. Welch's work in
9 that, regarding the very inception of this case?

10 A. I did review David Welch's work.

11 Q. You looked at the first profile he
12 obtained from the breast swab of Julie Kim?

13 A. I did, yes.

14 Q. And in your opinion was that profiling
15 done correctly?

16 A. Yes, it was.

17 MR. REED: Object. This is vouching
18 for another expert witness's testimony.

19 This is not proper.

20 THE COURT: What is it?

21 MS. KOLLINS: She can read another
22 expert's report.

23 THE COURT: Absolutely she can.

24 Overruled. Proceed.

25 You can make your record later. Thank

1 you.

2 Proceed.

3 BY MS. KOLLINS:

4 Q. Did you review his extraction process?

5 A. I did.

6 Q. Did you review his charting?

7 A. I did.

8 Q. Did you review his conclusions?

9 A. I did.

10 Q. And what is your conclusion of the
11 work he did on the profile?

12 A. That the DNA work was done properly,
13 there was no contamination and the DNA results
14 obtained were correct.

15 Q. Moving forward to February of 2005,
16 when Ms. Gunther obtained information from another
17 agency regarding a potential suspect by the name of
18 Joseph Henderson, are you familiar with that part of
19 the file?

20 A. I am.

21 Q. Ms. Gunther was directed to get a
22 search warrant to get a known sample from the person
23 identified as Joseph Henderson, correct?

24 A. Correct.

25 Q. She didn't directly obtain that

1 sample. Metro did it on her behalf?

2 A. That is correct.

3 Q. And she did a re-comparison of the
4 breast sample to the known sample of Joseph
5 Henderson, correct?

6 A. Yes.

7 She worked the new sample obtained
8 from Joseph Henderson and obtained the same profile
9 and confirmed the match.

10 Q. Did you review that match confirmation
11 work done by Ms. Gunther in March of 2005?

12 A. I did.

13 Q. Did you review her extraction process?

14 A. I did.

15 Q. Did you review her documentation
16 process?

17 A. I did.

18 Q. Did you check her file similar to what
19 a peer review would do?

20 A. I did.

21 Q. Did you find any errors in her
22 reporting?

23 A. I did not.

24 Q. Did you review her conclusions?

25 A. I did.

1 Q. In your opinion, did she arrive at the
2 appropriate conclusion?

3 A. Yes.

4 Q. Which was?

5 A. That the DNA profile, whether -- are
6 we talking about the first when she worked the
7 buccal swab from Joseph Henderson or the entire
8 case?

9 Q. No, the buccal swab from Joseph
10 Henderson against the breast swab.

11 A. The results obtained were that the DNA
12 profile obtained from the breast swab from Julie Kim
13 matched the DNA profile of that obtained from Joseph
14 Henderson's swab.

15 Q. Do you agree with her statistical
16 conclusion one in six hundred billion?

17 A. I do.

18 Q. One in six hundred billion, would you
19 agree with this statement, that's the probability
20 that that profile generated from that breast
21 swabbing, that it was identical to the profile of
22 the defendant's known sample, so small that if
23 ordered to find it again you would have to have more
24 people than are on the planet?

25 A. That is correct. The DNA profile

1 obtained from the breast swab from Julie Kim, the
2 male profile is rarer than one in six hundred
3 billion individuals.

4 Q. Which means to find it again you'd
5 have to have 100 times the earth's population?

6 A. Yes.

7 Q. Now, did you -- after looking at that
8 analysis did you then -- there was some more testing
9 done in the case; is that correct?

10 A. That's correct.

11 Q. The vaginal swabs were looked at again
12 as well as a bed sheet and a robe?

13 A. That is correct.

14 Q. Ms. Gunther was able to come up with
15 profiles on the vaginal swabs and the bed sheet?

16 A. That is correct.

17 Q. As to the vaginal swab extraction and
18 profiling process do you have an opinion as to
19 whether or not Ms. Gunther carried out her work
20 correctly?

21 A. She did it according to the protocols
22 in place and there was no combination or no evidence
23 of anything that went wrong in the case, so yes, she
24 did reach the correct conclusions.

25 Q. And her conclusion as to the vaginal

1 swab was that there was a mixture of Julie Kim and
2 Joseph Henderson; is that correct?

3 A. That is correct.

4 Q. In reviewing her work did you find any
5 error in her conclusion?

6 A. I did not.

7 Q. Do you agree with her conclusion?

8 A. I do.

9 Q. As to the bed sheet, did you review
10 her work done on the bed sheet?

11 A. I did.

12 Q. And anything wrong with the extraction
13 process?

14 A. No.

15 Q. Anything incorrect in the
16 documentation?

17 A. No.

18 Q. Did you agree with her conclusion?

19 A. I did.

20 Q. Did you -- and her conclusion was?

21 A. Her conclusion was the male profile
22 obtained from the bed sheet was consistent with the
23 same male profile obtained from the vaginal swab
24 which was consistent with the same male profile
25 obtained from the breast swab of Julie Kim.

1 Q. Did you agree with her statistical
2 analysis?

3 A. Yes.

4 Q. If I could back you up to the vaginal
5 swab for a second, in the vaginal swab we had a
6 mixture, a minor male contributor?

7 A. Yes.

8 Q. A major contributor, that being the
9 known sample of Julie Kim, correct?

10 A. Yes.

11 Q. I'm showing you that up there at F, G,
12 A and D, D13 there was, there was insufficient
13 material to assign a profile to that location; is
14 that correct?

15 A. That is correct.

16 Q. And does that sometimes happen?

17 A. Absolutely, in samples that are
18 degraded or old or just have very few DNA cells,
19 yes.

20 Q. Ms. Gunther's conclusion, statistical
21 conclusion was still what?

22 A. That the male contributor to the
23 mixture of the vaginal swab matched that profile of
24 Joseph Henderson.

25 Q. And it still has that one in six

1 hundred billion number?

2 A. **That is correct.**

3 Q. And the fact that those two places are
4 missing on the profile does not alter that
5 statistical analysis?

6 A. **That's correct.**

7 Q. The last couple questions I have for
8 you is six hundred billion is a number set by the
9 laboratory, correct?

10 A. **That is correct.**

11 Q. Is the actual number actually far
12 different than that?

13 A. **It is actually.**

14 **The number sentenced into the**
15 **quadrillions and the quintillions, which is**
16 **something like 15 zeroes behind that, but I mean**
17 **those are huge numbers, difficult for even me to**
18 **comprehend and so our lab decided that we would cut**
19 **identity, identifying somebody, calling somebody the**
20 **contributor of that stain at 100 times the world**
21 **population which at the time was six billion.**

22 **So we just stop at 100 times the world**
23 **population because the numbers are so astronomical.**

24 Q. To a reasonable degree of scientific
25 certainty, do you have an opinion as to who the

34

1 contributor was to the semen sample found on the bed
2 sheet?

3 A. **I believe that that person was Joseph**
4 **Henderson.**

5 Q. And the same question as to the breast
6 swabbing, do you have an opinion to a reasonable
7 degree of scientific certainty who the contributor
8 was to the epithelial cells found in the saliva on
9 the breast of Julie Kim?

10 A. **The individual who left the DNA on the**
11 **breast swab of -- on the breast sample of Julie Kim**
12 **is Joseph Henderson.**

13 Q. The same last question, to a
14 reasonable degree of scientific certainty do you
15 have an opinion as to who the minor contributor was
16 in the vaginal -- from the vaginal swabs of Julie
17 Kim?

18 A. **The individual who contributed to the**
19 **DNA mixture, the male profile in the vaginal swab is**
20 **Joseph Henderson.**

21 MS. KOLLINS: Pass the witness.

22 THE COURT: Cross-examination.

23 MR. REED: Thank you.

24

25

EXAMINATION

1

2 BY MR. REED:

3 Q. When did you look at these records,
4 Ms. Murga?

5 A. **I looked at them couple of weeks ago.**

6 Q. Couple weeks ago?

7 A. **Yes.**

8 Q. And the testing was done back in 2005?

9 A. **2004 and 2005.**

10 Q. Who asked you to look at the records?

11 A. **Actually I was subpoenaed. I was**
12 **called a couple of weeks ago by an attorney**
13 **regarding this case and I pulled the records at that**
14 **time, because one of my former co-workers was going**
15 **to testify.**

16 **I always pull his cases.**

17 Q. When you say subpoenaed, you were
18 subpoenaed by the District Attorney's Office?

19 A. **Yes, couple weeks ago.**

20 Q. The attorney you're talking about is a
21 prosecutor, correct?

22 A. **You know --**

23 Q. Not sure?

24 A. **-- I think it was a defense attorney.**

25 **I know his last name, but I don't know if I should**

36

1 say it.

2 Q. **That's okay.**

3 A. **Acuna, something Acuna.**

4 Q. All right. You were asked to look at
5 these records two weeks ago?

6 A. **Yes.**

7 Q. Or roughly?

8 A. **I wasn't asked. I was subpoenaed so I**
9 **pulled the files.**

10 Q. A subpoena is a request?

11 A. **Yes.**

12 Q. So a request came from the prosecutor
13 to look at these records?

14 A. **Yes.**

15 Q. And then about two weeks ago you
16 looked at these records from three years, that are
17 almost four years old?

18 A. **Correct.**

19 Q. When you were saying you looked at all
20 of these records basically what you looked at is
21 just all the paperwork and data and such that's in
22 the file?

23 A. **Correct.**

24 Q. And you probably have a copy of it
25 there?

1 A. **Identify.**
 2 Q. Is that the same stuff Mr. Welch or
 3 Ms. Gunther had when they were testifying?
 4 A. **Yes, this is actually Dave Welch's**
 5 **case. Kathy Gunther has her own files.**
 6 Q. Did you take any notes while you were
 7 looking at all these reports?
 8 A. **Yes, I did.**
 9 Q. Do you have those notes?
 10 A. **I do.**
 11 Q. Can you -- can I see those?
 12 A. **Absolutely.**
 13 Q. What day did you generate these notes
 14 on?
 15 A. **I generated them over the course of**
 16 **past couple weeks.**
 17 MR. REED: Can I have a little time to
 18 study these notes? I've received them just now.
 19 I need a minute to look at them.
 20 THE COURT: Are you suggesting a break
 21 or pause?
 22 MR. REED: I might take five minutes.
 23 I'd like to at least read them before I ask her
 24 questions about them.
 25 I just found out about it just now in

38

1 Court.
 2 [Whereupon, the court admonished the
 3 jury.]
 4 THE COURT: The continuation of C12968,
 5 State versus Joseph Alexander Henderson. Record
 6 reflect the presence of the Defendant and his
 7 counsel, Mr. Reed and Ms. Radosta. Ms. Kollins and
 8 Mr. Turner present for the State.
 9 Will counsel stipulate all members of
 10 the jury are present and properly seated?
 11 MS. KOLLINS: Yes, Your Honor.
 12 MS. RADOSTA: Yes.
 13 THE COURT: Ms. Murga, let me admonish
 14 you you're still under oath.
 15 Proceed, please.
 16 BY MR. REED:
 17 Q. The notes that you took were like on a
 18 plain old piece of notebook paper, right?
 19 A. **That is correct.**
 20 Q. Front and back?
 21 A. **That is correct.**
 22 Q. You took those notes to allow you to
 23 relate to the jury basically what you reviewed from
 24 the actual records themselves?
 25 A. **I didn't take it with the intent in**

1 relaying it to the jury.
 2 **I took it with the intent so I knew**
 3 **what was going on with the case; that's what I do**
 4 **when I review cases, look over and take notes for**
 5 **myself so I have a timeline of what was going on,**
 6 **especially something that occurs over such a large**
 7 **time, length of time.**
 8 Q. Did you have to go back and look at
 9 these notes before testifying today?
 10 A. **Yes.**
 11 Q. You used them to refresh your memory?
 12 A. **Yes.**
 13 Q. Now, you had had -- you had testified
 14 that you looked at the extraction process on the top
 15 sheet.
 16 What extraction process was used by
 17 Ms. Gunther on the top bed sheet back in 2005?
 18 A. **She used a kiagen [phonetic]**
 19 **extraction methodology.**
 20 Q. Can you explain to the jury briefly
 21 what that is?
 22 A. **Kiagen is a methodology where when you**
 23 **have a substraight you can actually cut out that**
 24 **substraight or take off the swab, whatever it may**
 25 **be, add some chemicals, the DNA is then aladded**

40

1 **[phonetic] off of the substraight and you have your**
 2 **extraction ready for the next step in DNA analysis**
 3 **called amplification.**
 4 Q. Fair to say there's different ways to
 5 extract DNA?
 6 A. **Absolutely.**
 7 Q. And that different examiners might use
 8 different methods?
 9 A. **That is correct.**
 10 Q. That would have been the decision that
 11 was made by Ms. Gunther at the time?
 12 A. **Yes.**
 13 Q. Now, have you reviewed any other DNA
 14 cases from the years preceding your employment at
 15 the Las Vegas Metropolitan Police Department?
 16 A. **I have.**
 17 Q. Does that include any cases that have
 18 been around for at least four years or more?
 19 A. **Yes.**
 20 Q. Do you do that frequently or do you do
 21 that on occasion?
 22 A. **I do that on occasion.**
 23 Q. When you do that is that done in
 24 anticipation of testifying before a jury?
 25 A. **Well, sometimes yes and then sometimes**

1 I'm going back to look at other methodologies,
2 stats, and stuff that was done to kind of see the
3 evolution of where we were and where we are today.

4 Q. But in that second review it's more
5 for learning than it is to make sure they did the
6 job right?

7 A. Correct.

8 Q. That's fair to say?

9 A. Correct, yes.

10 Q. And obviously you didn't know who the
11 technical -- maybe you do.

12 Do you know who the technical leader
13 was back in 2004?

14 A. I believe was Birch Henry.

15 Q. And then there was a peer review done,
16 too?

17 A. Yes.

18 Q. So all of these steps that are
19 normally taken in the lab were all done years before
20 you even came into the case?

21 A. That is correct.

22 Q. Dave Welch testified that despite all
23 the peer review and technical review it isn't th a
24 flawless process.

25 Do you concur with that?

42

1 A. Yes, I concur.

2 MR. REED: Pass the witness.

3 THE COURT: Re-direct?

4 MS. KOLLINS: Couple questions.

5

6

7

8

RE-EXAMINATION

9 BY MS. KOLLINS:

10 Q. Mr. Welch is no longer employed with
11 your laboratory; is that correct?

12 A. Yes. He retired in December 2007.

13 Q. Some of these requests of older cases
14 that you've been asked to review have you done that
15 in anticipation of his perhaps unavailability to
16 come back to this jurisdiction?

17 A. That is correct.

18 I routinely review Dave Welch's cases
19 when subpoenas come in. I might have to testify for
20 him.

21 Q. And Birch Henry is also no longer with
22 the lab?

23 A. Yes. Birch Henry left I believe April
24 or May of 2006.

25 Q. The person that did this peer review

1 for Mr. Welch is also no longer at your laboratory?

2 A. That is correct.

3 Q. And do you review cases that he
4 reviewed in case you may have to testify from his
5 results for a trial?

6 A. That is correct.

7 Q. I'm sorry, one second, please.

8 This report -- well, it's not a
9 report -- your personal notes that you took in this
10 case, this was not something that was shared, in
11 other words, the State did not have a copy of this
12 before today either?

13 A. That is correct.

14 Q. These were no notes personal to you?

15 A. Yes.

16 Q. They were not part of the original
17 work up on the case?

18 A. No.

19 Q. Anything that's contained within here
20 is contained within Dave Welch's and Kathy Gunther's
21 original files; is that correct?

22 A. That is correct.

23 Q. This is just condensed information
24 from those files?

25 A. Yes.

44

1 Q. And nothing new appears in this
2 document that you shared with Mr. Reed and myself
3 this morning?

4 A. No.

5 It's a summation of the timeline for
6 both Dave Welch and Kathy Gunther's processes.

7 Q. Is this something you would routinely
8 do for yourself when you are preparing, in the event
9 that you would have to testify for somebody that's
10 not in the jurisdiction any longer?

11 A. Yes.

12 Q. Or at least not employed by the
13 jurisdiction any longer?

14 A. Even my own cases that I do I do that.

15 MS. KOLLINS: No more questions.

16 THE COURT: Anything further?

17

18

RE-EXAMINATION

19 BY MR. REED:

21 Q. Despite the fact Dave Welch is a
22 retired fisherman he came back to testify, correct?

23 A. Correct.

24 Q. Examiners leave and retire but it
25 doesn't mean they are unavailable, necessarily,

1 right?

2 A. I mean --

3 Q. Dave Welch was here?

4 A. Yes, he was here, but I know he's also
5 taken a series of lengthy trips and I've been called
6 to testify several times for Dave Welch.

7 Q. But not in this case?

8 A. Not in this case.

9 Initially, I was, but he was available
10 at the last minute, I believe.

11 Q. He cleared up one of his fishing
12 trips?

13 A. Yes.

14 MR. REED: Thanks. That's it.

15 THE COURT: Anything further?

16 MS. KOLLINS: No.

17 THE COURT: Thank you very much.

18 Further witnesses?

19 MS. KOLLINS: No, Your Honor.

20 I would check to see that everything
21 the State has offered save and except what the court
22 declined to admit has been admitted into evidence.

23 COURT CLERK: Those things I showed
24 you -- those photos in the two envelopes.

25 MS. KOLLINS: Court's indulgence.

1 With that confirmation the State is
2 prepared to rest.

3 THE COURT: Counsel approach, please.
4 (DISCUSSION OFF THE RECORD)

5 THE COURT: Ladies and Gentlemen,
6 counsel and I are going to work on some items we
7 need to prepare. It's going to take us a little
8 time.

9 I'm going to recess and have you exit
10 the court room and I'll indicate I'll have you back
11 quarter after three.

12 [Whereupon, the court admonished the
13 jury.]

14 THE COURT: The record will indicate
15 the jury has exited the courtroom.

16 Mr. Reed?

17 MR. REED: Your Honor, on behalf of
18 Mr. Henderson at this point we'd make a motion for
19 mistrial or in the alternative to strike the
20 testimony of Kim Murga.

21 That request is based on the
22 following: Kim Murga was noticed as an expert
23 witness by the State 20 days prior to trial, albeit
24 it's only one day short.

25 Nevertheless, the Supreme Court has

1 said unless good cause can be shown that they are
2 strictly enforcing the 21 day rule regarding expert
3 witnesses.

4 THE COURT: Is there a good cause?

5 MS. KOLLINS: Your Honor, there is.

6 When Mr. Welch testified in the last
7 trial for the District Attorney's Office the bill
8 went to the county.

9 The county did not pay him in a timely
10 fashion, and he was back and forth whether he was
11 going to testify for us in this case.

12 I spent probably an hour and a half on
13 the phone with him trying to get him to agree to
14 come in for this case.

15 In addition, in April 2007, when we
16 were here on the calendar call for the last date
17 that was vacated for the defense, I think that was
18 about the 28th or 29th trial setting, I told Mr.
19 Reed verbally that we may have to use Kim Murga
20 because Dave Welch's availability has been very
21 happenstance over the course of the last six or
22 eight months for the District Attorney's Office.

23 He said he understood. There wasn't a
24 problem. That conversation was had.

25 I still didn't know 21 days ago

1 whether Dave Welch was going to testify. In an
2 effort to make sure I preserved probably the ninth
3 or 10th trial setting that was continued by the
4 public defender's office.

5 I made sure that I had an expert on
6 board. I didn't want to walk in here and say I
7 could not present my DNA evidence.

8 That is good cause.

9 I didn't know whether Dave Welch was
10 going to be in the jurisdiction such that I could
11 serve him a subpoena and whether or not his travel
12 plans he's very reluctant to share were going to be
13 shared with the District Attorney's Office such that
14 I knew where he was even going to be.

15 He is no longer a Metro employee.
16 He's like any other civilian right now. If I catch
17 him, I can serve him.

18 I don't have his sargents or
19 lieutenants directing him as I do the rest of these
20 lab individuals to come down here and testify.

21 He has been less than amenable, I will
22 say, to coming in and testifying on behalf of the
23 State.

24 I know someone else has him in a trial
25 next week or on the 7th and he is not going to come

1 in for that and they are in a position where they
2 have to use Kim Murga.

3 MR. REED: Reply to that. What counsel
4 said is absolutely correct.

5 My understanding was that Dave Welch
6 would be used -- Ms. Murga would be used in the
7 place and instead of Mr. Welch for -- if he were to
8 be unavailable then she would be the substitute for
9 him.

10 That didn't in fact happen.

11 We had that conversation way more than
12 21 days prior to trial. Additionally, judge, it is
13 more now the nature of Ms. Murga's testimony that
14 becomes prejudicial to Mr. Henderson.

15 What they have now done is actually
16 basically introduced rebuttal testimony into their
17 case in chief to help buttress the opinions of Mr.
18 Welch, and Ms. Gunther, and in doing so the
19 additional problem we have with this testimony in
20 doing so is there is no report or record of any of
21 the work that is done by Ms. Murga at all, until I
22 walk in here in the middle of a case and begin to
23 cross-examine her in front of the jury and notes are
24 produced and I have to literally take a break and
25 read these notes which I cannot now confer with my

1 expert regarding any of these notes, and to be able
2 to properly cross-examine them on it.

3 We have the complexity of not only the
4 prejudicial nature of her testimony, but we also
5 have a discovery violation.

6 I realize the State is going say
7 because they elicited it on re-direct examination,
8 we were not aware of these notes.

9 With all due respect to the District
10 Attorney, so what?

11 The discovery rules say that they have
12 an ongoing responsibility to provided all discovery
13 especially when it comes to expert witnesses.

14 Any new notes or any new reports that
15 are generated by the Las Vegas Metropolitan Police
16 Department forensic lab must be timely turned over
17 to the Defense.

18 They had three weeks to do it and now
19 I'm completely surprised by this and have to
20 cross-examine Ms. Murga the best I can with these
21 notes.

22 The notes are basically a summary,
23 that is true, of what was already done by Mr. Welch
24 and Ms. Gunther.

25 However, there is also -- and we've

1 made it a court exhibit and I'm going to ask it be
2 introduced as a court exhibit, there is also
3 mathematical calculations on there and other
4 notations regarding her analysis all of which I
5 would like to show to my expert to say, are these
6 numbers correct?

7 Are they reasonable?

8 Did she do this right?

9 I can't do that in the middle of the
10 trial.

11 MS. KOLLINS: If I may -- and I don't
12 know if the Court has looked at the document. We've
13 made the copy on the a court exhibit.

14 What is on here is the event number,
15 the statistic one in six hundred billion that was on
16 every report.

17 She just testified all this
18 information was taken for her to put together a
19 chronology. She lists what things were in the
20 sexual assault kit which is also on a report by
21 David Welch and Kathy Gunther, she talks about when
22 the code hit, which we're all precluded from talking
23 about and she talks about when the match was done in
24 the convicted offender database.

25 She talks about the supplemental DNA

1 report. She puts the dates of each of the reports
2 that are on here. She does the dates, wrote her
3 report, did her testing, got her requests.

4 She looks at the math that was
5 contained within Kathy Gunther's report. I did not
6 elicit the actual mathematics that Mr. Reed wants to
7 quibble about right now.

8 One in 36 quadrillion, I mean, the
9 numbers she gets to that are out of Kathy Gunther's
10 report are actually --

11 MR. REED: Those are not in the report.

12 MS. KOLLINS: Those calculations are
13 done.

14 MR. REED: They are not reflected in
15 the report nor in her notes.

16 MS. KOLLINS: I haven't interrupted
17 you.

18 THE COURT: Let her finish.
19 Go ahead.

20 MS. KOLLINS: She draws the same --
21 puts the same statistic on, one in six hundred
22 billion, talks about the 13 losi tests and the 15
23 losi tests from the July report.

24 This is -- these are a chronological
25 list of things for her to familiarize herself with

1 the file.

2 This is like me writing down notes for
3 a witness I'm going to question. This is not
4 anything substantive that they have been deprived
5 of, nor is it any new information.

6 It's not new discovery. There is no
7 new conclusions in here. There is no new evidence.

8 There is nothing can be gleaned from
9 this two-page report that is not part and parcel of
10 the entire file that they and their expert whose
11 report I never received, by the way, have been going
12 over for the last four months since April or
13 whenever they obtained that file from Metro.

14 I assume it's sometime before April
15 because April they came in here and said they didn't
16 have a re-test.

17 They have had access to the full and
18 complete analyses, sometime after they came in here
19 last August and said that they were going to
20 re-test.

21 They decided in April not to, I assume
22 sometime between August of 2007 and and April of
23 2008 they obtained a full and complete copy of every
24 charted piece of evidence.

25 This is a summary for this witness to

1 testify and there is nothing in here prejudicial.
2 It all mimics what is already contained in
3 discovery.

4 This is to make a record.

5 MR. REED: Can I reply?

6 THE COURT: Yes.

7 MR. REED: Here is the problem.

8 Specifically on the mathematical calculations, they
9 break it down into caucasion, black, I assume,
10 Hispanic and white. It's hard to tell from these
11 indications.

12 Nowhere in any report or in any record
13 contained in Ms. Gunther's file are these
14 mathematical calculations present.

15 This is the first time, and this is
16 the only time that I have them. If counsel
17 disagrees with that, then I'd ask her to show me
18 where these specific numbers are represented in the
19 data compiled by Ms. Gunther.

20 Additionally, if we keep talking about
21 this, my expert, I have an expert consultant. There
22 is no report. If I am not offering her as a witness
23 I am not obligated to give the State anything.

24 MS. KOLLINS: You know what?

25 You're obligated by the reciprocal

1 discovery rules.

2 MR. REED: Which says if I intend to
3 use her as a witness. That's an aside.

4 THE COURT: Let me ask you, you said
5 something about caucasion and black hair. According
6 to my reading, the black designation is one in 2.1
7 quadrillion.

8 MR. REED: Correct.

9 THE COURT: It's higher in the
10 caucasion realm; is that correct? One in 36
11 quadrillion; is that right?

12 MR. REED: I didn't ask these questions
13 because I wasn't prepared to do so, but I think it's
14 actually the opposite.

15 I'm a novice. I don't know.

16 MS. KOLLINS: It certainly isn't
17 exculpatory. We didn't talk about ethnicity
18 anywhere in this case.

19 THE COURT: How is this beneficial to
20 your case, Mr. Reed, assuming that you did inquire
21 of the witness about these notes?

22 MR. REED: That's a good question.

23 If I could ask my expert I might be
24 able to answer that question. I can't. I don't
25 know the answer to that question.

1 THE COURT: All right.

2 First of all, as to the late
3 designation of expert, I think there has been shown
4 good cause for the excusal of the one day shortfall,
5 certainly, under the circumstances set forth.

6 As to the discovery argument, these
7 are just what the lady says, looks to me like
8 confirmation of Mr. Welch's and Ms. Gunther's work.

9 It is according to the witness and
10 from what I can glean in looking at it the
11 supervisor's checklist of what occurred in the
12 chronology of that which was set out in these
13 reports.

14 We heard from Mr. Welch, that is the
15 usual procedure whereby there are several checks.
16 This is evidently evidence of one and I don't see
17 there's any new information here that militates in
18 favor of the defense or in any way prejudices the
19 defense.

20 Most of it I can recognize -- and I'm
21 certainly not a trained eye here as to stuff we've
22 heard of -- and it just recites the events that took
23 place in the analysis of it is DNA. I don't think
24 it's prejudicial at all.

25 I think there was some suggestion

1 somehow that one witness could not vouch for
2 another. That's not true with the expert witnesses.

3 You can have multiple experts that
4 concur or vary in different ways.

5 Anything else to be said?

6 MR. REED: Make sure I have a complete
7 record, this motion is made and based on the Fifth
8 and Sixth Amendment to the United States
9 Constitution as well as Article 1, sections three
10 and eight of the Nevada Constitution.

11 Additionally, in case I didn't make
12 this clear, I would have liked to have a continuance
13 as well to be able to consult with my expert to see
14 the relevancy of this newly produced data and how it
15 would impact my client.

16 THE COURT: That's understood,
17 certainly. I'm going to deny a continuance and
18 disallow any of the objections.

19 MS. KOLLINS: For the record there was
20 no motion to strike Kim Murga previously made.
21 Prior to today, prior to her testifying there was no
22 formal written motion to strike Kim Murga.

23 THE COURT: That's true.

24 MR. REED: That's correct.

25 THE COURT: Stand, Mr. Henderson. I'll

1 admonish you of important rights that you have.

2 You have the right under the
3 Constitution of the United States and Constitution
4 of the State of Nevada not to be compelled to
5 testify in this case.

6 Do you understand that?

7 THE DEFENDANT: Yes.

8 THE COURT: You may if you wish give up
9 this right and take the stand and testify. If you
10 do, you'll be subject to cross-examination by the
11 District Attorney and anything that you may say, be
12 it on direct or cross-examination, would be the
13 subject of fair comment when the District Attorney
14 speaks to the jury in his or her final argument.

15 Do you understand that?

16 THE DEFENDANT: Yes.

17 THE COURT: If you choose not to
18 testify the Court will not permit to District
19 Attorney to make any comments to the jury concerning
20 the fact that you've not testified.

21 In other words, they couldn't say "He
22 didn't say he didn't do it so," you know, that kind
23 of thing. Nothing like that can be said.

24 Do you understand?

25 THE DEFENDANT: Yes.

1 THE COURT: If you elect not to testify
2 the Court will instruct the jury, if your attorneys
3 request, the following instruction or something very
4 similar to this.

5 "The law does not compel a Defendant
6 in a criminal case to take the stand and testify or
7 offer any evidence if he chooses not to and no
8 presumption may be raised and no inference of any
9 kind can be drawn from the failure of the Defendant
10 to testify."

11 I would read that along with the
12 another instructions to the jury if your attorney's
13 request I read it.

14 There are strategies involved as to
15 whether or not they would request that. You might
16 want to discuss that with them.

17 Any questions?

18 THE DEFENDANT: No, sir.

19 THE COURT: Lastly, if you elect to
20 testify the District Attorney can inquire of you as
21 to any criminal convictions you have from this point
22 to the last 10 years that are of a felony, in
23 nature.

24 They can't go into it at great length
25 but certainly can inquire if you were convicted on a

1 certain date in a certain location of whatever it
2 was. If you say yes, it's on the record.

3 If you say no they can bring a record
4 up and impeach your testimony. That kind of thing
5 would come out if it exists. I don't know what your
6 record might be.

7 Do you understand?

8 THE DEFENDANT: Yes.

9 THE COURT: What I tell people every
10 time whether you testify or not is your decision.
11 There is a whole lot of things that go into this
12 that you might not appreciate, not being a lawyer, a
13 lot of strategies, a lot of doors that can be opened
14 if you testify and various things can occur one way
15 or the other.

16 There is a lot to it. I tell people
17 it's your decision. You might want to discuss it
18 with your attorneys and listen to what they say.
19 There's some real strong arguments both ways.

20 Do you understand?

21 THE DEFENDANT: Yes.

22 THE COURT: I'll leave it with you.

23 Counsel, anything else before we
24 retire to my chambers to look at instructions?

25 MR. REED: No, Your Honor.

1 MS. KOLLINS: No, Judge.
2 THE COURT: Very good. Court is in
3 recess.
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21 ATTEST that this is a true and
22 complete transcript of the proceedings.
23
24
25


J. A. D'AMATO CCR17

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DISTRICT COURT
CLARK COUNTY, NEVADA

FILED

2008 NOV 25 A 8:25

THE STATE OF NEVADA,

Plaintiff,

vs.

JOSEPH ALEXANDER HENDERSON,

Defendant.

E. J. D'Amato
CLERK OF THE COURT

No. C212968
Dept. XIV

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DONALD M. MOSLEY

June 25, 2008
1:30 p.m.
Department XIV

APPEARANCES:

For the State:

MS. STACY KOLLINS

MR. BRAD TURNER

Deputy District Attorneys

For the Defendant:

MS. VALERIE RADOSTA

MR. NORMAN REED

Deputy Public Defenders

Reported by:
Joseph A. D'Amato
Nevada CCR #17

RECEIVED

NOV 25 2008

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

JOSEPH ALEXANDER HENDERSON,

Defendant.

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Deputy District Attorneys

For the Defendant:
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MR. NORMAN REED
Deputy Public Defenders

Reported by:
Joseph A. D'Amato
Nevada CCR #17

A. Eric Bernzweig, E-r-i-c

B-e-r-n-z-w-e-i-g.

Q. Eric, are you married?

A. Yes.

Q. Who is your wife?

A. Julie Bernzweig.

Q. Was she here yesterday?

A. Yes.

Q. In September 2004 where did you and

Julie reside?

A. 7833 Lonesome Harbor Drive.

Q. That is in Las Vegas, Clark County,

Nevada?

A. Yes.

Q. Is it in the northwest area of town?

A. Yes.

Q. The first week of September 2004, were you on vacation, you and Julie?

A. Yes.

Q. When did you arrive home?

A. September 2nd.

Q. Drawing your attention to September 3, 2004, what did you and Julie do that evening?

A. We had gone to work that afternoon, then we went to dinner at Gardunios in the Fiesta

THE COURT: The continuation of C212968

State of Nevada versus Joseph Alexander Henderson.

Record reflect the presence of the Defendant, his counsel, Mr. Reed and Ms. Radosta, Ms. Kollins and Mr. Turner for the State.

Ms. Clerk, will you call the roll of the jury?

[Whereupon, the court clerk called the roll of the jury.]

THE CLERK: The panel is present.

THE COURT: Very good. Good afternoon.

Ladies and Gentlemen.

Ms. Kollins?

MS. KOLLINS: Doctor Eric Burnzweig.

ERIC BERNZWEIG,

called as a witness herein was sworn by the court clerk, was examined and testified as follows:

EXAMINATION

BY MS. KOLLINS:

Q. Could you state your full name and spell your first and last for the record?

and came home.

Q. You and Julie both work in your general practice; is that correct?

A. Yes.

Q. So you left work together, went to Gardunios and went home?

A. Yes.

Q. What time did you get home that evening?

A. I'd say about 8:00 o'clock.

Q. What did do you when you got home?

A. Just got ready for bed.

Q. What time did you go to bed, if you recall?

A. Nine, 9:30.

Q. Anyone else live in that residence with you and Julie?

A. No.

Q. No roommates?

A. No.

Q. Is that a one or two story home?

A. Two-story.

MS. KOLLINS: Approach the witness?

THE COURT: You may.

BY MS. KOLLINS:

1 Q. Showing you, Mr. Bernzweig, what have
2 been previously marked for purposes of
3 identification as state's proposed one and two, can
4 you look at both of the photographs and tell me
5 whether or not you recognize those?

6 A. Yes.

7 Q. What's depicted in those photographs?

8 A. My home.

9 Q. The home we've been discussing?

10 A. Yes.

11 Q. From September 3, 2004?

12 A. Yes.

13 Q. Fair and accurate description of your
14 home on that date?

15 A. Yes.

16 MS. KOLLINS: Move for the admission
17 of one and two.

18 THE COURT: Objection?

19 MS. RADOSTA: No objection.

20 THE COURT: Received.

21 MS. KOLLINS: Permission to publish?

22 THE COURT: Yes.

23 BY MS. KOLLINS:

24 Q. That is your residence on Lonesome
25 Harbor, correct?

1 A. Yes.

2 Q. You said you and Julie went to bed
3 about nine, 9:30?

4 A. Yes.

5 Q. Is your bedroom up or downstairs?

6 A. Upstairs.

7 Q. You were sleeping well through the
8 night or average or --

9 A. I had dozed off but I had woken back
10 up again.

11 Q. What time did you wake up?

12 A. About midnite.

13 Q. Did something cause you to wake up or
14 did you wake up on your own?

15 A. I woke up on my own.

16 Q. After you woke on your own at midnite
17 what happened?

18 A. Julie and I were just talking in bed.

19 Q. Did there come a time when there was a
20 ring of the door bell?

21 A. Yes.

22 Q. What time was that?

23 A. About 12:30.

24 Q. Showing you admitted state's 2, is
25 that the front door to your residence?

1 A. Yes.

2 Q. What did you do when the door bell
3 rang?

4 A. I went down to answer it.

5 Q. Who was at the door?

6 A. A young man, 25 to 30 year's old.

7 Q. Those front doors being glass, could
8 you see through the glass as to who was at the front
9 door?

10 A. No.

11 Q. A young man 25 to 30 year's old?

12 A. Yes.

13 Q. Had you ever seen him before?

14 A. No.

15 Q. Did you think that perhaps you knew
16 who this was?

17 A. No.

18 Q. After you opened the door what
19 happened?

20 A. He told me that his child had thrown a
21 set of keys over the back wall of my back yard and
22 he needed me to look for them.

23 Q. Did you agree to look for them?

24 A. Yes.

25 Q. And when you agreed to look for them,

1 doctor, what did you do?

2 A. I closed the front door and locked it,
3 walked to the back yard, turned all the lights on in
4 the pool and the lights in the house to look for the
5 keys.

6 Q. So you did not let the man in?

7 A. No.

8 Q. And doctor, if you can tell the jury
9 how long was it before you went back to the front
10 door to tell him you couldn't find the keys?

11 A. One to three minutes.

12 Q. When you got back to the front door
13 you had to unlock it to open it?

14 A. Yes.

15 Q. And the gentleman was still standing
16 there alone?

17 A. Yes.

18 Q. Did you have conversation with him at
19 that time?

20 A. Yes.

21 Q. What did that conversation consist of?

22 A. That I couldn't find his keys.

23 Q. And what was his reaction when you
24 couldn't find his keys?

25 A. He said he had gone to the neighbor

1 and they said that they couldn't find them. He had
2 asked them to look for the keys in their back yard
3 and he thought it was in my back yard.

4 Q. Can you describe this man for me,
5 doctor?

6 A. About 5'7", 5'8", about my height,
7 thin, dark skinned, olive-skinned.

8 Q. You said between 25 and 30 year's old?

9 A. Yes.

10 Q. After he said he had consulted the
11 neighbors and you had that portion of the
12 conversation was there discussion about a
13 flashlight?

14 A. He had asked to come into the house at
15 that point to come and look for the keys himself.

16 Q. What was your response to that?

17 A. I let him in and brought him to the
18 back yard.

19 Q. Did you -- so you took him through
20 your home to the back yard?

21 A. Yes.

22 Q. How much time did you spend with him
23 in the back yard?

24 A. Few minutes.

25 Q. Did you have discussion with him

1 during those few minutes?

2 A. I don't recall.

3 Q. Had anything in his behavior caused
4 you any concern that you wouldn't let him in your
5 back yard?

6 A. No.

7 Q. Did he accompany you back through the
8 house to the front door?

9 A. Yes.

10 Q. What happened next?

11 A. He said he was going to go look for a
12 flashlight and I was going to go look for a
13 flashlight.

14 As he walked through the kitchen and
15 fire area he let himself out and I went into the
16 garage.

17 Q. So you watched him exit the front
18 door?

19 A. Yes.

20 Q. Did you find a flashlight in the
21 garage?

22 A. Yes.

23 Q. Did you then return into the house?

24 A. Yes.

25 Q. What happened next?

1 A. When I came into the house there were
2 two men standing in front of the garage, the inside
3 garage door, with pistols in their hands with laser
4 sights.

5 Q. Was one of those two men the man you
6 had been searching for the keys with or were these
7 two different men?

8 A. Two different men.

9 Q. Can you describe generally for me what
10 those two different men with the guns with the laser
11 sights looked like?

12 A. The man to the right was a little
13 closer to me. He was about 5'10", maybe six feet,
14 stocky build.

15 The man to the left was smaller, maybe
16 5'7", 5'8".

17 Q. Could you see their faces?

18 A. No.

19 Q. Why not?

20 A. It was dark in the foyer.

21 Q. Were there faces covered or uncovered?

22 A. I'm not sure.

23 Q. Could you tell what ethnicity those
24 two individuals with the guns with the laser sights
25 were?

1 A. What I was looking at was the guns and
2 the laser sights. In their hands I saw black hands.

3 Q. Black, African American hands?

4 A. Yes.

5 Q. As to both individuals?

6 A. Yes.

7 Q. As you entered the foyer and you saw
8 the guns with the laser sights what did you do next?

9 A. What did I do next?

10 I stepped forward a little bit and
11 they came behind me and pulled my robe over my back.

12 Q. You say they came behind you.
13 Which individuals are you talking
14 about that came behind you?

15 A. Both of them.

16 Q. Were all three men present in the area
17 at that time?

18 A. No.

19 The olive-skinned man was in the
20 kitchen at that point.

21 Q. When you say both of them you're
22 referring to both the African American males with
23 the guns?

24 A. Yes.

25 Q. You say they pulled your robe over

1 you. Explain that to me a little bit.

2 A. **They pulled the top of my robe over**
3 **the back of -- over my back as to constrain my arms.**

4 Q. You're demonstrating that with your
5 jacket right now, for the record?

6 A. **Yes, yes.**

7 Q. After they constrained your arms
8 what's the very next thing that happened?

9 A. **They pushed me up the stairs and asked**
10 **me where the safe was.**

11 MS. KOLLINS: Approach the witness?

12 THE COURT: You may.

13 BY MS. KOLLINS:

14 Q. Showing you, Dr. Bernzweig, what's
15 been marked for purposes of identification as
16 state's proposed 30, do you recognize that's
17 depicted in state's 30?

18 A. **Yes.**

19 Q. What is depicted in state's 30?

20 A. **My circular stairs.**

21 Q. From the residence we've been speaking
22 of?

23 A. **Yes.**

24 Q. Fairly and accurately depicted on
25 September 3, 2004?

1 A. **Yes.**

2 MS. KOLLINS: Move move for the
3 admission of state's 30.

4 MS. RADOSTA: No objection.

5 THE COURT: Received.

6 BY MS. KOLLINS:

7 Q. Are these the stairs that you were
8 forced up from your foyer area, doctor?

9 A. **Yes.**

10 Q. As the two African American males took
11 you up that stairway was the olive-skinned male
12 still in the kitchen area?

13 A. **I don't know.**

14 Q. Do you know whether he was with the
15 two African American males taking you up the stairs?

16 A. **I don't believe so.**

17 Q. So you said there was some discussion
18 being had.

19 What was the discussion between the
20 two African American males and yourself as you went
21 up the stairs and got to the second floor of your
22 house?

23 A. **Where is the safe, where is the safe.**

24 Q. They called you by name?

25 A. **They actually called me by name at the**

1 **bottom of the stairs. Be cool, Eric. Be cool.**

2 Q. Are we still talking about the African
3 American males?

4 A. **Yes.**

5 Q. What about the olive-skinned male?
6 Did he call you by name earlier?

7 A. **No.**

8 Q. Did you have safe in your residence?

9 A. **No.**

10 Q. Where did you go with the two African
11 American males when you got to the top of your
12 stairs?

13 A. **There is a second and third bedroom**
14 **upstairs. We went into the second one where that**
15 **was used as storage.**

16 Q. What happened in that room?

17 A. **We got into that room and then the**
18 **olive-skinned man came up in front of me and said --**
19 **he wanted to know where the money was, where the**
20 **safe was.**

21 Q. Did you tell all of these individuals
22 after their inquiry that there was no safe?

23 A. **Yes.**

24 Q. And what was their response to that?

25 A. **They wanted to know where the money**

1 **was. I had some spare money in the house so I led**
2 **them to that area.**

3 Q. Is that the second bedroom you're
4 talking about?

5 A. **Yes.**

6 Q. Where is that spare money kept in the
7 second bedroom?

8 A. **In the closet.**

9 Q. In the closet laying loose or within a
10 container?

11 A. **Within a container.**

12 Q. About how much money did you have in
13 there?

14 A. **Approximately a thousand dollars.**

15 Q. Did you lead the olive-skinned -- how
16 many individuals were in the room with you now?

17 A. **The olive-skinned man and at least one**
18 **of the African American men.**

19 Q. Did you lead them to that money within
20 the box in the closet?

21 A. **Yes.**

22 Q. Did they take it out?

23 Did you give it to them?

24 What happened next?

25 A. **The olive-skinned man couldn't find it**

1 so he kept saying where is the box. He wanted to
2 know where the money was.

3 I told him it was there. He couldn't
4 find the box. So --

5 Q. He couldn't find the box?

6 A. **Couldn't find the box. The African
7 American man pushed me forward so that I should find
8 the box.**

9 Q. During the course of this time where
10 you're up in the second bedroom does the African
11 American male still have his weapon?

12 A. **He's behind me. I don't know.**

13 Q. Is there anything that makes you think
14 that he has left it or put it down anywhere?

15 A. **No.**

16 Q. Who actually takes the cash out of the
17 box?

18 A. **The olive-skinned man.**

19 Q. Where did the cash go; do you know?

20 A. I don't know.

21 Q. You didn't see him put it away?

22 A. **I don't recall.**

23 Q. Okay. After you give them -- you said
24 how much money was in there?

25 A. **Approximately a thousand dollars.**

1 Q. Small bills, large bills; do you
2 remember?

3 A. **Hundred dollar bills.**

4 Q. After you give them this thousand
5 dollars what's the next thing that happens?

6 A. **They wanted to know where the safe is.**

7 Q. Your response continues to be the
8 same?

9 A. **Yes.**

10 Q. "I have no safe."?

11 A. **Yes.**

12 Q. Did they permit you to stay in that
13 second room, that spare bedroom, if you will?

14 A. **The olive-skinned man rifles through
15 the closet saying "Where is the safe" and we're
16 there for a few seconds.**

17 Q. After the olive-skinned man rifles
18 through the closet and you're in there for a few
19 minutes what's next thing that happens?

20 A. **They take me out of the room and put
21 me in the small hallway between the two -- the
22 second and third bedroom.**

23 Q. Is that like a foyer area?

24 A. **Yes.**

25 Q. Kind of at the top of your stairs?

1 A. **It's just a small entranceway for the
2 two -- in front of that is a den and then there is
3 the hallway between the two bedrooms.**

4 Q. When they take you to this area -- may
5 I approach your clerk?

6 THE COURT: Yes.

7 BY MS. KOLLINS:

8 Q. When they take you to this area do you
9 still have your robe wrapped behind you?

10 A. **They take the robe off and now I'm
11 only in my underwear and they put ties, plastic ties
12 on my -- around my back to tie my hands behind my
13 back.**

14 Q. Are these the kind of ties like
15 zipties that are commonly referred to as zipties?

16 That is what you mean?

17 A. **I would think it's kind of like --
18 it's not metal, just plastic ties.**

19 Q. Once you secure them they lock through
20 and you can't pull them back out the other way?

21 A. **Correct.**

22 Q. Did they leave you there for a portion
23 of time?

24 A. **No.**

25 Q. Where did you go after they took you

1 in the foyer area?

2 A. **They put me on the floor, um, and the
3 larger of the two black men was standing over me
4 with the gun site on the rug, right in front of me,
5 and he kept saying where is the safe?**

6 **"We're gonna kill you if you don't
7 show us the safe."**

8 **I kept saying there is no safe.**

9 Q. When you told them that there was no
10 safe did they start to look for other things in your
11 home?

12 A. **The olive-skinned man walked away into
13 the master bedroom and the larger black man
14 continued to hover over me.**

15 **My head was now toward the third
16 bedroom which was my office and he was now looking
17 through that office.**

18 Q. Was there anything of value in that
19 office?

20 A. **A few watches.**

21 MS. KOLLINS: Approach the witness?

22 THE COURT: Yes.

23 BY MS. KOLLINS:

24 Q. Doctor, I'm showing you State's
25 proposed 36. Do you recognize what's depicted in

1 state's proposed 36?

2 A. Yes.

3 Q. Fair and accurate depiction of what it
4 represents back in September 2004?

5 A. Yes.

6 MS. KOLLINS: Move for the admission of
7 state's 36.

8 MS. RADOSTA: Can I see 36?

9 THE COURT: You may.

10 MS. KOLLINS: The State has provided a
11 full copy to counsel.

12 MS. RADOSTA: Okay. No objection.

13 THE COURT: Received.

14 BY MS. KOLLINS:

15 Q. Is this the area that we're talking
16 about, Eric, in state's admitted 36?

17 A. **This is the landing in the front area
18 with the blood in it -- is the landing area on top
19 of the stairs.**

20 **This room to the right is an open den
21 area and this is the foyer area in the back left.**

22 Q. If you touch that screen you can mark
23 on there and we can see where you're pointing to.

24 Touch it, put a mark on there with your finger.

25 A. **I'm laying right here; my head is over**

1 here.

2 Q. Then you're moved to another location,
3 correct?

4 A. No.

5 Q. No.

6 How long do you stay at that location?

7 A. **At least four or five minutes.**

8 Q. And you're still constrained by the
9 zipties at this time?

10 A. **The zipties they put on me, it didn't
11 fit that well on me. In the meantime, somebody had
12 found a pair of gag Halloween handcuffs that you
13 could release with your fingers. There was no key
14 to it.**

15 **They put that on me at that point.**

16 MS. KOLLINS: Showing Defense counsel
17 State's proposed 38. May I approach?

18 THE COURT: You may.

19 BY MS. KOLLINS:

20 Q. Showing you, doctor, State's proposed
21 38 for purposes of identification, do you recognize
22 what's depicted in state's 38?

23 A. Yes.

24 Q. How do you recognize that?

25 A. **They are gag handcuffs.**

1 Q. Same as from September 2004?

2 A. **I would think so.**

3 MS. KOLLINS: Move for admission of 38.

4 MS. RADOSTA: No objection.

5 THE COURT: Received. Thank you.

6 MS. KOLLINS: Publish?

7 THE COURT: Yes.

8 BY MS. KOLLINS:

9 Q. You said the zipties didn't fit that
10 well so they put these handcuffs around your wrists?

11 A. Yes.

12 Q. Did the handcuffs fit your wrist?

13 A. Yes.

14 Q. Do those handcuffs require a lock?

15 A. No.

16 Q. How can you get out of them without a
17 key?

18 A. **There is a small release. It's a
19 little prong that you push and it releases.**

20 Q. So after they put the handcuffs on you
21 where were you in terms of location in the
22 residence?

23 A. **Same location.**

24 Q. The same location in the hallway that
25 you pointed out for us in the picture?

1 A. Yes.

2 Q. Tell me what happened next.

3 A. **The larger of the two black men
4 continued to walk back and forth from where I was
5 laying to the master bedroom and then came back to
6 see what I was doing.**

7 **Then he would walk into the other
8 bedroom and in the meantime continued to tell me "If
9 you don't tell us where the safe is we're going to
10 kill you."**

11 Q. The one with the gun continued to tell
12 you that?

13 A. Yes, with the laser sight of the
14 floor.

15 Q. Did the olive-skinned man join him at
16 all in telling you that?

17 A. **I don't recall.**

18 Q. You're still continuing to tell them
19 there is no safe?

20 A. Yes.

21 Q. How long did you watch them walk back
22 and forth through your home upstairs?

23 By them I mean the one African
24 American male and the one olive-skinned male?

25 A. **At least five minutes, maybe 10.**

1 Q. During that five or 10 minutes was the
2 second African American male upstairs at all that
3 you could see?

4 A. No.

5 Q. Could you hear your wife from where
6 you were?

7 A. No.

8 Q. Could you hear anything from
9 downstairs from where you were?

10 A. No.

11 Q. After you watched them walk back and
12 forth for a few minutes what's the next thing that
13 happened?

14 A. **I knew these were gag handcuffs. I**
15 **was continuing to watch the black man continue to go**
16 **back and forth from the bedroom, timing him so that**
17 **I could uncuff myself and run down the stairs.**

18 Q. Were you successful in getting those
19 gag handcuffs off?

20 A. Yes.

21 Q. An did you get up immediately or did
22 you wait for an opportunity?

23 A. **I waited for an opportunity.**

24 Q. What happened -- did you take that
25 opportunity to get up and try to run down the

1 stairs?

2 A. Yes.

3 Q. What happened when you took that
4 opportunity?

5 A. **The larger black man saw me and caught**
6 **me and there was a scuffle.**

7 Q. When you say there was a scuffle can
8 you describe that scuffle for the Ladies and
9 Gentlemen of the Jury?

10 A. **It was more pushing. It was the idea**
11 **if he had caught me I would push him over the**
12 **bannister and have him laying on the downstairs.**

13 Q. Was this man bigger than you?

14 A. Yes.

15 Q. Did you get to push him over the
16 bannister or get him away from you?

17 A. No.

18 Q. Was he joined by a second individual
19 at that point?

20 A. **What had happened was we discussed for**
21 **a few minutes and then he hit me with the gun on the**
22 **top of my head twice, possibly a third time, and I**
23 **went to my knees at that point.**

24 **A second African American came up the**
25 **stairs, came flying up the stairs and between the**

1 **two of them pushed me to the floor.**

2 Q. You said you were hit a couple times
3 with the gun. Where were you struck?

4 A. **On the top of my head.**

5 Q. Did you receive any other injuries?

6 A. **I think the gun had slipped off the**
7 **top of my head and split my lip open.**

8 MS. KOLLINS: Showing defense counsel
9 state's 95, 96, 97 and 8, proposed.

10 Approach, Your Honor?

11 THE COURT: You may.

12 BY MS. KOLLINS:

13 Q. I'd like you to look at those and tell
14 me whether or not you recognize what's depicted in
15 state's 95 through 98 proposed.

16 Do you recognize those photographs?

17 A. Yes.

18 Q. What are those photographs of?

19 A. **My split open head.**

20 Q. The injuries you received on September
21 3, 2004?

22 A. Yes, ma'am.

23 Q. Do those photographs fairly and
24 accurately depict those injuries as you recall them
25 back on that date?

1 A. Yes.

2 MS. KOLLINS: Move for the admission of
3 state's 95 through 98, inclusive.

4 MS. RADOSTA: We would object.

5 They are kind of cumulative. They are
6 all pictures of the same injury.

7 MS. KOLLINS: That's not true. There
8 are two pictures of each injury.

9 MS. RADOSTA: We would object to two of
10 the four.

11 THE COURT: Is it necessary to have two
12 of each?

13 MS. KOLLINS: I mean I have an
14 allegation of substantial bodily harm. I need to
15 prove it beyond a reasonable doubt.

16 I think it's only fair everyone gets
17 an accurate view of what Dr. Bernzweig suffered.

18 THE COURT: I'm going to allow the
19 four.

20 MS. KOLLINS: Approach, publish, Your
21 Honor?

22 THE COURT: You may.

23 BY MS. KOLLINS:

24 Q. Doctor, you said you were struck on
25 top of the head. Showing you State's admitted 97,

1 that is, in fact, the injury that you suffered?

2 A. Yes.

3 Q. Did that -- you subsequently got

4 medical treatment for that; is that correct?

5 A. Yes.

6 Q. We'll come back to that later.

7 That's what the injury looked like

8 that evening, same as in 96, just a different angle.

9 You said that the gun butt also

10 slipped and sliced your lip?

11 A. I would think so.

12 Q. That's what you believe happened?

13 A. Yes.

14 Q. That's what is depicted in 98?

15 A. Yes.

16 Q. And 95, a little bit cleaned up so you
17 can see the cut?

18 A. Yes.

19 Q. After, doctor, you were struck on the
20 head and you were on your knees on the floor in the
21 foyer what's next thing that happened?

22 A. **Um, the second smaller black man went**
23 **back -- I'm sorry. They tied me up with the robe,**
24 **the sash for the robe around my hands, and I had an**
25 **IPod like unit that was from Dell and they tied up**

1 **around my calves that electrical cord.**

2 Q. I believe I showed you this and
3 admitted it previously, state's 36.

4 Can you circle, if you see it depicted
5 in that picture, the robe belting as well as the
6 cord you're talking about?

7 A. **[Witness complied.]**

8 Q. That was restraining your arms?

9 A. **The robe was.**

10 Q. What about the cording from the Dell
11 MP3 player, where was that tied?

12 A. **Around my legs, my calves and ankles.**

13 Q. If you just tap that screen in the
14 bottom corner that will go away.

15 Thank you, doctor.

16 At this point had you had any contact
17 with your wife since -- and I mean visual contact
18 with your wife since these men had been in the
19 house?

20 A. No.

21 Q. What's the next thing that happened?

22 A. **The second larger black man told me**
23 **"Don't be stupid." And then the smaller of the two**
24 **black men came up the stairs with my wife with some**
25 **sort of something wrapped around her head.**

1 Q. Something wrapped around her head?

2 A. Yes.

3 Q. Could you see your wife's face?

4 A. No.

5 Q. Where did the second smaller African
6 American male take you wife?

7 A. **Into the master bedroom.**

8 Q. Could you see into your master
9 bedroom?

10 A. **I could only see through the door and**
11 **a little bit into her walk-in closet.**

12 Q. Could you see the bed from where you
13 were restrained?

14 A. No.

15 Q. Could you hear your wife talking at
16 all?

17 A. No.

18 Q. Could you hear that second African
19 American male who was accompanying your wife talking
20 at all?

21 A. No.

22 Q. What was the olive-skinned man doing?

23 A. **He was rifling through her walk-in**
24 **closet and he was knocking down paintings**
25 **off-the-wall, I guess, looking for a safe.**

1 Q. Was this in your master bedroom?

2 A. Yes.

3 Q. How long a time were all three of them
4 upstairs at this point?

5 Like how much more time were all three
6 of them up there?

7 A. **Things were going -- not that they**
8 **were going leisurely, but they were kind of taking**
9 **their time until the point I got up.**

10 **At that point everything kind of sped**
11 **up. They were now rushing around, running around.**

12 Q. From when you had got up and there had
13 been in the altercation and you received your
14 injuries and then were re-tied things kind of
15 escalated and got faster.

16 Is it at that point in time you're
17 discussing?

18 A. Yes.

19 Q. Did the smaller African American male
20 stay in the master bedroom with your wife for a
21 period of time?

22 A. Yes.

23 Q. How much longer until this came to a
24 conclusion?

25 A. **Five to 10 minutes.**

- 1 Q. Did you ever see a vehicle that the
2 olive-skinned man had arrived in?
- 3 A. No.
- 4 Q. Did any one of the three of them use
5 the phone at some point near the conclusion of this?
- 6 A. **Everybody came out of the bedroom, the
7 man that was standing over me, and number two, the
8 olive-skinned man and the third man, who was an
9 African American, came out and were now running up
10 and down the stairs.**
- 11 **The olive-skinned man at the top of
12 the stairs next to me a few stairs down makes a
13 phone call on his cell and says "Come and pick us
14 up."**
- 15 Q. Is that all you hear is "Come and pick
16 us up."?
- 17 A. Yes.
- 18 Q. After this phone call was made how
19 much longer were these three strangers in your home?
- 20 A. **A few minutes.**
- 21 Q. How did they leave, if you know?
- 22 A. **Through the front door.**
- 23 Q. Now, the injuries that you received,
24 were you bleeding?
- 25 A. Yes.

- 1 Q. Bleeding in the front of your face,
2 back of your head, where?
- 3 A. **Blood was streaming down. I was face
4 down and the bleeding was coming down from the top
5 of my head down to over my face.**
- 6 Q. Did one of them put something under
7 your head or on it?
- 8 A. Yes.
- 9 Q. What did they put on your head?
- 10 A. **A shirt.**
- 11 Q. Showing you 36, is that the shirt
12 depicted on the floor?
- 13 A. Yes.
- 14 Q. When they all left did they leave
15 through the front door?
- 16 A. Yes.
- 17 Q. Did you hear anything as they left
18 from outside?
- 19 A. No.
- 20 Q. Were you able to get yourself out of
21 the cording that was wrapped around your legs and
22 the belt?
- 23 A. No.
- 24 Q. Did you get out of it eventually?
- 25 A. Yes.

- 1 Q. How did that happen?
- 2 A. **Julie called out from the other room.**
- 3 **"Are you okay, Eric?" And then about 30 seconds
4 later she came out, saw what had happened to me and
5 untied me.**
- 6 Q. What was Julie's demeanor when she
7 undid you?
- 8 A. **She was frantic.**
- 9 Q. When you say frantic, was she crying,
10 was she --
- 11 A. **No, she wasn't crying, but she was
12 wide-eyed like she had seen a ghost.**
- 13 Q. A ghost.
- 14 What did you two decide to do at that
15 point?
- 16 A. **She untied me and then I said I had to
17 call the police. Then she said they raped her.**
- 18 Q. Did you make a decision to call the
19 police together?
- 20 A. Yes.
- 21 MS. KOLLINS: It's my understanding we
22 have a stipulation to the 911 tape. I'm going to
23 mark one and admit it and I have one in my computer
24 to play, with the Court's permission.
- 25 THE COURT: Is that correct, counsel?

- 1 MS. RADOSTA: That we don't need the
2 Custodian of Records?
- 3 MS. KOLLINS: If you would give me just
4 a moment.
- 5 BY MS. KOLLINS:
- 6 Q. Eric, who actually made the 911 call?
7 Who started the call?
- 8 A. Me.
- 9 Q. What was Julie's demeanor while you
10 were on the phone with 911?
- 11 A. **Distraught.**
- 12 Q. By this time did you know what had
13 happened to Julie?
- 14 A. Yes.
- 15 Q. What did Julie tell you had happened
16 to her?
- 17 MS. RADOSTA: Objection. We've
18 already -- he already testified to that.
- 19 THE COURT: Has that been covered?
- 20 MS. KOLLINS: No, not yet, not
21 substantively.
- 22 MS. KOLLINS: I said did he know at
23 this point what had happened to his wife and I asked
24 what she had told him?
- 25 MS. RADOSTA: He's already testified as

1 to what she told him.

2 MS. KOLLINS: No, he hasn't.

3 THE COURT: She had been raped? That
4 doesn't quite cover the whole incident.

5 Is that what you're trying to elicit?

6 MS. KOLLINS: I'm trying to elicit her
7 words at or near the time while she was sexually
8 assaulted what she told her husband.

9 He has not testified to that.

10 MS. RADOSTA: We've already heard
11 Ms. Kim testify yesterday as to what happened.

12 It's cumulative testimony.

13 MS. KOLLINS: Are we changing the
14 objection now?

15 THE COURT: I'm going to allow it.

16 Proceed.

17 BY MS. KOLLINS:

18 Q. Dr. Bernzweig, just before you were
19 making this phone call did you have a conversation
20 with your wife?

21 A. **I don't recall.**

22 Q. At some point before or during the 911
23 call did she tell you what happened to her with the
24 African American male?

25 A. **I don't recall.**

1 Q. You don't recall whether she told you
2 she was sexually assaulted?

3 A. **She told me at the top of the stairs.**

4 MS. RADOSTA: Objection. Leading.

5 THE COURT: I'm going to allow it. Go
6 ahead.

7 THE WITNESS: She told me she was raped
8 at the top of the stairs. At that point I threw --
9 my heart was in my throat.

10 MS. KOLLINS: Can I get you some water?

11 THE WITNESS: No.

12 We went downstairs and went into the
13 front bedroom and then we called -- I called 911. I
14 don't remember anything.

15 I was in a state of shock.

16 BY MS. KOLLINS:

17 Q. So you had no information before you
18 called 911?

19 A. **Yes.**

20 Q. Thank you.

21 [Whereupon, the 911 tape of the call
22 was played.]

23 BY MS. KOLLINS:

24 Q. Eric, as you got off the phone did you
25 answer the front door for the police officers?

1 A. **Yes.**

2 Q. Were they in uniform and in black and
3 white patrol cars?

4 A. **Yes.**

5 Q. What's next thing that happened?

6 A. **We let them in and I'll tell you the
7 truth. It was all a blur after that.**

8 Q. If I can back you up one second.

9 You had some conversation with the 911
10 operator about not letting Julie take a bath?

11 A. **Yes.**

12 Q. Did you keep Julie still and quiet and
13 not allow her to bathe until she left the residence?

14 A. **Yes.**

15 Q. You say it's a blur after that. Was
16 your head still bleeding?

17 A. **Yes.**

18 Q. Do you recall whether or not either
19 you or Julie got medical attention?

20 A. **They separated us.**

21 **EMT's came in and I remember them
22 taking what's called a liver cloth off the top of my
23 head because it continued to bleed and then I
24 remember a bottle of irrigation saline and some
25 gauze.**

1 Q. For yourself?

2 A. **Yes.**

3 Q. An you say they separated you.

4 Did Julie leave the residence with

5 EMR?

6 A. **No.**

7 Q. How was she eventually treated at the
8 hospital?

9 A. **They wanted to take us down both to
10 the hospital. They took her and I wanted to call an
11 oral surgeon friend of mine to stitch me up.**

12 Q. When you say they took her, who took
13 her?

14 A. **The police.**

15 Q. You said you were going to be treated
16 by an oral surgeon friend of yours?

17 A. **Yes.**

18 Q. Why did you make that decision?

19 A. **Because I have a scar on my face that
20 was taken care of a number of years ago in the
21 emergency room that wasn't done very well.**

22 **I know Dr. Selznick very well and I
23 know he takes teeth out. His job is taking teeth
24 out to putting people's faces back together after a
25 shotgun blast.**

- 1 Q. Did you entrust your facial injuries
2 to him then?
- 3 A. **Yes.**
- 4 Q. Where was his practice?
- 5 A. **Summerlin Hospital.**
- 6 Q. How did you get to Summerlin Hospital?
- 7 A. **I drove myself and there was a police
8 officer that drove behind me.**
- 9 Q. When you say police officer do you
10 mean in a uniform and black and white patrol car?
- 11 A. **Yes.**
- 12 Q. He followed you to where you were
13 treated?
- 14 A. **Yes.**
- 15 Q. Where was your wife taken; do you
16 know?
- 17 A. **UMC.**
- 18 Q. Julie didn't have any bleeding
19 injuries that you could see, correct?
- 20 A. **No.**
- 21 Q. How long did you stay with Dr.
22 Selznick?
- 23 A. **I'm not sure.**
- 24 Q. What did he do to you?
- 25 A. **He stitched up the laceration, the cut**

- 1 **on my head and on my lower lip and into the oral
2 cavity.**
- 3 Q. Do you know how much stitches you got
4 in your lower lip?
- 5 A. **No.**
- 6 Q. Do you know how many stitches you got
7 in your head?
- 8 A. **No.**
- 9 Q. Did that take a while to heal?
- 10 A. **Yes.**
- 11 Q. What kind of physical pain were you in
12 from those two injuries?
- 13 A. **My lower lip, I lost sensation in it
14 for a long time. I still am missing some sensation.
15 When I smile I can feel tension, like
16 pulling on a rubber band on the suture line where
17 they -- where he had sewn me up.
18 I was getting a lot of headaches early
19 on with my head but that has gone away.**
- 20 Q. It's now 2008. This happened
21 September 2004.
- 22 How long did it take those headaches
23 to go away?
- 24 A. **At least a couple years.**
- 25 Q. They have subsided now?

- 1 A. **Yes.**
- 2 Q. Did you go to UMC to pick up your
3 wife?
- 4 A. **Yes.**
- 5 Q. What time did you get there?
- 6 A. **I don't know.**
- 7 Q. Was the sun up yet?
- 8 A. **No.**
- 9 Q. Still nighttime?
- 10 A. **Yes.**
- 11 Q. Do you know what time it was when you
12 called 911?
- 13 A. **No.**
- 14 Q. Was Julie at the conclusion of her
15 sexual assault examination when you go to UMC or was
16 she still undergoing it?
- 17 A. **She was still undergoing it.**
- 18 Q. Did they release her to you at the
19 conclusion of that examination?
- 20 A. **Yes.**
- 21 Q. How was her demeanor when you first
22 saw her at UMC?
- 23 A. **Catatonic.**
- 24 Q. By catatonic you just mean --
- 25 A. **In a daze.**

- 1 Q. Do you know what time of day that was
2 or evening?
- 3 A. **No.**
- 4 Q. Did you go straight home?
- 5 A. **I believe so.**
- 6 Q. Did you go back to your Lonesome
7 Harbor residence?
- 8 A. **Yes.**
- 9 Q. Did you stay there?
- 10 A. **No.**
- 11 Q. What did you do when you got there?
- 12 A. **What I do remember is we asked the
13 police -- they didn't want us to go back in.
14 We asked to get our dog and we were
15 going to leave the cats behind for a few days, so we
16 went to go pick up the dog and I believe at that
17 point the tv stations were there and they didn't
18 want us to be there.
19 I can remember -- I remember that we
20 came around to the entrance of the complex which
21 there is a park right there and we could see our
22 house through the park through the other entrance,
23 saying I can't believe this happened.**
- 24 Q. Did you keep that residence very long
25 after this happened?

1 A. We emptied everything.
 2 Actually we went to a condo that we
 3 also owned that Julie owned before we were married
 4 and we went there and we couldn't sleep and then
 5 turned on the news and saw our house.

6 MS. RADOSTA: Objection, Your Honor.
 7 Relevance.

8 THE COURT: Next question, please.
 9 BY MS. KOLLINS:

10 Q. Did you end up staying at the condo
 11 instead of the house from then on?

12 A. Yes. We never slept in the house
 13 again.

14 Q. Did you speak with detectives?

15 A. Yes.

16 Q. With Detective Michael Jeffries?

17 A. Yes.

18 Q. This happened after midnite on
 19 September 3, 2004?

20 A. Yes.

21 Q. Did you interview with him actually
 22 later that afternoon of September 3, 2004?

23 A. I believe it was early evening.

24 Q. Late afternoon, early evening?

25 A. Yes.

1 Q. You and Julie both were interviewed by
 2 him at that time?

3 A. Yes.

4 Q. Did your facial and head injury
 5 require follow-up care?

6 A. Yes.

7 Q. What was the follow-up care?

8 A. Just follow post-op making sure the
 9 areas were healing correctly, removal of stitches.

10 Q. Did you do those with Dr. Selznick?

11 A. Yes.

12 MS. KOLLINS: Court's indulgence.

13 BY MS. KOLLINS:

14 Q. I forgot to follow up on this with you
 15 earlier. My apologies.

16 Other than the thousand dollars that
 17 you gave over did you discover any other items
 18 missing from your home?

19 A. I think that iPod, that Dell iPod that
 20 they had used the wire, the charging wire on it that
 21 was gone. They took a Dell computer.

22 That was a computer from the office we
 23 had taken home while we had went on vacation and
 24 they took Julie's driver's license.

25 Q. Anything else --

1 A. Not that I remember.

2 Q. -- that you recall?

3 A. Not that I remember.

4 MS. KOLLINS: Pass the witness, Your

5 Honor.

6 THE COURT: Cross-examination.

7

8

9

10 EXAMINATION

11 BY MS. RADOSTA:

12 Q. Good afternoon.

13 First of all, the District Attorney
 14 kept referring to you as Dr. Bernzweig?

15 A. Yes.

16 Q. You're not here today in any capacity
 17 as an expert witness, correct?

18 A. Correct.

19 Q. You are technically a dentist.

20 Do you have an M. D., in addition do
 21 that?

22 A. I'm a DDS and I have a Masters of
 23 Science after that. I'm a periodontist. That's a
 24 gum surgeon, gum specialist.

25 Q. Now, you obviously were in the court

1 room when the state played the 911 call.

2 A. Yes.

3 Q. And that call was made minutes after
 4 the men left your house that night, correct?

5 A. Yes.

6 Q. One of the first things they asked you
 7 on the 911 call was how many people were inside your
 8 house that night, correct?

9 A. Yes.

10 Q. Your initial answer and first thing
 11 that you responded was you didn't know how many
 12 people had been in your house that night, correct?

13 A. I don't know. If you say so.

14 Q. You actually identified one of the men
 15 as a Hispanic man, correct?

16 A. Yes.

17 Q. Throughout the initial contact with
 18 the police you identified one of the men as a
 19 Hispanic man, correct?

20 A. Yes.

21 Q. There were two African American men
 22 that came into your house that night; is that
 23 correct?

24 A. Yes.

25 Q. You said one was your height, 5'7",

- 1 5'8". I believe that's what you testified to on
2 direct?
- 3 A. **Yes.**
- 4 Q. An that's the individual you actually
5 didn't have a lot of interaction with that
6 individual; is that correct?
- 7 A. **Correct.**
- 8 Q. That person was downstairs with Julie
9 most of the time?
- 10 A. **Correct.**
- 11 Q. And after this had all happened you
12 decided to go to Summerlin Hospital?
- 13 A. **Correct.**
- 14 Q. To see Dr. Selznick?
- 15 A. **Correct.**
- 16 Q. You knew Julie was going to UMC?
- 17 A. **Correct.**
- 18 Q. At this point in time you knew what
19 Julie had told you what happened to her at the
20 house, correct?
- 21 A. **Yes.**
- 22 Q. You knew she was going to have to be
23 undergoing some type of examination at University
24 Medical Center?
- 25 A. **I had no idea what they were going to**

- 1 **do with her.**
- 2 Q. The police officers didn't tell you
3 why they were taking her to UMC?
- 4 A. **I would assume to check her out.**
- 5 Q. You made the decision to go to a
6 different hospital?
- 7 A. **Yes.**
- 8 Q. Just a couple other quick questions.
9 Out of curiosity, I believe you told
10 the 911 operator that this particular community that
11 you and Julie, at Lonesome --
- 12 A. Lonesome Harbor?
- 13 Q. Thank you -- at that address is it a
14 gated community; is that correct?
- 15 A. **Yes.**
- 16 Q. Do you have any idea how someone would
17 get into your gated community or I should say that
18 gated community?
- 19 MS. KOLLINS: Objection. Calls for
20 speculation.
- 21 MS. RADOSTA: If he knows.
- 22 THE COURT: He can answer if he has any
23 idea.
- 24 THE WITNESS: Every pizza guy in town
25 knows that number. Every pizza guy has a friend

- 1 that knows that number.
- 2 BY MS. RADOSTA:
- 3 Q. So I believe what you're saying is
4 there is a code that you can use at the gate that
5 will let anybody in?
- 6 A. **There's one code to the gate that
7 nobody is supposed to tell, but I'm sure many other
8 people knew that number, and all you had to do was
9 follow somebody that had pushed that code and you
10 could follow somebody right into the community.**
- 11 Q. Is the gate for your community, is
12 there one gate for residents and non-residents?
- 13 A. **One gate in, one gate out.**
- 14 Q. One follow up.
15 After you had been hit on the head you
16 said that you saw Julie being brought upstairs?
- 17 A. **Yes.**
- 18 Q. And she was then taken into the
19 master?
- 20 A. **Yes.**
- 21 Q. This was by the smaller of the two
22 black men?
- 23 A. **Yes.**
- 24 Q. And you said at that point in time
25 also the olive-skinned man was also in the master,

- 1 going through, I believe you testified to, going
2 through Julie's closet and knocking pictures and
3 things off the walls?
- 4 A. **That was outside the closet, too.**
- 5 Q. But that was located inside the
6 master?
- 7 A. **Correct.**
- 8 Q. And shortly there after the phone call
9 was made come and pick us up?
- 10 A. **How many minutes, I don't know.**
- 11 **Like I said, after -- everything sped
12 up after my altercation with the larger of the two
13 black men.**
- 14 **The exact minutes, I don't know.**
- 15 Q. I'm sorry.
16 But by everything sped up do you mean
17 everything sped up in your mind or that the men
18 started moving quicker?
- 19 A. **Started moving quicker.**
- 20 Q. And so after you were hit on the head
21 how long a period of time do you think from the
22 moment you were hit on the head until the time the
23 men left, how long of a period of time was that?
- 24 A. **Ten, 15 minutes, tops.**
- 25 Q. And upon the phone call being made, I

1 believe you testified on direct, that at that point
2 in time everyone left the master bedroom; is that
3 correct?

4 A. **Can you repeat that?**

5 Q. At the time of the phone call, that
6 the phone call was made, come and pick us up, all
7 the men were in the master bedroom and then they
8 left it?

9 A. **No.**

10 **They were running up and down the**
11 **stairs and while the olive-skinned man was three or**
12 **four steps down from the top of the stairs he made**
13 **that phone call.**

14 Q. The other two men were both in the
15 master bedroom at that point in time?

16 A. **No.**

17 **They were running up and down the**
18 **stairs, too.**

19 Q. All three men were running up and down
20 the stairs while the phone call was being made?

21 A. **Not altogether. There was a lot of**
22 **movement up and down those stairs.**

23 MS. RADOSTA: Court's indulgence.

24 Nothing further, judge.

25 THE COURT: Re-direct?

1 MS. KOLLINS: Very briefly. Couple of
2 questions.

5 RE-EXAMINATION

6 BY MS. KOLLINS:

7 Q. Two black men, one olive-skinned man,
8 correct?

9 A. **Correct.**

10 Q. **The olive-skinned man, you've given**
11 **another description for him, but we're talking about**
12 **the same person?**

13 A. **Yes.**

14 Q. You say perhaps Hispanic, perhaps
15 middle Eastern, but with olive skin?

16 A. **Correct.**

17 Q. If you used one of those descriptors
18 we're talking about the same person?

19 A. **Yes.**

20 MS. KOLLINS: No more questions.

21 THE COURT: Anything further from the
22 Defense?

23 MS. RADOSTA: No.

24 THE COURT: Doctor, thank you.

25 Next, please.

1 MR. TURNER: State would call Linda
2 Ebbert.

3 LINDA EBBERT,

4 called as a witness herein, was sworn by the court
5 clerk, was examined and testified as follows:

6 THE COURT: Counsel approach the bench,
7 please.

8 [Discussion at the Bench.]

9 THE COURT: Continue, please.

10 MR. TURNER: Proceed?

11 THE COURT: Yes.

15 EXAMINATION

16 BY MR. TURNER:

17 Q. If you can state your name and spell
18 your last name for the record.

19 A. **My name is Linda E-b-b-e-r-t.**

20 Q. Ms. Ebbert, where are you employed?

21 A. **I'm employed as a SANE nurse/examiner**
22 **by Rose Heart, Incorporated which is contracted by**
23 **University Medical Center to do sexual assault**
24 **examinations.**

25 Q. You said you used the term sexual

1 assault nurse/examiner. Is the shorthand term for
2 that a SANE nurse?

3 A. **Yes, it is.**

4 Q. What training and experience do you
5 have that would qualify you to be a sexual assault
6 nurse examiner?

7 A. **I took a course at Cabrillo College in**
8 **California for the class work portion of the**
9 **training to become a SANE nurse.**

10 **Then I came back to University Medical**
11 **Center and worked under the direction of the**
12 **physicians until I was deemed appropriate to go**
13 **ahead and do the examinations on my own.**

14 **I also spent time with Las Vegas**
15 **Metropolitan Police Department with the crisis**
16 **center with the Court system and each of these**
17 **together gave me enough time to be considered**
18 **appropriate to do examinations without supervision.**

19 Q. After there was a determination made
20 you could be a SANE nurse and conduct these
21 examinations without supervision how many years have
22 you been a sexual assault nurse examiner?

23 A. **I've been a sexual assault nurse**
24 **examiner for 13 years, little over 13 years, and**
25 **I've been SANE A, which means I'm certified to do**

1 **exams all over the world for the last four years.**

2 Q. In the course of your career as a
3 sexual assault nurse examiner how many sexual
4 assault examinations have you conducted?

5 A. **Over five thousand.**

6 Q. Have you ever testified in your
7 capacity as a sexual assault nurse examiner in the
8 8th Judicial District Court of Clark County, Nevada?

9 A. **Yes, I have.**

10 Q. About how many times have you
11 testified?

12 A. **Approximately 60.**

13 Q. I'm going to draw your attention back
14 to September 3, 2004 approximately 3:54 a.m.

15 Do you recall that date and time?

16 A. **Yes, I do.**

17 Q. Were you working at that particular
18 time?

19 A. **I am an on-call person, so when
20 somebody arrives at the hospital stating they have
21 been sexually assaulted I'm called and I respond to
22 the hospital within 20 minutes.**

23 Q. Was that done on the particular date
24 and time you just referenced?

25 A. **Yes, it was.**

1 Q. When you arrived -- first of all,
2 where did you go?

3 A. **I went to University Medical Center to
4 the quiet room which is where the patient is put so
5 that they have some privacy and everybody isn't in
6 the waiting room -- isn't hearing what is being said
7 to them and what they are saying.**

8 Q. Did you have occasion to come in
9 contact with a person identified to you as Julie
10 Kim?

11 A. **Yes, I did.**

12 MR. TURNER: Approach the clerk?

13 THE COURT: You may.

14 MR. TURNER: Approach the witness?

15 THE COURT: You may.

16 BY MR. TURNER:

17 Q. I'm showing you what has been marked
18 State's proposed exhibit 145. I'm going to ask you
19 if you recognize who is depicted in that exhibit.

20 A. **That's Julie Kim the morning that I
21 saw her as a patient.**

22 Q. And that fairly and accurately depicts
23 how she appeared to you when you conducted this
24 examination?

25 A. **Yes. That was her demeanor while she**

1 **was in the room.**

2 Q. Who took this photograph?

3 A. **I did.**

4 Q. You actually take photographs during
5 the examination to document the examination as it
6 takes place?

7 A. **Yes, I do.**

8 MR. TURNER: State moves to admit
9 state's proposed exhibit 145.

10 MS. RADOSTA: No objection.

11 THE COURT: Received.

12 MR. TURNER: Move to publish.

13 THE COURT: Show it. Go ahead.

14 BY MR. TURNER:

15 Q. Now, first of all what is the purpose
16 of a sexual assault examination?

17 A. **The job of the sexual assault nurse
18 examiner is to address injuries to the patient,
19 address their history, address the collection of
20 evidence and keeping it safe so that it can be used
21 later for the crime lab to analyze.**

22 Q. Is there any medical treatment that
23 also takes place during this examination?

24 A. **There is. If there are injuries they
25 are addressed and there's also medication given when**

1 **the patient is ready to leave our room.**

2 Q. How did Ms. Kim appear to you when you
3 first saw her?

4 What was her demeanor like?

5 A. **She was worried about her boyfriend.**

6 **She was very quiet. She mostly looked at the floor.**

7 **She was visibly upset.**

8 Q. Was she cooperative with you during
9 the examination?

10 A. **She was very cooperative.**

11 Q. When you go through this examination
12 are there steps that you follow when you do a sexual
13 assault examination?

14 A. **Yes, there are.**

15 Q. What's the first step?

16 A. **The first step is that we bring the
17 patient in -- first when I go to the room I
18 introduce myself so they know who I am and what I'm
19 going to be doing. We explain everything we do to
20 the patient.**

21 **The first thing we do is have them
22 sign a paper saying they are agreeable to have the
23 examination and we can give the evidence to the
24 police and the agencies that will be involved with
25 the crime.**

1 Q. This is a completely consensual
2 process?
3 A. **Yes, it is.**
4 Q. You, in fact, did that in this case?
5 A. **I did.**
6 Q. What did do next?
7 A. **I then gather a medical history and I**
8 **also gather a history of the event.**
9 **The medical history is used so that if**
10 **I am going to give her medications I can consider**
11 **those things that she's had wrong in the past and**
12 **make sure that the medications won't be harmful to**
13 **her.**
14 Q. You said you also get a history of the
15 event. You're talking about the event that brought
16 Ms. Kim to you in the first place; is that correct?
17 A. **Yes, it is.**
18 Q. What did Ms. Kim relate to you about
19 what happened?
20 A. **She expressed that she was at home**
21 **around 2330, which is 11:30 at night, and that**
22 **somebody came to the door and that it was an**
23 **Hispanic male.**
24 **He had told her that somebody threw**
25 **his keys into their back yard and could he get help**

1 in retrieving them.
2 **At that point I guess her boyfriend**
3 **then went to the garage to get a light so they could**
4 **see to get the keys and she stated that then there**
5 **were two black males there almost immediately and**
6 **that she and her boyfriend were tied with plastic**
7 **strips and that she was sexually assaulted first on**
8 **the couch and then she was sexually assaulted on the**
9 **bed.**
10 Q. Did she specify how she was assaulted?
11 A. **She said that there was penis to**
12 **vaginal penetration, twice, and that there was**
13 **finger penetration in the vagina by the assailant.**
14 Q. Did she say anything else that you
15 recall?
16 A. **She said when she was on the bed her**
17 **legs were also tied and that after the assault the**
18 **assailants left and she was able to get herself**
19 **loose enough get out of the restraints and then the**
20 **police were called.**
21 Q. Did Ms. Kim ever indicate to you
22 whether there was a possibility of any exchange of
23 fluid between the assailant and herself?
24 A. **She did tell me that he had sucked on**
25 **her breasts, but other than that she was unsure**

1 **whether anybody had ejaculated or not.**
2 Q. Is one of the purposes of getting this
3 history so that you can potentially obtain samples
4 that can be tested at a later date?
5 A. **Yes, it is.**
6 Q. After you obtained this history of the
7 event what did you do?
8 A. **Each piece is dried and put into a**
9 **specific box that is in a bag in the sexual assault**
10 **kit.**
11 **Then it's sealed and it was -- my**
12 **initials and the date and time I gathered that**
13 **evidence.**
14 **After all the envelopes are filled and**
15 **they are marked and they are put into the sexual**
16 **assault container that it originally came in, and**
17 **it's sealed with the date and time and my initials**
18 **on the date of it.**
19 Q. You're talking about how you go about
20 collecting evidence and impounding evidence?
21 A. **Yes.**
22 Q. Did you conduct a physical examination
23 of Ms. Kim in this case?
24 A. **Yes.**
25 Q. How did you go about it?

1 A. **I did -- I have to check, look at**
2 **their hair, their eyes, their arms and their limbs**
3 **and comment on any problems at the time.**
4 Q. Did you have any significant findings
5 as a result of your examination of her body?
6 A. **I did not find any trauma to her**
7 **torso. I found trauma to her extremities.**
8 Q. What trauma did you see?
9 A. **At the wrist there were red marks that**
10 **appeared to be ligature marks, considered the**
11 **different type of ligature that she described as**
12 **tight or plastic.**
13 Q. Did you personally observe these
14 yourself?
15 A. **Yes, I did.**
16 Q. Did you document those injuries?
17 A. **I did.**
18 Q. And did you indicate on the
19 photographs that you took the fact they were
20 consistent with the disclosure given you?
21 A. **I put that they were those type of**
22 **injuries.**
23 Q. And that's based upon your -- her
24 disclosure and your observation of it, right?
25 A. **Yes.**

1 Q. Did you see anything else on her body?
 2 A. **She did have external -- she did have**
 3 **blood on which which she stated was from her**
 4 **boyfriend who had had an injury due to an attack by**
 5 **someone in the group.**

6 Q. You didn't see any injuries on her
 7 that would appear to cause that blood being at those
 8 locations; is that correct?

9 A. **No, I didn't.**

10 Q. And you documented locations as well?

11 A. **I did.**

12 Q. Did you also prepare any kind of
 13 diagram that would indicate the different locations
 14 where you saw these injuries?

15 A. **The diagram which is called a**
 16 **bodygram, when I -- the number of the picture**
 17 **appears on the diagram.**

18 Q. So you basically take a picture.

19 You number that picture and you have a
 20 diagram for the corresponding numbers that are on
 21 that diagram?

22 A. **That's correct.**

23 Q. I'm showing you what marked State's
 24 proposed exhibits 147 -- 146, 47, 48, 49, 150, 151,
 25 152, 153 and 154.

1 I'm going to ask you to look through
 2 all of them and then let me know when you're done.

3 Specifically as to exhibits 146
 4 through 153, what are depicted in those exhibits?

5 A. Those are pictures that I took of
 6 blood on her skin and also of injuries to her wrists
 7 and her ankles.

8 Q. And the photographs that are depicted
 9 in those exhibits, do they fairly and accurately
 10 depict how she appeared on the date and time of your
 11 examination?

12 A. **That's correct.**

13 MR. TURNER: State would move to admit
 14 state's proposed exhibits 147 through 153.

15 MS. RADOSTA: May we approach on this
 16 one?

17 THE COURT: Yes.

18 (Discussion at Bar)

19 THE COURT: You may proceed.

20 Are you offering those exhibits.

21 MR. TURNER: Yes.

22 THE COURT: They will be received.

23 MS. RADOSTA: Actually so the record is
 24 clear, the defense was objecting to those. I don't
 25 think I specifically objected.

1 THE COURT: Very good. Thank you.

2 MR. TURNER: Publish, Your Honor?

3 THE COURT: Yes.

4 BY MR. TURNER:

5 Q. I'm showing what you has been marked
 6 and admitted as State's exhibits 146. What's
 7 depicted on that exhibit?

8 A. **That's her left hand and she's -- she**
 9 **said the blood that was on the hand in this area**
 10 **here is from her boyfriend who had been injured**
 11 **during this event.**

12 Q. In fact, at the top there there is
 13 something that said -- that says body image number
 14 four; is that correct?

15 A. **Yes.**

16 Q. That corresponds with what's present
 17 in state's proposed exhibit 154; is that correct?

18 A. **Yes, it is.**

19 Q. Just explain to the jury what State's
 20 proposed exhibit 154 is.

21 A. **This is a body diagram. It shows a**
 22 **body in different positions and the number of the**
 23 **picture corresponds with the area that we're**
 24 **describing.**

25 **This one is number four and number**

1 **four would be right here.**

2 MR. TURNER: At this time the state
 3 would move to publish State's proposed exhibit 154.

4 THE COURT: Objection?

5 MS. RADOSTA: Just with what we had
 6 said -- is this -- no, judge. That's fine.

7 THE COURT: It is received.

8 BY MR. TURNER:

9 Q. This is body image number four -- I'm
 10 showing you what's now State's exhibit 54, the body
 11 graphic -- can you point on there where number four
 12 is, if you can see it?

13 Actually touch the screen.

14 A. **Right.**

15 Q. So in fact, every exhibit the state
 16 introduced where there is a picture of the part,
 17 body part of Ms. Kim there is a number on it that
 18 corresponds with the number on that bodygram?

19 A. **That's correct.**

20 Q. Showing you what has been marked
 21 State's exhibit 147, do you recognize what that is?

22 A. **Yes.**

23 **This is -- on the body image it's**
 24 **number five and this is -- these are marks on her**
 25 **ankles that would go along with the fact she had**

1 **been tied up.**

2 Q. Based on your opinion, it's consistent
3 with the disclosure she gave you?

4 A. **Correct.**

5 Q. State's proposed exhibit or state's
6 exhibit 148?

7 A. This is her knee area and that's blood
8 that was on there, which again she explained was
9 blood that had come from her boyfriend, because he
10 had been injured in the event.

11 Q. State's exhibit 149?

12 A. **Number 149 would indicate the injuries**
13 **to the wrists. This would be her left hand and the**
14 **marks are in these areas.**

15 Q. Again in your training experience
16 these were consistent with ligature marks?

17 A. **Yes.**

18 Q. State's exhibit 151?

19 A. **Again, this shows the injuries due to**
20 **being tied up.**

21 Q. Which wrist was that?

22 A. **That would be the right wrist.**

23 Q. State's exhibit 150?

24 A. **That would be also the right wrist**
25 **area and as you can see there's injury here.**

1 Q. That's circled.

2 Did you indicate on there ligature
3 marks?

4 A. **I did.**

5 Q. The reason you did that was based on
6 your training and experience and the fact of the
7 disclosure that was consistent -- that was
8 consistent with what Ms. Kim related to you?

9 A. **That's correct.**

10 Q. State's exhibit 152, is that the same
11 image without the marks indicated?

12 A. **Yes, it is.**

13 Q. And finally state's exhibit 153?

14 A. **Again, that is on the left hand and as**
15 **you can see there are injuries here, here and here**
16 **and here and there.**

17 Q. After you conducted the physical
18 examination outside of her body did you perform an
19 examination of her vagina?

20 A. **I did.**

21 Q. Did you have any significant findings?

22 A. **I found increased redness at 6:00**
23 **o'clock on the introitus which is the opening area**
24 **of the vaginal canal.**

25 Q. You say 6:00 o'clock. If you could

1 describe to the jury where exactly would that
2 position be.

3 A. **If I had the patient in stirrups in**
4 **front of me her back would be laying on the bed, her**
5 **knees would be bent and parted and the top is where**
6 **the hair is, and the 6:00 o'clock area would be the**
7 **closest area of the vaginal opening to the anus.**

8 Q. And was the fact there was redness
9 there consistent with a penis in the vagina?

10 A. **Yes.**

11 Q. After you conducted the examination of
12 the vagina what did you do next?

13 A. **After I finished collecting all of the**
14 **evidence I checked the patient's lab work and**
15 **offered medication if they care to take it.**

16 Q. You said you actually obtained
17 evidence in this case. From what locations?

18 A. **Number one, I did not collect**
19 **underwear. There was no underwear present.**
20 **Mouth samples, um, we swabbed around**
21 **the teeth, under the tongue, the roof of the mouth,**
22 **um, and we used dental floss.**

23 **That is for any foreign DNA.**

24 Q. How many swabs do you use?

25 A. **I use two swabs and the dental floss**

1 **is a plastic piece with the floss strung across it.**

2 Q. What is the purpose of obtaining this
3 oral swab?

4 A. **To find any DNA that doesn't belong to**
5 **the patient.**

6 Q. What do you do with these swabs and
7 this dental floss after you obtain that sample?

8 A. **They are dried and sealed in an**
9 **envelope that goes into sexual assault kit.**

10 Q. How are they dried?

11 A. **We have a swab dryer.**

12 **There's an area where the mouth swabs**
13 **are dried in it and they are dried probably 20**
14 **minutes to half an hour and then placed into a**
15 **little box that's in the envelope for the mouth**
16 **samples.**

17 **Then again it's sealed and placed in**
18 **the sexual assault kit.**

19 Q. When you get this swab and impound it
20 into evidence is it under your sole, care, custody
21 and control?

22 A. **Yes.**

23 Q. Does any else participate in the
24 recovery of the swab and then the subsequent sealing
25 in the envelope?

1 A. **No. I'm the only one in there.**
 2 Q. You actually sealed these up,
 3 separately from other swabs you may take from other
 4 parts of the body?
 5 A. **Yes, I do.**
 6 Q. You took an oral swab, multiple swabs?
 7 A. **Yes.**
 8 Q. What did you do next?
 9 A. **She had said that he had licked her**
 10 **nipples. I swabbed the nipples and again that's**
 11 **dried and placed into the sexual assault kit.**
 12 Q. So you got swabbings of the location
 13 where she informed you the suspect put his mouth?
 14 A. **Yes, I did.**
 15 Q. She directed you where to do it?
 16 A. **Yes.**
 17 Q. You, in fact, did that?
 18 A. **Yes, I did.**
 19 Q. And again was that with two swabs?
 20 A. **It was with two swabs, yes.**
 21 Q. What did you do with those swabs?
 22 A. **When I go to gather evidence when I'm**
 23 **trying to select saliva or other secretions that**
 24 **would be on the skin there is a drop of sterile**
 25 **water placed on them.**

1 **The area they describe where they have**
 2 **been touched or licked or whatever, I swab that**
 3 **area.**
 4 **They are put into the swab dryer and**
 5 **placed into a small box that goes in the bag that**
 6 **contains the miscellaneous evidence and then it's**
 7 **sealed and placed in the sexual assault kit.**
 8 Q. Again, the swabbings that were taken
 9 from the breasts of Ms. Kim were separated from any
 10 other swabs; is that correct?
 11 A. **That's correct.**
 12 Q. Then those were all put together into
 13 a single kit?
 14 A. **Yes, they were.**
 15 Q. After you took those swabs did you
 16 take any other swabs?
 17 A. **I took swabs of the vaginal area,**
 18 **swabs of the anal area and again, they were dried,**
 19 **placed in boxes, placed in the bags appropriately**
 20 **and sealed and placed in the sexual assault kit.**
 21 Q. With each of those swabbings that you
 22 took were they under your sole, care, custody and
 23 control from the time you took the sample until the
 24 time you dried the sample until the time you placed
 25 them in individual containers?

1 A. **Yes.**
 2 Q. **And those individual containers we're**
 3 **sealed by yourself?**
 4 A. **Yes.**
 5 Q. When you seal each of those individual
 6 containers do you put some information on them to
 7 identify each of those individual containers and
 8 what may be contained inside?
 9 A. **The patient has stickers that are made**
 10 **when they are -- when their chart is made. I put**
 11 **those on each box.**
 12 **There also are little numbers that are**
 13 **the number of the kit and those are also put onto**
 14 **the evidence so that it's consistent throughout. If**
 15 **anything were moved or anything it would be**
 16 **identified as this particular kit.**
 17 Q. After you took all the swabs that you
 18 just mentioned what did you do?
 19 A. **I marked them the date and time I took**
 20 **them -- put my initials on them, then the kit is**
 21 **sealed and it is placed in a locked area and the**
 22 **crime lab comes and picks it up.**
 23 Q. So each individual container is sealed
 24 and they are placed within a larger container which
 25 is also sealed by yourself?

1 A. **That's correct.**
 2 Q. And what information do you put on the
 3 larger container?
 4 A. **I put the event number, the patient's**
 5 **name, that it was done at the UMC, that the law**
 6 **enforcement group that has asked for the kit to be**
 7 **done and then I sign that I'm the nurse who put the**
 8 **evidence into the kit and date that also.**
 9 Q. Who has access to that locked area
 10 after you place the sexual assault kit in it?
 11 A. **The crime lab does.**
 12 Q. Anybody else?
 13 A. **No.**
 14 Q. Do you take any swabs so that you can
 15 use to get a profile of the victim?
 16 A. **Yes, I do.**
 17 Q. Where is that taken from?
 18 A. **That's taken from the mouth and**
 19 **actually everything else we do in the kit is to find**
 20 **DNA from someone else.**
 21 **This is specific to the victim and I**
 22 **have them rinse their mouth well and then there are**
 23 **little sponge type Q-tips that have teeth on them**
 24 **and I go up in the upper gum and swab that area.**
 25 **That's specific to the patient for**

1 DNA.

2 Q. You say you have the patient use mouth
3 wash. Julie Kim used mouthwash before you obtained
4 that swab?

5 A. **I don't use mouth wash; I use water.**

6 Q. But rinsed the mouth out before you do
7 that?

8 A. **Yes, I do.**

9 Q. I assume that was done after you got
10 the original oral swab looking for potential
11 evidence of other individuals DNA?

12 A. **That's correct.**

13 Q. Did you also put that swab -- is there
14 a term for a swab of inside the mouth?

15 A. **It's called -- the one that's specific
16 to the patient themselves is called a buccal swab.**

17 Q. This buccal swab, was that also put in
18 its own particular container?

19 A. **It was put in the little cardboard box
20 and sealed and into the envelope and then sealed
21 into the sexual assault kit.**

22 Q. That was identified by you as a swab
23 taken from Ms. Kim's cheek?

24 A. **That's correct.**

25 Q. When you impound the sexual assault

1 kit do you impound it under what's called an event
2 number?

3 A. **I do.**

4 Q. Where are you given that number?

5 A. **The police -- whoever responds --
6 either the police officer or the detective gives me
7 that number and I use that on all of my documents.**

8 Q. That's for purposes of the
9 investigation of the alleged sexual assault?

10 A. **That's correct.**

11 MR. TURNER: Pass the witness, Your
12 Honor.

13 THE COURT: Does defense counsel intend
14 to be long with this witness?

15 MS. RADOSTA: Maybe, judge. Honestly,
16 yeah, maybe.

17 THE COURT: We might take our typical
18 break.

19 MS. RADOSTA: Fine.

20 [Whereupon, the Court admonished the
21 jury.]

22 [Recess taken.]

23 THE COURT: The continuation of
24 C212986, state versus Joseph Alexander Henderson.
25 Record reflect the presence of the Defendant, his

1 counsel, Mr. Reed and Ms. Radosta. Mr. Turner and
2 Ms. Kollins present for the state.

3 Will counsel stipulate that all
4 members of the jury are present and properly seated?

5 MR. TURNER: Yes.

6 MS. RADOSTA: Yes.

7 THE COURT: Let me admonish you you're
8 still under oath, if I may.

9 Proceed.

10

11

12

13

EXAMINATION

14 BY MS. RADOSTA:

15 Q. Ms. Ebbert, do you recall in this
16 specific case how many different swabs that you
17 booked into evidence?

18 A. **I can't tell you exactly how many
19 swabs. I can tell you that all of them were
20 documented in the kit.**

21 Q. You don't have an independent
22 recollection as to how many swabs were booked into
23 the kit?

24 A. **To go through them, there would have
25 been two oral swabs, there would have been dental**

1 floss, there would have been the nipples, there
2 would have been --

3 Q. How many would there have been for the
4 the nipples?

5 A. **Two swabs in one box.**

6 There would have been two vaginal
7 swabs, two anal swabs, swabs of blood stained areas.

8 I believe that those were taken also.

9 There would have been the buccal swabs which are
10 different than the cotton tipped swabs. These have
11 a sponge on them.

12 I believe that's pretty much it. I
13 can't recall what else there would be other than
14 fingernail scrapings and that type of thing.

15 Q. You would have done two buccal swabs
16 for the mouth or one?

17 A. **One from each side, each side. Those
18 are the only ones that are done independently.**

19 One is done on the left and one is
20 done on the right side of the mouth.

21 Q. With regard to the swabbing of the
22 nipples on Ms. Kim, you said there are two swabs
23 booked into evidence regarding that, correct?

24 A. **Yes, there would have been.**

25 Q. And I believe you described a little

1 bit on direct that it's already a sealed kit that
 2 you get that has a drop of sterile water in it for
 3 each of the swabs; is that correct?
 4 A. **No, that's not.**
 5 Q. What?
 6 A. **It's a sealed kit. The only time we**
 7 **put a drop of sterile water onto the swabs is when**
 8 **we're going to swab and area like the breasts and**
 9 **that sterile water is not found in the kit.**
 10 Q. Makes sense.
 11 So you put the drop of sterile water
 12 on each of the tips that you're going to use for the
 13 swabbing?
 14 A. **For secretions, yes.**
 15 Q. In this case you swabbed both the
 16 right and left nipple of Ms. Kim?
 17 A. **I believe I did.**
 18 Q. Would you have then swabbed, used one
 19 swab for the right nipple and one swab for the left
 20 nipple?
 21 A. **Most often the person who has been**
 22 **assaulted is able to show you where the person was**
 23 **licking them and I concentrate on those areas, and I**
 24 **don't recall whether I used -- they would have been**
 25 **two swabs together.**

1 **I don't recall whether or not he had**
 2 **sucked both of her nipples or it was just one.**
 3 Q. If you indicated in your report that
 4 she told you that she had been, I believe the
 5 terminology in the report is licked or kissed on --
 6 and it's plural, nipples -- would you then have used
 7 both swabs -- rephrase that.
 8 If she had indicated she had been
 9 licked or kissed on both nipples would you have one
 10 swab for the left and one for the right?
 11 A. **That would be what I normally would**
 12 **do. If both nipples were touched by the assailant,**
 13 **then I would swab both of them with one Q-Tip, one**
 14 **for each side.**
 15 Q. I want to make sure we're clear about
 16 this. One swab was for the left nipple and one swab
 17 was for the right nipple?
 18 A. **It would have been, yes.**
 19 Q. Additionally, if Julie had told you
 20 that the suspect had dripped sweat on her ankle you
 21 would have swabbed that area, correct?
 22 A. **If she told me that, I believe I would**
 23 **have.**
 24 Q. Do you recall whether or not you
 25 swabbed her ankle in this particular case?

1 A. **I do not.**
 2 Q. You don't recall?
 3 A. **I do not.**
 4 **I don't recall her telling me he**
 5 **dripped sweat onto her ankle at all.**
 6 MS. TURNER: Court's indulgence.
 7 Nothing further, judge.
 8 THE COURT: Re-direct?
 9 MR. TURNER: Briefly.
 10
 11 RE-EXAMINATION
 12 BY MR. TURNER:
 13 Q. You obtained a sterile kit prior to
 14 the examination; is that correct?
 15 A. **That's correct.**
 16 Q. Within that kit it has the sterile
 17 separate containers that you ultimately put the
 18 separate swabs in; is that correct?
 19 A. **That's correct.**
 20 Q. My only other question to you is you
 21 were directed by Ms. Kim as to where the subject
 22 licked or kissed her breasts; is that correct?
 23 A. **That's correct.**
 24 Q. And you took samples where she
 25 directed you that that person placed their mouth?

1 A. **That's correct.**
 2 Q. Then you impounded that into the
 3 separate container which was then placed into the
 4 larger sexual assault kit?
 5 A. **That's correct.**
 6 MR. TURNER: Pass the witness, judge.
 7 THE COURT: Anything further?
 8 MS. RADOSTA: No.
 9 THE COURT: Thank you.
 10 Next, please.
 11 MR. TURNER: State would call Detective
 12 Jeffries.
 13
 14 MICHAEL JEFFRIES,
 15 called as a witness herein, was sworn by the court
 16 clerk, was examined and testified as follows:
 17 MR. TURNER: Proceed?
 18 THE COURT: You may.
 19
 20
 21 EXAMINATION
 22 BY MR. TURNER:
 23 Q. Detective Jeffries, if you could state
 24 and spell your last name for the record.
 25 A. **Michael Jeffries, J-e-f-f-r-i-e-s.**

1 Q. Detective, where are you currently
2 employed?

3 A. **I'm with the Los Angeles Sheriff's**
4 **Department in California right now.**

5 Q. What is your current duties?

6 A. **I'm in the cold case homicide unit.**

7 Q. Prior to working in the L. A.

8 Sheriff's Department where were you employed?

9 A. **The Las Vegas Metropolitan Police**
10 **Department.**

11 Q. In what capacity?

12 A. **At the time this occurred I was in the**
13 **sexual assault unit.**

14 Q. At what point did you leave Metro and
15 go to the LA Sheriff's Department?

16 A. **It was the end of 2005.**

17 Q. How long were you with the sexual
18 assault detail?

19 A. **Approximately I want to say two and**
20 **half, three years perhaps.**

21 Q. How long were you with Metro as a
22 commissioned police officer?

23 A. **Since 1996.**

24 Q. Detective, I'm going to draw your
25 attention specifically back to September 3, 2004.

1 **16 hours after the crime had taken place. So some**
2 **significant time had passed before we were able to**
3 **contact and actually get with the two victims to**
4 **speak to them.**

5 Q. The sexual assault detail was not
6 called out to the scene at the time this incident
7 occurred; is that correct?

8 A. **That's correct. We were not.**

9 Q. Is it the responsibility of another
10 detective bureau to respond to those type of scenes?

11 A. **At the time they had what they called**
12 **general assignment which I don't believe is any**
13 **longer in place.**

14 **They responded and then of course**
15 **whatever protocol it is a notification process, if**
16 **you will, to have a lieutenant or a commanding**
17 **person tell you whether or not to respond to a**
18 **particular crime at that time in the morning or that**
19 **time at night.**

20 Q. Would it be safe to say that patrol
21 would respond, a general assignment detective would
22 come out do the initial investigation, determination
23 would be made as to which specific detail would be
24 called out at that time?

25 A. **That's correct.**

1 Do you recall that particular date and
2 time?

3 A. **Yes, I do.**

4 Q. Were you with the sexual assault
5 detail and that date?

6 A. **Yes, I was.**

7 Q. What was your shift?

8 A. **Day shift. I believe our shift**
9 **started at 0600 and ended at 1800 which is 6:00**
10 **o'clock p.m.**

11 Q. 0600 which would be 6:00 a.m.?

12 A. **Correct. Early.**

13 Q. On that particular date were you
14 assigned to investigate a robbery sexual assault or
15 alleged robbery sexual assault involving Julie Kim
16 and Eric Bernzweig?

17 A. **Yes, I was.**

18 Q. When you were assigned that case what
19 did you do?

20 A. **We were notified that this had taken**
21 **place and as I recall we -- after the information**
22 **was given, we immediately tried to contact our**
23 **victims in this case to follow up with what we**
24 **figured would be some important interviews.**

25 **We were able to do that approximately**

1 Q. Be it a robbery detail or sexual
2 assault detail?

3 A. **That's correct.**

4 Q. And ultimately a determination was
5 made this would be handled by the sexual assault
6 detail?

7 A. **That's correct.**

8 Q. You were the particular sexual assault
9 detective that was assigned this case?

10 A. **Yes.**

11 Q. You indicated on September 3, 2004,
12 you did you actually conduct and interview with the
13 two victims in the case?

14 A. **Yes, I did.**

15 **Like I say, that was approximately 16**
16 **hours after the crime had taken place. We did**
17 **finally make contact with them and conducted our**
18 **interview.**

19 Q. Was that taped?

20 A. **Yes, it was.**

21 Q. After you conducted the interview with
22 the two victims in this case what did you do?

23 A. **Well, we formulated what we could get**
24 **and obviously we did want to have the analysis of**
25 **the sexual assault kit that was done analyzed and**

1 see if that would perhaps give us any leads as to
2 who the suspect or suspects might have been.

3 Q. Did you put a request in with the lab
4 to have that particular sexual assault kit tested?

5 A. Yes.

6 Q. That a sexual assault kit would be
7 impounded under a particular event number; is that
8 correct?

9 A. That's correct.

10 Q. If you could explain to the jury what
11 is an event number?

12 A. An event number is simply an event.
13 Each event as it occurs on a daily basis, even
14 throughout the course of the night and the day, has
15 attached to it the month, the day, the year and four
16 digits at the end that kind of give a person that
17 would understand event numbers a good indication as
18 to what time of day it may have occurred.

19 If the numbers are low, because at 12
20 a.m. or midnite those numbers, those four numbers at
21 the very end all go to zero.

22 The first call that comes in or
23 responds or incident that is created, a number is
24 generated. Therefore, it starts 0001 and so on and
25 goes on throughout the day until midnite the

1 following day where it then resets itself.

2 You always know because of the month,
3 or actually the year that's attached to it, month
4 and the day. That's always known by just looking at
5 an event number, hopefully that makes sense.

6 Q. With this particular incident was
7 there in fact two event numbers that were generated?

8 A. Yes, there was.

9 Q. Why was that?

10 A. There were two numbers generated
11 simply because the event of the initial responding
12 officers with our two victims was in a different
13 area of town.

14 It was northwest, and through the
15 investigation or the course of that investigation
16 they realized that there might have been some keys
17 missing and he had a business -- he was a dentist --
18 and therefore they thought or assumed perhaps the
19 suspects could have gotten into his office which was
20 in a different area command and they asked someone
21 to go check that.

22 The officers that checked that or went
23 to check that obviously generated another event
24 number, so these two separate numbers, although very
25 close in sequence, still on the same day, but a

1 little bit different in sequence because the one
2 that originally occurred at the house that they
3 responded to created the next one that the officers
4 responded to at the business.

5 Therefore, they didn't connect them.

6 It was generated because of their call and they
7 probably might not even have been aware of what had
8 taken place originally. Just that they were told to
9 go check this business to see if it was secure or
10 not.

11 That would be an explanation as to why
12 there are two event numbers.

13 Q. Both event numbers arose out of this
14 incident; is that correct?

15 A. That is correct, yes.

16 Q. And the event number that ultimately,
17 I guess, would be the one in this case would that be
18 the lower?

19 A. That is correct.

20 In other words, the original one would
21 be the original. Anything thereafter would be
22 something attached to it.

23 Q. Detective, do you recall what the
24 original event number is under this case?

25 A. I believe I do.

1 Q. What is that?

2 A. That would be 040903-0152.

3 Q. Again, that would be the 4 day of
4 September -- did I get that wrong?

5 A. Yes.

6 Q. 2000 -- September 3, 2004, so it's the
7 year, month and day?

8 A. Yes, month, day. So 2004, 09,
9 September, and 03, the third and the last four are
10 the generated numbers like I told you that start at
11 zero and go up throughout the night and the
12 following day to kind of give you an indication
13 that it was either early in the day or very late in
14 the day or somewhere in between.

15 Q. So that the last four numbers, 0152
16 was 152 an event number that was generated for that
17 particular day?

18 A. That is correct.

19 Q. That's a fairly low number so you know
20 that happened fairly early that day?

21 A. Right.

22 Q. Do you recall what the other event
23 number was that was generated on this?

24 A. You know what?

25 I believe it was the same year and

1 month and day, but it was 0158. They are very close
2 in numbers.

3 Q. When you put in a request for testing
4 of the sexual assault kit what number did you put
5 the request in for?

6 A. The original.

7 Q. That's --

8 A. That's the 0152.

9 Q. Do you know what the event number was
10 that was actually on the kit?

11 A. I think that's where it was a little
12 off or it just so happened they used the numbers
13 that was generated at the dentist's office. They
14 attached that to it which was, I think, 0158 or 59.

15 They used that one because the
16 officers that probably gave the SANE nurse that
17 information got that off their computer most likely
18 and they are still attached.

19 It's just that the original is what it
20 should have been under but it still puts them
21 together.

22 Q. The same incident we're talking about?

23 A. Same incident.

24 Q. After you put that request in for
25 testing did you receive information from Kathy

1 Gunther over at the crime lab?

2 A. Yes, I did.

3 Q. Who is she?

4 A. She is -- I don't know what her
5 technical title is, but she works with the
6 Department of Justice and/or I should say she's
7 associated with finding out --

8 Q. DNA?

9 A. DNA.

10 Q. And you got information from her about
11 a particular suspect; is that correct?

12 A. That is correct.

13 Q. That individual was identified to you
14 as Joseph Henderson?

15 A. That is correct.

16 Q. Based on the information that you
17 received did you prepare a search warrant?

18 A. Yes, I did.

19 Q. Was that search warrant signed by a
20 judge?

21 A. Yes, it was.

22 Q. And once you got that search warrant
23 did you have occasion to execute that search
24 warrant?

25 A. Yes, I did.

1 Q. What were you authorized to do with
2 that search warrant?

3 A. Well, the search warrant gave me a
4 reason to make contact with Mr. Henderson and obtain
5 his DNA to make sure that this was the DNA in fact
6 that was at the crime scene.

7 Q. Did you have occasion to contact
8 Joseph Henderson?

9 A. Yes, I did.

10 Q. Is that individual in the courtroom
11 today?

12 A. Yes, he is.

13 MR. REED: We'll stipulate to the
14 identification of Mr. Henderson.

15 THE COURT: Do you accept that?

16 MR. TURNER: That's fine.

17 THE COURT: Very good.

18 Proceed.

19 BY MR. TURNER:

20 Q. You contacted the Defendant; is that
21 correct?

22 A. Yes.

23 Q. And you obtained a buccal swab?

24 A. Yes.

25 Q. How did you go about obtaining that

1 swab from the Defendant?

2 A. It's actually quite simple. The
3 buccal swab comes in a small package. It's not
4 complicated.

5 It's kind of a long Q-Tip, if you
6 will, that you use to swab the mouth on both sides
7 and then place back in the box to preserve it,
8 placed in an envelope that is sealed and signed,
9 dated with an evidence sticker on it and that's
10 really all there is to it.

11 It takes literally a minute.

12 Q. So you have to open up the package in
13 order to get to the swab?

14 A. Correct, and follow the protocol, the
15 gloves to keep everything clean.

16 Q. This is a sterilized package?

17 A. Correct.

18 Q. You're wearing gloves?

19 A. Yes.

20 Q. You open the package, you obtain the
21 swab from the Defendant; is that correct?

22 A. That's correct.

23 Q. Following protocol?

24 A. Yes.

25 Q. What did you do with the swab after

1 you obtained it?

2 A. **I immediately put it back into its**
3 **container and sealed it.**

4 Q. Was that done in the Defendant's
5 presence?

6 A. **Yes, it was.**

7 Q. You said you sealed it.
8 How did you seal it?

9 A. **I sealed it in an envelope with and**
10 **evidence sticker that's part of the total package.**

11 Q. What information do you put on that
12 envelope?

13 A. **You put the time, the date, the person**
14 **and the event number that it's associated to.**

15 Q. The event number that you just
16 mentioned?

17 A. **0152.**

18 Q. What did you do with it after you
19 obtained it?

20 A. **It was taken to our evidence locker**
21 **and locked up, because I obtained it in the evening**
22 **hours or later hours on, I'm reflecting in my notes,**
23 **March 17 which was a Thursday night, Thursday**
24 **evening.**

25 Q. That's when you actually obtained the

1 swab from the Defendant?

2 A. **That's correct.**

3 Q. March 17th?

4 A. **Correct.**

5 Q. Of 2005?

6 A. **That is correct.**

7 Q. And then you put it at what location?

8 A. **Our evidence locker, which is no**
9 **longer there.**

10 **It was a locked up evidence room that**
11 **we had at our office at the old office, if you will,**
12 **that was located on West Charleston.**

13 Q. From the time you took the swab,
14 sealed it up, put it in the box to the time you
15 placed it in the locked evidence locker was it in
16 your sole care, custody and control?

17 A. **Yes, it was.**

18 Q. Once you put it in there did you put
19 in a request that be tested?

20 A. **Yes.**

21 Q. Do you know who took it to the
22 location to test it?

23 A. **Detective Wilds took it in the**
24 **following morning, as soon as they opened our crime**
25 **lab in order to have the analysis performed.**

1 Q. Now, at some point after that you
2 received information that there was a positive
3 match; is that correct?

4 A. **That is correct.**

5 Q. At which point you arrested
6 Mr. Henderson?

7 A. **That is correct.**

8 MR. TURNER: Court's indulgence.

9 BY MR. TURNER:

10 Q. Do you recall when you obtained the
11 profile of this suspect, when you first submitted
12 the sexual assault kit for examination?

13 A. **Um-hum.**

14 Q. Do you recall when you first got a
15 profile of the suspect?

16 A. **No, I don't.**

17 **I'm sure -- there is a form letter**
18 **that is in the package that would tell you. I can't**
19 **recall exactly what date that was.**

20 Q. That information, though, was provided
21 to you by -- do you recall who prepared that
22 profile?

23 Would it be David Welch?

24 A. **Yes.**

25 Q. Who is he?

1 A. **He's a -- one of the crime analysts**
2 **for the Las Vegas Metropolitan Police Department.**

3 Q. At this point you were provided with a
4 profile of a possible suspect?

5 A. **Yes.**

6 Q. At this time did you have any idea who
7 Joseph Henderson was?

8 A. **No, not the slightest.**

9 Q. Do you recall the date when
10 Ms. Gunther gave you the information regarding the
11 Defendant, Joseph Henderson, as a potential suspect?
12 A. **You know, I think it might even have**
13 **been on Saturday, which would have been the 19th.**
14 **That might have been late afternoon**
15 **hours.**

16 Q. Detective, I apologize. I think I
17 confused you.

18 Before you got the actual match when
19 you got information regarding a potential suspect?

20 A. **The original information?**

21 Q. Yes.

22 A. **I don't recall when that was. I want**
23 **to say it was some time in March, I believe.**

24 Q. March of 2005?

25 A. **Yes.**

1 Q. So I think I may have confused the
2 jury here. If we can go back to how this took
3 place.

4 You submitted the sexual assault kit
5 for examination; is that correct?

6 A. That is correct, meaning the
7 examination that was performed by the SANE nurse I
8 requested analysis of that to perhaps help produce a
9 suspect.

10 Q. You received information from David
11 Welch about a profile of a potential suspect?

12 A. That is correct.

13 Q. You had no information as to who that
14 profile belonged to?

15 A. No, I did not.

16 Q. Then you received additional
17 information at a later date from Kathy Gunther about
18 a potential suspect; is that correct?

19 A. That is correct.

20 Q. At that point you obtained a search
21 warrant?

22 A. That is correct.

23 Q. For a swab of the Defendant; is that
24 correct?

25 A. That is correct.

1 Q. You then later received information
2 that confirmed the match at which point the
3 Defendant was arrested?

4 A. That is correct.

5 Q. Is that a correct statement of the
6 chronology?

7 A. Yes.

8 MR. TURNER: Pass the witness.

9 THE COURT: Cross-examination.

10 MR. REED: Yes. We'll see if we can do
11 this in two questions.

12
13
14 EXAMINATION

15 BY MR. REED:

16 Q. When you executed the search warrant
17 Mr. Henderson, Joseph Henderson was cooperative with
18 you in providing that sample?

19 A. Yes, he was.

20 Q. Second question: How tall is Joseph
21 Henderson?

22 A. If you want me to guess, 5'10".

23 Q. I don't want you to guess.

24 A. I don't know how tall he is. Never
25 measured him.

1 Q. In your arrest report it would reflect
2 his height, correct?

3 A. It would indicate what was recorded
4 perhaps in a driver's license or something to that
5 effect.

6 It's not that I would have measured
7 him myself.

8 Q. Understood.

9 His height as he would have appeared
10 in the report when you arrested him, do you recall
11 that height?

12 A. I believe it was 5'10".

13 Q. If the report says six foot would you
14 have a dispute with that?

15 A. No.

16 MR. REED: Approach?

17 THE COURT: If you like.

18 MR. REED: Thank you.

19 MR. TURNER: He doesn't dispute it.

20 BY MR. REED:

21 Q. Just make sure.

22 THE COURT: Go ahead. You can show it
23 to him.

24 BY MR. REED:

25 Q. Now it's more than two questions.

1 A. Yeah, it says six foot.

2 MR. REED: Thank you. That's all I
3 have.

4 THE COURT: Anything further?

5 MR. TURNER: No.

6 THE COURT: Thank you. You're excused.
7 Next.

8 MS. KOLLINS: May the state have just a
9 moment? I don't know which of my witnesses has
10 arrived.

11 MR. KOLLINS: State calls Officer
12 Jogodka.

13

14

15 MATTHEW JOGODKA,
16 called as a witness herein, was sworn by the court's
17 clerk, was examined and testified as follows:

18

19

20 EXAMINATION

21 BY MS. KOLLINS:

22 Q. Good afternoon. How are you employed?

23 THE COURT: Excuse me. Excuse me just
24 a minute.

25 State and spell your name, please.

1 THE WITNESS: First name Matthew,

2 J-o-g-o-d-k-a.

3 THE COURT: Thank you.

4 BY MS. KOLLINS:

5 Q. My apologies for burning your name.
6 How are you employed?

7 A. **I'm a detective with the Las Vegas
8 Metropolitan Police Department.**

9 Q. How long have you been a detective for
10 Metro?

11 A. **For less than six months.**

12 Q. How long have you been employed with
13 metro?

14 A. **Six and a half years.**

15 Q. Prior to your position as a metro
16 detective what was your assignment?

17 A. **I was uniformed patrol officer.**

18 Q. In what area of town?

19 A. **Northwest area command.**

20 Q. Did do your entire stint as a patrol
21 officer in the northwest area command?

22 A. **About three quarters, yes, I did.**

23 Q. You're a detective in what detail now?

24 A. **Fraud detail.**

25 Q. Turn your attention to September 3,

1 2004, to and address on Lonesome Harbor Way, do you
2 remember responding to that call?

3 A. **Yes, I do.**

4 Q. Can you tell me how it is that you
5 came to respond to that residence?

6 A. **Me and another officer were dispatched
7 to that address in reference to a home invasion. We
8 just -- I'm sorry -- we were dispatched to that
9 address for a home invasion to assist and see if we
10 can help investigate whatever happened.**

11 Q. Were you the only patrol unit to
12 respond to that location?

13 A. **No, I was not.**

14 Q. Do you who how many patrol units
15 responded to that location?

16 A. **Initially, two.**

17 Q. Were air units called out regarding
18 that call?

19 A. **Yes, they were.**

20 Q. Did you respond directly to the
21 residence or did you do any attempt to locate work
22 on the suspects?

23 A. **Me and the other officer went directly
24 to the target house.**

25 Q. Who was at the target house when you

1 arrived?

2 A. **It was the victim -- I believe his
3 name was Eric Bernzweig -- and a female, Julie, or
4 something like that.**

5 Q. What condition were they in when you
6 arrived?

7 Let's talk about Julie, first.

8 A. **I believe she was quite quiet. She
9 was pretty distraught and kind of panicking, a
10 little sweaty, kind of disoriented.**

11 **Didn't really know what was going on.**

12 Q. What about the gentleman?

13 A. **He was bleeding from all different
14 parts of his face and kind of yelling, asking, you
15 know, random questions about what was going on or
16 telling us stuff what was going on.**

17 Q. Showing you state's admitted 145, is
18 that the female that we're discussing?

19 A. **Yes, it is.**

20 Q. Julie?

21 A. **Yes.**

22 Q. I'll get you a pictures of Eric if you
23 give me just a minute.

24 What was the first -- state's
25 admitted 95, is that the gentleman?

1 A. **Yes, it is.**

2 Q. Anyone else at the residence?

3 A. **Not that I recall.**

4 Q. When you go out to a call like this do
5 you take efforts to clear the residence, in other
6 words, take a look around make sure everything is
7 secure, make sure suspects are not at least in the
8 immediate vicinity?

9 A. **That's correct.**

10 Q. Did you accomplish that that night?

11 A. **Yes.**

12 Q. With the assistance of anyone?

13 A. **With officer Kevin Koval.**

14 Q. After you arrived and made your
15 initial contact with Julie and Eric what's the next
16 thing that you did?

17 A. **Basically we do a patient assessment,
18 see what their needs are, request medical, if
19 medical has not been requested.**

20 **Depending on the crime we might
21 request the detectives -- at that time they were
22 called general assignment detectives, basically give
23 preliminary information we received on what
24 happened.**

25 Q. Did you make a determination that

1 medical was required in this instance?

2 A. **Yes, I did.**

3 Q. For which party?

4 A. **Initially, both parties.**

5 Q. What about the decision to involve
6 detectives?

7 A. **Due to us being patrol officers we
8 don't handle all the follow-up investigation so we
9 do the initial assessment and hand it over to the
10 detectives due to the -- to do the follow up.**

11 Q. At this time again it was the general
12 assignment bureau in the overnight hours between
13 midnite and 8:00 a.m.?

14 A. **That is correct.**

15 Q. General assignment then responded to
16 the scene?

17 A. **Yes.**

18 Q. And then from that point they make the
19 decisions as to crime scene analysts being called an
20 what needs to be collected and accomplished
21 vis-a-vis the crime scene; is that correct?

22 A. That is correct.

23 Q. Would it be fair to say it is patrol's
24 job to give the victim immediate assistance and seal
25 the zone for the detectives' arrival?

1 A. **That is correct.**

2 Q. Did you accomplish that that night?

3 A. **Yes, we did.**

4 Q. Was Julie put in an ambulance for
5 transport for medical care?

6 A. **Yes, she was.**

7 Q. Do you know about what time that was?

8 A. **We arrived at 1:40 and probably about
9 1:45 after the house was cleared the ambulance came,
10 sometime after that. I wasn't responsible for the
11 ambulance part.**

12 **Then somewhere between like 1:45,
13 1:50, 1:50 and 2:00 o'clock she was transported to
14 UMC.**

15 Q. Now, at the time Eric made a decision
16 to go somewhere other than UMC; is that correct?

17 A. **That is correct.**

18 Q. What did you do in terms of assisting
19 like to get to UMC or to where he was going for
20 treatment?

21 A. **He insisted he drive himself and I
22 guess he had another doctor friend that worked at
23 Summerlin, had an office at Summerlin.**

24 **He drove himself and I followed behind
25 in my patrol car to the hospital.**

1 Q. Eric was going to be leaving prior to
2 crime scene arriving at the residence, correct?

3 A. **That is correct.**

4 Q. What did you do in an effort to
5 preserve what he looked like before he left to get
6 his head stitched up?

7 A. **We took polaroids -- I took polaroid
8 pictures of him, I think about six pictures of his
9 head and face and whatnot.**

10 MR. TURNER: May I approach the
11 witness?

12 THE COURT: You may.

13 BY MR. TURNER:

14 Q. I'm showing you what has been marked
15 for purposes of identification as state's 130; do
16 you recognize that envelope?

17 A. **Yes.**

18 Q. What is that envelope?

19 A. **It's an evidence envelope with the
20 event number, time, date, one of the victim's names
21 and my signature.**

22 Q. Your signature and also your P number
23 or your personnel number with Metro?

24 A. **That is correct.**

25 Q. Do you recall this specific envelope,

1 130, from this incident?

2 A. **Yes, I do.**

3 Q. I'm going to show you what have been
4 marked state's proposed 138, 130A through 130F. If
5 you can flip through those for me real quick.

6 Do you recognize the person or what's
7 depicted in 130A through F?

8 A. **Yes.**

9 Q. How is it that you recognize those?

10 A. **I took the pictures and those are
11 Eric, the victim.**

12 Q. Pictures of his injuries about how
13 they appeared on September 3, 2004?

14 A. **Correct.**

15 Q. Before he departed to his physician?

16 A. **That was at the doctor's office prior
17 to them doing any kind of surgeries, I insisted we
18 take photos of his injuries.**

19 MS. KOLLIS: Move for the admission of
20 130 and 130A through F.

21 MS. RADOSTA: Approach?

22 THE COURT: Very good.

23 (DISCUSSION OFF THE RECORD)

24 THE COURT: You may proceed.

25 MS. KOLLINS: 130A and contents will

1 not be admitted?

2 THE COURT: That's correct.

3 BY MR. TURNER:

4 Q. Officer or detective, how long did you
5 spend with Mr. Bernzweig at Dr. Selznick's office?

6 A. **I'd say about 45 minutes to an hour.**

7 Q. Is that about how long for -- it took
8 for him to stitch up Eric?

9 A. **Yes.**

10 Q. Where did you go, if anywhere with
11 Eric, after he was stitched up?

12 A. **After that he insisted he would go see
13 his girlfriend, so she was still at UMC. I believe
14 she was done with all the medical examinations
15 there.**

16 **He wanted to go there and pick her up.**

17 Q. Did you follow him back to UMC?

18 A. **Yes.**

19 Q. What time about was it when you
20 followed him back to UMC?

21 A. **I'd say somewhere around 2:30, 3:00
22 o'clock or 3:30, I believe.**

23 Q. A.m.?

24 A. **Yes.**

25 Q. Was his girlfriend or Julie, had she

1 concluded her sexual assault examination by the time
2 you got there?

3 A. **Yes, she had.**

4 Q. Other than what we've discussed this
5 afternoon did you have any other responsibilities
6 regarding this robbery sexual assault report?

7 A. **No other responsibilities.**

8 Q. You're not responsible for any
9 follow-up investigation?

10 A. **No, I'm not.**

11 MS. KOLLINS: Pass the witness.

12 THE COURT: Cross examination?

13 MS. RADOSTA: No questions, judge.

14 THE COURT: You can step down. Thank
15 you.

16 THE COURT: Next witness, please.

17 MR. TURNER: State calls officer Koval.

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1 KEVIN KOVAL,

2 called as a witness herein, was sworn by the court
3 clerk, was examined and testified as follows:

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EXAMINATION

8 BY MR. TURNER:

9 Q. Officer Koval, please state and the
10 spell your last name.

11 A. **Kevin Koval, K-o-v-a-l.**

12 Q. Officer, where are you employed?

13 A. **Las Vegas Metropolitan Police
14 Department.**

15 Q. What capacity?

16 A. **Patrol officer.**

17 Q. How long have you been an officer with
18 Metro?

19 A. **Approximately six years.**

20 Q. What is your current assignment?

21 A. **Field training officer.**

22 Q. I'm going to draw your attention back
23 to September 3, 2004, approximately 1:27 a.m.

24 Do you recall that particular date and
25 time?

1 A. **Yes, I do.**

2 Q. What was your assignment on that date?

3 A. **Patrol graveyard officer.**

4 Q. Did you receive a call from dispatch?

5 A. **Yes, I did.**

6 Q. What was the nature of the call?

7 A. **It was a potential robbery/home
8 invasion that took place.**

9 Q. Did you respond to a particular
10 location?

11 A. **Yes.**

12 Q. Do you recall what that location was?

13 A. **Can't recall the address exactly.**

14 Q. 7833 Lonesome Harbor Drive sound
15 familiar?

16 A. **Yes, it does.**

17 Q. That's in Las Vegas?

18 A. **Yes.**

19 Q. Was that a gated community?

20 A. **I believe so.**

21 Q. What did when you responded to the
22 location?

23 A. **Upon initial arrival we knocked on the
24 door. I believe that the victim was locked inside.
25 They were on the phone with the dispatch.**

1. **We asked dispatch to have them come**
 2. **unlock the door so we could go in and do a**
 3. **protective sweep of the residence.**

4. Q. You say we. Were any other officers
 5. present with you?

6. A. **Officer Jogodka.**

7. Q. Was that the officer who just walked
 8. out of the courtroom?

9. A. **Yes, it was.**

10. Q. You said you did a sweep.

11. You were looking for potential

12. suspects?

13. A. **That's correct.**

14. Q. What did you do next?

15. A. **As soon as we did the protective sweep**
 16. **our first thing we were going to do was lock down**
 17. **the residence, not allow people to go in and out to**
 18. **preserve the crime scene, start people on the**
 19. **statement and the report and I believe at that point**
 20. **I had officer Jokada notify ID.**

21. Q. You say notify ID. What is that?

22. A. **Basically they put in a request for**
 23. **our ID department to come out and process the scene,**
 24. **to collect the evidence and do all the processing.**

25. Q. Were any efforts made to locate any

1. potential suspects outside of the residence?

2. A. **Yeah.**

3. There was a few officers detailing the
 4. area, attempting to locate them, but we didn't have
 5. a good description on where they went or how they
 6. left.

7. Q. Were any individuals stopped?

8. A. **No.**

9. Q. No suspects were taken into custody?

10. A. **No.**

11. Q. After you called ID to respond would
 12. that be like a Crime Scene Analyst?

13. A. **Yes.**

14. Q. So a patrol officer wouldn't be
 15. responsible for collecting any evidence at the crime
 16. scene, correct?

17. A. **That's correct.**

18. Q. After you put a request for that --
 19. for an ID tech did you ask any other individuals to
 20. respond to the location?

21. A. **We asked for a general assignment**
 22. **detective and we notified the Sargent. It's just**
 23. **due to our protocol, due to the nature of the crime.**

24. Q. The seriousness of the crime in this
 25. case?

1. A. **That's correct.**

2. Q. After you did that what did you do?

3. A. **I started conducting interviews with**
 4. **both victims while Officer Jogodka started on the**
 5. **paperwork going out to his car, started on the**
 6. **report.**

7. Q. Did you separate the two?

8. A. **Yes.**

9. Q. Did you walk through the scene with
 10. them?

11. A. **Yes.**

12. Q. By that I mean did you have tell them
 13. tell you what happened and point out the various
 14. locations where it happened?

15. A. **That's correct.**

16. **I typically do that so I can have a**
 17. **better understanding when the general assignment**
 18. **detective comes so I can walk him through the scene**
 19. **and have a very good understanding of where the**
 20. **people moved.**

21. Q. What about the Crime Scene Analyst?

22. A. **The Crime Scene Analyst, I walked her**
 23. **through the scene with the general assignment**
 24. **detective.**

25. Q. Those individuals ultimately responded

1. to this location; is that correct?

2. A. **That's correct.**

3. Q. Then you had interviewed the victims
 4. in this case?

5. A. **That's correct.**

6. Q. Do you recall whether they were
 7. present at the time the general assignment detective
 8. and the crime scene analyst showed up?

9. A. **I believe they both were when the**
 10. **general assignment detective showed up.**

11. Q. What about the Crime Scene Analyst?

12. A. **The Crime Scene Analyst, for sure.**
 13. **The male victim was there. I'm not sure if the**
 14. **female victim was there or if she already got**
 15. **transported.**

16. Q. Do you recall name of the Crime Scene
 17. Analyst?

18. A. **Robbie Dahn.**

19. Q. You just testified you walked her,
 20. along with the detective, through the crime scene as
 21. described to you by the victim; is that correct?

22. A. **That's correct.**

23. Q. And that would include the female
 24. victim, Julie Kim?

25. A. **That's correct.**

1. Q. What did do you after you briefed the
2. general assignment detective and Crime Scene
3. Analyst?

4. A. After I briefed both of them I
5. continued on the report, filling that out which is
6. our incident crime report.

7. Q. Did you do anything else in regards to
8. this investigation?

9. A. Not at that point.
10. We just basically filled out the crime
11. report, passed it over to the general assignment
12. detective who passes it off to the correct detail at
13. that point.

14. Q. Basically you pass on any
15. responsibilities on to the general assignment
16. detective?

17. A. That's correct.

18. Q. At which point they would pass it on
19. to whichever specific detail would take over the
20. case?

21. A. That's correct.

22. MR. TURNER: Pass the witness, judge.

23. THE COURT: Cross-examination.

24. MS. RADOSTA: No questions, judge.

25. THE COURT: Very good. Step down, sir.

1 Thank you.

2 MR. TURNER: May we approach?

3 THE COURT: You may.

4 [Discussion at the Bench.]

5 THE COURT: Ladies and Gentlemen,
6 counsel and I are going to remain to speak on some
7 procedural matters. I'll let you leave a little
8 early.

9 [Whereupon, the Court admonished the
10 jury.]

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21 ATTEST that this is a true and

22 complete transcript of the proceedings.

23

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25

J. A. D'AMATO CCR17

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DISTRICT COURT **FILED**

CLARK COUNTY, NEVADA

2008 NOV 25 /A 8:24

THE STATE OF NEVADA,

Plaintiff,

vs.

JOSEPH A. HENDERSON,

Defendant.

E. J. Smith
CLERK OF THE COURT

No. C212968

Dept. XIV

ORIGINALREPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DONALD M. MOSLEY

March 19, 2008

9:00 a.m.

Department XIV

APPEARANCES:

For the State:

MS. STACY KOLLINS

Deputy District Attorney

For the Defendant:

MS. VALERIE RADOSTA

Deputy Public Defender

Reported by:

Joseph A. D'Amato

Nevada CCR #17

RECEIVED
NOV 25 2008
CLERK OF THE COURT

1 DISTRICT COURT
2 CLARK COUNTY, NEVADA
3
4 THE STATE OF NEVADA,)
5 Plaintiff,)
6 vs.) No. C212968
7 JOSEPH A. HENDERSON,) Dept. XIV
8 Defendant.)
9

10 REPORTER'S TRANSCRIPT OF PROCEEDINGS
11 BEFORE THE HONORABLE DONALD M. MOSLEY

12 March 19, 2008
13 9:00 a.m.
14 Department XIV

15
16
17 APPEARANCES:

18 For the State:
19 MS. STACY KOLLINS
20 Deputy District Attorney

21 For the Defendant:
22 MS. VALERIE RADOSTA
23 Deputy Public Defender

24 Reported by:
25 Joseph A. D'Amato
Nevada CCR #17

3
1 of '06. Defendant's motion to continue granted.
2 September of '06, defendant's motion to continue,
3 granted again.

4 We go to February of '07, defendant's
5 motion to continue granted again over the State's
6 objection.

7 Move to August '07, defendant's motion to
8 continue again. We might re-test the DNA. We come
9 in in September of 2007 to status check their
10 re-testing of the DNA.

11 Now we're two weeks out from trial and
12 from September until March 19, 2008, they have not
13 accomplished this re-testing.

14 If it took the State, the District
15 Attorney's Office that long to play around with DNA
16 evidence I would be getting cases thrown out.

17 I'm sitting here making a horrible
18 post-conviction record, but these victims are
19 anxious for this to go to trial. I hear from them
20 no less than one time a month.

21 I don't know what preliminary testing was
22 accomplished. I've never heard of such a thing in
23 DNA testing, between September and April of '07, or
24 April of '08, but now what do I do?

25 I have to throw my hands up and say okay.

2
1 THE CLERK: Page two, Henderson.

2 THE COURT: C212968, State versus Joseph
3 A. Henderson. Record reflects presence of the
4 Defendant, in custody, Ms. Radosta is counsel,
5 Ms. Kollins for the State.

6 This is on for status check. We're still
7 trying to get this DNA tested, I believe. What's
8 the status?

9 MS. RADOSTA: As I told you in chambers,
10 due to a lot of extenuating circumstances in the
11 case that really aren't relevant we're still in the
12 process of getting DNA re-tested.

13 We sent it out for preliminary examination
14 and have decided that actual re-testing is necessary
15 in this case. We were talking to one expert, Nora
16 Rudin. That's the name I gave to Ms. Kollins.

17 My new second chair on the case has
18 informed me about another lab that might be able to
19 get it done faster than Ms. Rudin's lab. I don't
20 believe we'll be able to have it done by the 23rd of
21 April. We believe -- I think it was April 28.

22 We will -- do believe we'll have it done
23 by June, which I think is June 23rd.

24 MS. KOLLINS: The State's position is
25 this: Our first trial date in the case was in April

4
1 They get another one. This is seven trial
2 continuances on behalf of the defense. I have no
3 choice in the matter but to say, okay, judge
4 continue it again.

5 THE COURT: All right.

6 MS. RADOSTA: If you'd like me to address
7 the prior continuances, I can.

8 THE COURT: It's a matter of record. I
9 put down here six times it's been vacated. April 28
10 is vacated. 23rd of June is the trial date.

11 The Court is concerned about the history
12 of this case. I'm going to leave it there.

13 MS. RADOSTA: I appreciate that.

14 THE COURT: I'm going to have a two-week
15 status check, if that is viable. I'll ask counsel.

16 I want to know which one of these people,
17 Ms. Rudin or the fellow in North Dakota some place,
18 which one of those is going to be able to do this
19 the earliest and which one it has been sent to.

20 MS. RADOSTA: Absolutely.

21 THE COURT: Two weeks. Is that good?

22 MS. RADOSTA: What would the date be?

23 THE COURT: Date in two weeks.

24 THE CLERK: April 2nd.

25 THE COURT: We'll have all that hopefully

1 right on the record. 23rd of June is the trial that
2 we're now dealing with.
3 MS. RADOSTA: Your calendar call for that
4 would be?

5 THE COURT: 17th of June.

6 MS. KOLLINS: What I would ask for right
7 now is the state be given the CV's of these experts.
8 I've had several phone calls and it's been I don't
9 know who we're using. If I can have a CV from the
10 North Dakota expert and CV from Nora Rudin so I can
11 prepare.

12 I've given them there two and a half three
13 years. I think giving me a little early expert
14 notice is fair under the circumstances.

15 MS. RADOSTA: That's fine.

16 THE COURT: Do you have such?

17 MS. RADOSTA: I believe I have Ms. Rudin's
18 CV. The person from North Dakota, my understanding
19 is he was formerly of the Metro crime lab here.

20 THE COURT: Get that over by the 2nd of
21 April.

22 ATTEST that this is a true and complete
23 transcript of the proceedings held

24 
25 J. A. D'AMATO CCR17

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APR 16 10 05 AM '89

Ed. H. Smith
CLERK OF THE COURT

THE STATE OF NEVADA,
Plaintiff,
vs.
JOSEPH A. HENDERSON,
Defendant.

No. C212968
Dept. XIV

ORIGINAL

REVISÉD

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DONALD M. MOSLEY

June 27, 2008
1:30 p.m.
Department XIV

APPEARANCES:

For the State:
MR. STACY KOLLINS
MR. BRADFORD TURNER
Deputy District Attorneys

For the Defendant:
MS. VALERIE RADOSTA
MR. NORMAN REED
Deputy Public Defenders

Reported by:
Joseph A. D'Amato
Nevada CCR #17

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APR 16 2009

CLEAN OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)
Plaintiff,)
vs.) No. C212968
JOSEPH A. HENDERSON,) Dept. XIV
Defendant.)

SUPPLEMENTAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DONALD M. MOSLEY

June 27, 2008
1:30 p.m.
Department XIV

APPEARANCES:

For the State:
MR. STACY KOLLINS
MR. BRADFORD TURNER
Deputy District Attorneys

For the Defendant:
MS. VALERIE RADOSTA
MR. NORMAN REED
Deputy Public Defenders

Reported by:
Joseph A. D'Amato
Nevada CCR #17

THE COURT: The continuation of
C212968, State versus Joseph Alexander Henderson.
Record reflect the presence of the Defendant with
his counsel, Mr. Reed and Ms. Radosta, Ms. Kollins
and Mr. Turner present for the State.

Ms. Clerk, will you call the roll of
the jury, please?

[Whereupon, the court clerk called the
roll of the jury.]

THE CLERK: The panel is present, Your
Honor.

THE COURT: Very good. Good afternoon,
Ladies and Gentlemen.

Ms. Gunther, let me admonish you
you're still under oath.

Proceed, please.

MR. REED: Yes, Your Honor.

EXAMINATION [cont'd.]

BY MR. REED:

Q. Ms. Gunther, what I'd like to do is
pick up where we left off yesterday evening. In
doing that what I'd like to do is have you remind
the jury that we started into a line of questioning

concerning heterozygot and homozygot.

Can you explain to the jury the
difference between the difference between the two as
easily as we can?

THE WITNESS: Before I get into that
may I make a correction to an answer I made
yesterday?

THE COURT: Yes.

THE WITNESS: One of the questions Mr.
Reed had for me was whether or not the semen stain
on the bed sheet was a mixture.

I had said yes.

The correct answer is no, it was not a
mixture.

BY MR. REED:

Q. That's reflected in your report?

A. Yes.

Q. That it is not a mixture?

A. I identified semen, yes.

Q. I want to make sure we're clear.

Your report is, correctly identifies
it was not a mistake. You just misspoke yesterday.

It was a mixture versus a single

source?

A. Yes, and today I have corrected

myself.

Q. Back to today's question, heterozygot
and homozygot.

A. There are several forms of DNA at each
of the locations. They all have different numbers
based on the number of repeated units.

I don't know if Mr. Welch had
explained that difference to you, but we inherit our
DNA from our parents obviously.

We could have two different forms of
DNA if our parents were different at a particular
location like on the screen it's D2, and that's a
location on chromosome two.

Our parents could have either
differing locations or we could have the same
location.

If the parents, mother and father --
if it's my DNA and my mother and father have the
same DNA at that location will have a single spike
or peak -- we call them peaks -- and it will be
what's called a homozygot. Homo meaning the same,
both parents having the same.

If it's different, like say if the 17
and -- if the 17 and 20 go together that's a
heterozygot meaning they are different, two

1 different types.

2 Q. Now, you don't automatically know
3 whether it's going to be a homo or heterozygote; is
4 that a fair statement?

5 A. Well, you're talking about a single
6 source sample or a mixture sample --

7 Q. In a mixture sample.

8 A. In a mixture sample you're evaluating
9 the individual loci, meaning 2, D2, the individual
10 chromosome and you're also going to be looking at
11 the entire spread of all the different DNA types of
12 the 16 locations.

13 Q. Is D2 an example out of the many that
14 are represented here in defense proposed A in which
15 there could be the presence of a heterozygote?

16 A. In as much as this sample, this is the
17 vaginal swab and what we call the E2 portion or the
18 portion that contains cells and sperm, um, inasmuch
19 as this is a vaginal swab we will have a
20 contribution of the person's own vagina, I mean
21 that's kind of an expected thing and yes, we do have
22 an expectation, knowing Julie Kim's type, that we
23 expect to see a heterozygote in the mixture.

24 Q. But using D2 as an example, the
25 mixture what would be the possible combinations in

1 D2 if it is a heterozygote?

2 A. We're talking about a sample that is a
3 vaginal swab where we expect to see the female
4 contributor's type and in this case I've previously
5 mentioned that I had very few sperm in the sample,
6 so the minor contributor is going to be the lower
7 level person.

8 In this instance we're seeing a
9 mixture of types attributable to Julie Kim. Julie
10 Kim's known sample is a heterozygote, 17, 24.

11 Then there is -- the minor contributor
12 is a 20.

13 Q. I guess my question was this: You're
14 making that analysis based on your comparison with
15 Joseph Henderson's sample; is that correct?

16 A. That is correct.

17 Q. Right.

18 If we remove Joseph Henderson's sample
19 for a minute there's other possibilities concerning
20 the heterozygote; is that also correct?

21 A. We have to take into account Julie
22 Kim's own DNA profile type which is the major type,
23 so we're going to be seeing the 20 as could be a
24 homozygote or could be combined with the 24.

25 The 24 peak is taller than the 17.

1 Q. That is the peak height ratio
2 information that you testified to yesterday on
3 cross-examination?

4 A. Yes.

5 It gets a bit complicated with all the
6 calculations, but you can see that the 24 is higher
7 than the 17 which indicates to me that there is a
8 source, other source of 24 in that mixture.

9 Q. That other signatures of 24 could then
10 be, make it a 20, 24, 20, 20, correct?

11 A. If this were not a vaginal swab --
12 let's just say that this is a vaginal swab that
13 comes from Julie Kim.

14 Her type is the dominant type.

15 Q. Right. As far as the minor profile?

16 A. A minor profile definitely has the 20
17 and because the 24 is enhanced above the 17, it's
18 taller, I would say that there is a contribution of
19 a 24 in there.

20 Q. Right. But there also is the
21 potential for the contribution for the 20, correct?

22 A. The 20, yes.

23 Q. You said -- we started to talk about
24 complicated formula, but the actual peak height
25 ratio itself is not complicated to do, right?

1 A. No, it is not.

2 Q. In fact, can you do that for the jury
3 as to the peak height ratio between the 24 and the
4 20? The calculator is there on your right side.

5 A. The sheer ratio is -- basically when
6 we do a ratio it's going to be a comparison of the
7 lower peak to the higher peak, and so the ratio of
8 20 to 24 is 36.6 percent.

9 Q. Thank you.

10 You also -- you didn't have to in this
11 case, but you also could do that same, could you not
12 also, between the 17 and the 20?

13 A. You could do that between all of them,
14 yes.

15 Q. If we were to strip away the analysis
16 with the 24, you would in fact look at that?
17 Let me ask it this way.

18 That was a very poorly worded
19 question.

20 Regardless of what we see in D2,
21 you're going to look at the differences in the peak
22 between the 17 and the 20, correct?

23 A. Yes.

24 In looking at the numbers actually you
25 can visualize that that is, it's 39 percent.

1 Q. You can actually see there's --

2 A. Right. You can actually pretty much
3 do that calculation in your head.

4 Q. Right.

5 On the right-hand side, while we're
6 talking about it, too, is this RFU level that we
7 were testifying about yesterday?

8 A. Yes.

9 Within the graph printouts there is a
10 general scale showing just a relative peak height so
11 this one that's 1,010, it's just a little bit above
12 this marker over on this side that's 1,000.

13 Q. If we look at this now we know that in
14 your analytical data, obviously this left hand peak
15 is the 17, the center peak is the 20, the right hand
16 peak is the 24, and we know that the 17 and the 24
17 are relatively similar in peaks; is that correct?

18 They are about the same height?

19 A. Well, they are.

20 If you think back to one of my first
21 statements is that whenever you have -- and we know
22 Julie Kim's type at that location is a 17, 24 -- we
23 know that the smaller DNA fragment amplifies higher
24 than the smaller fragment, then we'll expect that
25 Julie Kim's 24 is going to be less than that 944

10

1 which indicates to me that this 1,010 is higher than
2 that 944, so there's something else going on in the
3 peak height.

4 Q. Right.

5 You have to look at that peak height
6 still in relation to the 20 in doing the analysis
7 that you did?

8 A. The companion -- if there were a
9 companion peak to the 020 it would be at least 60
10 percent of that 370.

11 That's where I said that the
12 calculation gets a little complicated, because we're
13 adding other things in now.

14 Q. Now, let me see if we can do this in a
15 more abbreviated version. In looking -- maybe I'll
16 bring it up to you. It might help.

17 There are some representations of
18 stutters in the data that's on defense proposed A.

19 If I bring them you to you can you
20 point out which ones those are or can you look at
21 your notes and indicate where there is a presence of
22 a stutter?

23 A. A presence of a stutter, a peak, would
24 be the prior -- the little bump.

25 Q. Right.

1 A. You can see that there. We've seen
2 some of those. It's hard. It's highly apparent
3 there.

4 Q. When a stutter gets above a certain
5 amount it's something that you have to actually take
6 notice of?

7 A. That's correct.

8 Q. What is that amount?

9 A. Each location on the DNA has a stutter
10 percent and stutter filter can be as high as one or
11 20 percent, depending on the ratio, so at that point
12 we have to look at that carefully.

13 Q. Can you point to the jury an example
14 of where there was a 17 to 20 percent stutter
15 somewhere on this chart?

16 A. The stutter filter has taken the
17 stutter out. There are actual peaks above stutter
18 at CSF1PO.

19 Q. Hold on. Let me see if I can move it.

20 A. Right above the D2.

21 Q. Can you touch the screen there?

22 A. Doesn't clear -- there it goes. There
23 is a 10, 11, 12.

24 Q. And, in fact, you put down, you looked
25 at this because you even put the percentage there of

12

1 22. That's the stutter percentage?

2 A. That is a true peak in a stutter
3 position.

4 Q. So sometimes you'll see stutters like
5 we have seen in some of the other samples here where
6 there is a smaller, little peak.

7 This one you determined to be an
8 actual representation of a potential DNA?

9 A. Correct.

10 MR. REED: I'd move for the admission
11 of defense proposed A.

12 THE COURT: Any objection?

13 MS. KOLLINS: No objection.

14 THE COURT: Received.

15 BY MR. REED:

16 Q. All right. We're going to shift gears
17 off the technical stuff for a minute, if we can.

18 You had, I think, testified that you
19 went over to where all the evidence is kept and you
20 removed the bed sheets out and did the extractions;
21 is that correct?

22 A. Yes. I did the examination of the bed
23 sheet and the robe.

24 Q. When you go over there you pulled out
25 anywhere where there might be the presence of DNA

1 and brought it back to the lab to see what you could
2 find out?

3 A. **No. Make a correction to your**
4 **question.**

5 **As far as going over to where the**
6 **evidence -- the evidence is brought to the forensic**
7 **lab through our chain of custody process.**

8 **We have an examination room where it**
9 **has a big table where you can spread out a large**
10 **item like a bed sheet.**

11 Q. So you have all the items of evidence
12 then you go through them and see if there's anything
13 of any -- where you can maybe get some samples?

14 A. **Yes. We do a visual examination.**

15 Q. Did you ever -- back up a second. You
16 talked about what is good quality DNA.

17 Is a hair sample a potential good
18 quality of DNA?

19 A. **A hair sample could be a good source**
20 **of DNA, depends how many hair sheath cells are**
21 **attached to that hair. It has to be evaluated.**

22 **Basically it has to be consumed in**
23 **testing.**

24 Q. Did you do an evaluation of the hair
25 sample in this case?

1 A. **No, I did not.**

2 Q. Now, if I -- is sweat a good source of
3 DNA?

4 A. **Sweat is not a good source of DNA.**

5 Q. Is it something you might look at?

6 A. **A sweat sample, as you all know, is**
7 **mostly dried water, so it would have -- you would**
8 **have to consume an entire huge area.**

9 **It would take a very laborious process**
10 **to get any DNA out of a sweat sample.**

11 Q. How about a cigarette butt?

12 A. **Can be a good source.**

13 Q. Because of the potential of having
14 your lips on the cigarette and there could be a
15 sloughing of skin cells?

16 A. **Yes.**

17 Q. The area I wanted to ask you about was
18 on the vaginal swab. I think you had testified -- I
19 don't want to misspeak on this -- there was very
20 little?

21 A. **That's correct.**

22 Q. There's an actual report that looks
23 like you indicate there might have only been
24 actually one head of sperm on the vaginal swab?

25 A. **I did have that in my note.**

1 **When we do a microscopic examination**
2 **of a portion of the sample that contains sperm, I'm**
3 **only taking out what's called a microliter, which is**
4 **a very, very tiny droplet.**

5 **Within that droplet I make a**
6 **preparation on the microscope slide. I'm only**
7 **taking 1/50th of the sample that I've extracted.**

8 **I'm making a microscope preparation.**
9 **I still have 49 parts left in my tube. If I find,**
10 **say, one sperm in that, I'm going to proceed and**
11 **follow the extraction through to see if I can get**
12 **more information out of that sample.**

13 **There is a potential.**

14 **At that point I want to proceed very**
15 **carefully and because I did get a male profile from**
16 **the vaginal swab it indicates to me there is more**
17 **sperm in the 49 parts that remained.**

18 Q. But you did -- the vaginal swab had
19 the one -- had one sperm?

20 A. **In the single microliter preparation**
21 **that I did.**

22 Q. Before you extracted out and do the
23 rest of the test?

24 A. **Before I did the rest of the testing.**

25 Q. Correct.

1 Now, is it true that the more sperm
2 that is present the better the chance of you getting
3 an accurate DNA profile?

4 A. **A complete profile instead of saying**
5 **accurate. It is accurate, but a more complete**
6 **profile.**

7 MR. REED: Pass the witness.

8 THE COURT: Cross-examination or
9 re-direct?

12 RE-EXAMINATION

13 BY MS. KOLLINS:

14 Q. Good afternoon, Ms. Gunther.

15 A. **Good afternoon.**

16 Q. I want to go over a couple of things
17 as briefly as I can.

18 I want to make sure we have this as
19 straightforward as we can.

20 Mr. Reed concentrated his
21 cross-examination of the vaginal swab.

22 A. **Yes.**

23 Q. That was the only mixture in all the
24 analyses that you performed in this case; is that
25 correct?

1 A. **Correct.**

2 Q. At the time you conducted your
3 examination you had a known DNA sample of -- the
4 person identified to you as Julie Kim?

5 A. **Yes, I did.**

6 Q. So when we went through the isolated
7 questions about each one of those peaks you can't
8 look at that isolation, can you?

9 You have to look at that as a TR
10 profile. You can't look other than just one peak at
11 a time?

12 A. **That's correct.**

13 Q. It's the combination of knowing Julie
14 Kim's profile, a known individual, and then looking
15 for the minor contributor?

16 A. **That's correct.**

17 Q. When Mr. Reed talked to you about --
18 I'm going to use, for example, not going through
19 each one of the peaks he went through with you, but
20 when he talked to you about I believe it was --
21 indulge me for a second.

22 Is D3 the last one he was asking you
23 about?

24 MR. REED: D2.

25 BY MS. KOLLINS:

1 Q. D2?

2 A. **Yes.**

3 MS. KOLLINS: Approach your clerk?

4 THE COURT: You may.

5 BY MS. KOLLINS:

6 Q. When he was going through -- excuse me
7 -- I can't quite get it right.

8 When he was going through D2 with you
9 is that D2 up here or D2 down at the bottom?

10 A. **The bottom D2.**

11 Q. You knew that Julie Kim's numbers were
12 17, 24, correct?

13 A. **Yes.**

14 Q. Knowing that that was 17, 24 any other
15 number that came up in that designation, what would
16 that suggest to you?

17 A. **Because I did detect the presence of**
18 **sperm and we do have what's called a miligenin TY**
19 **[phonetic], which indicates there was male DNA**
20 **there, because it's from sperm, then anything that**
21 **wasn't a 17 or a 24 would be from the foreign source**
22 **and then anything that was in excess of the ratio of**
23 **17 to 24 could be from the contributor also.**

24 Q. Can you look at -- I want to
25 articulate this question and not make it more

1 confusing than it is to me -- can you look at that
2 single location and when you look at that
3 contributor can you look at that isolated location
4 and tell whether it's male or female?

5 A. **No.**

6 Q. You can only tell it in combination
7 with everything else?

8 A. **Well, if we were thinking about a**
9 **vaginal swab where we know we have sperm, then we**
10 **know we have more than one contributor there, and**
11 **knowing what the female's type is we would say well,**
12 **the type that isn't her's has to come from the male**
13 **contributor.**

14 Q. In other words, then there is no
15 reason to come up with different combinations of
16 those numbers at that site if you know what the
17 female's numbers are?

18 A. **That's correct.**

19 Q. As far as testing a hair sample what
20 kind of DNA do you generally get from a hair sample?

21 A. **A hair sample has to have a lot of**
22 **cells from its root. It has to be pulled out.**

23 **If I would pull on my hair and pull**
24 **hair out I might be able to get enough DNA for a**
25 **test.**

1 **Hair analysis was not typically done**
2 **in our laboratory at that time. I'm sure that there**
3 **would be qualifying tests that you would have to**
4 **take.**

5 Q. Is it a different type of analysis
6 than what was performed here?

7 A. **It is a little bit different**
8 **extraction procedure.**

9 Q. As far as testing a cigarette, you
10 would be looking for saliva cells?

11 A. **Actually the cells from the lining of**
12 **the mouth, yes.**

13 Q. Epithelial cells contained within
14 saliva, certainly?

15 Q. The same kind of epithelial cells that
16 saliva on a breast might leave?

17 A. **Yes.**

18 Q. **And I know you clarified this earlier**
19 **when you first took the witness stand, but to make**
20 **sure the mixture, when you testified yesterday that**
21 **there was a mixture on the bed sheet, that was in**
22 **error?**

23 A. **That was in error.**

24 Q. The bed sheet testing was a single
25 source test, correct?

1 A. That was a single source, a male
2 profile.

3 Q. As well as the saliva from the breast,
4 that was also single source?

5 A. Yes.

6 Q. Ma'am, in your professional opinion,
7 to a reasonable degree of scientific certainty, who
8 was the contributor?

9 A. The male contributor is Joseph
10 Henderson.

11 Q. On the bed sheet?

12 A. On the bed sheet.

13 Q. In the vaginal -- from the vaginal
14 swab?

15 A. Sperm from the vaginal swabs.

16 Q. And as to the breast swabbing?

17 A. The breast swabbing, yes.

18 MS. KOLLINS: No more questions.

19 THE COURT: Anything further?

20 MR. REED: Nothing else, judge.

21 THE COURT: You're excused. Thank you.

22 Next, please.

23 MS. KOLLINS: State calls Kim Murga.

24 MR. REED: Approach, judge.

25 THE COURT: Yes.

1 (DISCUSSION OFF THE RECORD)

2

3 KIM MURGA,

4 called as a witness herein, was sworn by the court
5 clerk, was examined and testified as follows:

6

7 EXAMINATION

8 BY MS. KOLLINS:

9 Q. Good afternoon. Can you state your
10 full name and spell your last for the record?

11 A. My name is Kimberly M-u-r-g-a.

12 Q. Ms. Murga, how are you employed?

13 A. I'm currently the DNA laboratory
14 manager for the Las Vegas Metropolitan Police
15 Department, crime laboratory.

16 Q. How long have you been the laboratory
17 manager for Metro?

18 A. I've been the DNA laboratory manager
19 since February of 2008.

20 Q. Prior to February 2008 where were you
21 employed?

22 A. I was employed by the Las Vegas Metro
23 Police crime laboratory and I was the DNA technical
24 leader.

25 Q. For how long were you employed in that

1 capacity?

2 A. I began with Las Vegas in July of
3 2007.

4 Q. Prior to your career here in Las Vegas
5 as both a technical leader and the manager of the
6 DNA lab how were you employed?

7 A. I was previously employed by the Armed
8 Forces DNA identification laboratory in Rockville,
9 Maryland, for 11 years prior to that.

10 Q. And prior to that did you hold any
11 positions in this type of field?

12 A. No, I did not.

13 Q. What training and education qualifies
14 you to perform as the DNA lab manager as well as the
15 technical leader here at Metro?

16 A. I have a Bachelor of Science from
17 Shawmanaug University in criminal justice and a
18 Bachelor of Arts in Biology from Shawmanaug
19 [phonetic] University of Honolulu and I also have a
20 Master of Science, master of forensic science in
21 forensic sciences from the George Washington
22 University in D.C.

23 Q. Can you tell can you tell us have you
24 testified as an expert before?

25 A. I have.

1 Q. In the specific field of DNA profiling
2 and analysis?

3 A. Yes, I have.

4 Q. Which courts have you testified?

5 A. I testified in military courts,
6 several times, and I've also testified in Federal
7 Court here in Las Vegas.

8 Q. What kind of DNA profiling
9 investigations have you involved yourself in?

10 A. I've been qualified in autoselmo
11 STR's, currently the type of case we're trying.
12 I've also been qualified in YST analysis and
13 mitochondrial analysis and I have been involved in
14 doing thousands of cases to identify remains that
15 are diseased from military conflicts such as
16 Operation Iraqi Freedom, Enduring Freedom, plus
17 military conflicts such as the Viet Nam War, Korean
18 War.

19 I've been involved in a number of
20 plane crashes, as well as DNA analysis in terrorist
21 attacks such as the Pentagon plane crash, Sommerset
22 plane crash, as well as identification of a number
23 of high profile terrorists such as Saddam Hussein,
24 Uday and Usay Hussein, thousands of cases prior to
25 my arrival at Las Vegas Metropolitan Police crime

1 **laboratory.**

2 Q. I'd like to draw your attention to a
3 case under Metro Police event number 03409030152
4 involving the victimization of a female by the name
5 of Julie Kim.

6 Are you familiar with that case?

7 A. **I am familiar with that case.**

8 Q. Did you personally conduct any of the
9 testing on that case?

10 A. **I did not conduct any of the analysis**
11 **on that case.**

12 Q. Is part of your job as the laboratory
13 manager to sit in and do a peer review of cases?

14 A. **Yes.**

15 Q. And do you routinely review work and
16 reports that go in and out of the laboratory?

17 A. **I do.**

18 Q. This particular case, its inception
19 was prior to you being at the crime lab; is that
20 correct?

21 A. **That is correct.**

22 Q. Did you go back and review all the
23 case work that was conducted in this case?

24 A. **I did.**

25 Q. I'd like to take you back to the -- if

26

1 I could very briefly -- the sexual assault kit that
2 was initially examined by David Welch wherein at the
3 time there was no known suspect.

4 Are you familiar with that work on
5 this case?

6 A. **I am familiar with that.**

7 Q. Did you review Mr. Welch's work in
8 that, regarding the very inception of this case?

9 A. **I did review David Welch's work.**

10 Q. You looked at the first profile he
11 obtained from the breast swab of Julie Kim?

12 A. **I did, yes.**

13 Q. And in your opinion was that profiling
14 done correctly?

15 A. **Yes, it was.**

16 MR. REED: Object. This is vouching
17 for another expert witness's testimony.

18 This is not proper.

19 THE COURT: What is it?

20 MS. KOLLINS: She can read another
21 expert's report.

22 THE COURT: Absolutely she can.

23 Overruled. Proceed.

24 You can make your record later. Thank
25 you.

1 Proceed.

2 BY MS. KOLLINS:

3 Q. Did you review his extraction process?

4 A. **I did.**

5 Q. Did you review his charting?

6 A. **I did.**

7 Q. Did you review his conclusions?

8 A. **I did.**

9 Q. And what is your conclusion of the
10 work he did on the profile?

11 A. **That the DNA work was done properly,**
12 **there was no contamination and the DNA results**
13 **obtained were correct.**

14 Q. Moving forward to February of 2005,
15 when Ms. Gunther obtained information from another
16 agency regarding a potential suspect by the name of
17 Joseph Henderson, are you familiar with that part of
18 the file?

19 A. **I am.**

20 Q. Ms. Gunther was directed to get a
21 search warrant to get a known sample from the person
22 identified as Joseph Henderson, correct?

23 A. **Correct.**

24 Q. She didn't directly obtain that
25 sample. Metro did it, on her behalf?

28

1 A. **That is correct.**

2 Q. And she did a re-comparison of the
3 breast sample to the known sample of Joseph
4 Henderson, correct?

5 A. **Yes.**

6 **She worked the new sample obtained**
7 **from Joseph Henderson and obtained the same profile**
8 **and confirmed the match.**

9 Q. Did you review that match confirmation
10 work done by Ms. Gunther in March of 2005?

11 A. **I did.**

12 Q. Did you review her extraction process?

13 A. **I did.**

14 Q. Did you review her documentation
15 process?

16 A. **I did.**

17 Q. Did you check her file similar to what
18 a peer review would do?

19 A. **I did.**

20 Q. Did you find any errors in her
21 reporting?

22 A. **I did not.**

23 Q. Did you review her conclusions?

24 A. **I did.**

25 Q. In your opinion, did she arrive at the

1 appropriate conclusion?

2 A. Yes.

3 Q. Which was?

4 A. **That the DNA profile, whether -- are**
5 **we talking about the first, when she worked the**
6 **buccal swab from Joseph Henderson, or the entire**
7 **case?**

8 Q. No, the buccal swab from Joseph
9 Henderson against the breast swab.

10 A. **The results obtained were that the DNA**
11 **profile obtained from the breast swab from Julie Kim**
12 **matched the DNA profile of that obtained from Joseph**
13 **Henderson's swab.**

14 Q. Do you agree with her statistical
15 conclusion one in six hundred billion?

16 A. I do.

17 Q. One in six hundred billion, would you
18 agree with this statement, that's the probability
19 that that profile generated from that breast
20 swabbing, that it was identical to the profile of
21 the defendant's known sample, so small that if
22 ordered to find it again you would have to have more
23 people than are on the planet?

24 A. **That is correct. The DNA profile**
25 **obtained from the breast swab from Julie Kim, the**

30

1 **male profile is rarer than one in six hundred**
2 **billion individuals.**

3 Q. Which means to find it again you'd
4 have to have 100 times the earth's population?

5 A. Yes.

6 Q. Now, did you -- after looking at that
7 analysis did you then -- there was some more testing
8 done in the case; is that correct?

9 A. **That's correct.**

10 Q. The vaginal swabs were looked at again
11 as well as a bed sheet and a robe?

12 A. **That is correct.**

13 Q. Ms. Gunther was able to come up with
14 profiles on the vaginal swabs and the bed sheet?

15 A. **That is correct.**

16 Q. As to the vaginal swab extraction and
17 profiling process do you have an opinion as to
18 whether or not Ms. Gunther carried out her work
19 correctly?

20 A. **She did it according to the protocols**
21 **in place and there was no combination or no evidence**
22 **of anything that went wrong in the case, so yes, she**
23 **did reach the correct conclusions.**

24 Q. And her conclusion as to the vaginal
25 swab was that there was a mixture of Julie Kim and

1 Joseph Henderson, is that correct?

2 A. **That is correct.**

3 Q. In reviewing her work did you find any
4 error in her conclusion?

5 A. **I did not.**

6 Q. Do you agree with her conclusion?

7 A. **I do.**

8 Q. As to the bed sheet, did you review
9 her work done on the bed sheet?

10 A. **I did.**

11 Q. And anything wrong with the extraction
12 process?

13 A. **No.**

14 Q. Anything incorrect in the
15 documentation?

16 A. **No.**

17 Q. Did you agree with her conclusion?

18 A. **I did.**

19 Q. Did you -- and her conclusion was?

20 A. **Her conclusion was the male profile**
21 **obtained from the bed sheet was consistent with the**
22 **same male profile obtained from the vaginal swab**
23 **which was consistent with the same male profile**
24 **obtained from the breast swab of Julie Kim.**

25 Q. Did you agree with her statistical

32

1 analysis?

2 A. Yes.

3 Q. If I could back you up to the vaginal
4 swab for a second, in the vaginal swab we had a
5 mixture, a minor male contributor?

6 A. Yes.

7 Q. A major contributor, that being the
8 known sample of Julie Kim, correct?

9 A. Yes.

10 Q. I'm showing you that up there at F, G,
11 A and D, D13 there was -- there was insufficient
12 material to assign a profile to that location; is
13 that correct?

14 A. **That is correct.**

15 Q. And does that sometimes happen?

16 A. **Absolutely, in samples that are**
17 **degraded or old or just have very few DNA cells,**
18 **yes.**

19 Q. Ms. Gunther's conclusion, statistical
20 conclusion was still what?

21 A. **That the male contributor to the**
22 **mixture of the vaginal swab matched that profile of**
23 **Joseph Henderson.**

24 Q. And it still has that one in six
25 hundred billion number?

1 A. That is correct.

2 Q. And the fact that those two places are

3 missing on the profile does not alter that

4 statistical analysis?

5 A. That's correct.

6 Q. The last couple questions I have for

7 you is six hundred billion is a number set by the

8 laboratory, correct?

9 A. That is correct.

10 Q. Is the actual number actually far

11 different than that?

12 A. It is actually.

13 The number extended into the

14 quadrillions and the quintillions, which is

15 something like 15 zeroes behind that, but I mean

16 those are huge numbers, difficult for even me to

17 comprehend, and so our lab decided that we would cut

18 identity, identifying somebody, calling somebody the

19 contributor of that stain at 100 times the world

20 population which at the time was six billion.

21 So we just stop at 100 times the world

22 population because the numbers are so astronomical.

23 Q. To a reasonable degree of scientific

24 certainty, do you have an opinion as to who the

25 contributor was to the semen sample found on the bed

1 sheet?

2 A. I believe that that person was Joseph

3 Henderson.

4 Q. And the same question as to the breast

5 swabbing, do you have an opinion to a reasonable

6 degree of scientific certainty who the contributor

7 was to the epithelial cells found in the saliva on

8 the breast of Julie Kim?

9 A. The individual who left the DNA on the

10 breast swab of -- on the breast sample of Julie Kim

11 is Joseph Henderson.

12 Q. The same last question, to a

13 reasonable degree of scientific certainty do you

14 have an opinion as to who the minor contributor was

15 in the vaginal -- from the vaginal swabs of Julie

16 Kim?

17 A. The individual who contributed to the

18 DNA mixture, the male profile in the vaginal swab is

19 Joseph Henderson.

20 MS. KOLLINS: Pass the witness.

21 THE COURT: Cross-examination.

22 MR. REED: Thank you.

23

24

25

1 EXAMINATION

2 BY MR. REED:

3 Q. When did you look at these records,

4 Ms. Murga?

5 A. I looked at them couple of weeks ago.

6 Q. Couple weeks ago?

7 A. Yes.

8 Q. And the testing was done back in 2005?

9 A. 2004 and 2005.

10 Q. Who asked you to look at the records?

11 A. Actually I was subpoenaed. I was

12 called a couple of weeks ago by an attorney

13 regarding this case and I pulled the records at that

14 time, because one of my former co-workers was going

15 to testify.

16 I always pull his cases.

17 Q. When you say subpoenaed, you were

18 subpoenaed by the District Attorney's Office?

19 A. Yes, couple weeks ago.

20 Q. The attorney you're talking about is a

21 prosecutor, correct?

22 A. You know --

23 Q. Not sure?

24 A. -- I think it was a defense attorney.

25 I know his last name, but I don't know if I should

1 say it.

2 Q. That's okay.

3 A. Acuna, something Acuna.

4 Q. All right. You were asked to look at

5 these records two weeks ago?

6 A. Yes.

7 Q. Or roughly?

8 A. I wasn't asked. I was subpoenaed so I

9 pulled the files.

10 Q. A subpoena is a request?

11 A. Yes.

12 Q. So a request came from the prosecutor

13 to look at these records?

14 A. Yes.

15 Q. And then about two weeks ago you

16 looked at these records from three years, that are

17 almost four years old?

18 A. Correct.

19 Q. When you were saying you looked at all

20 of these records basically what you looked at is

21 just all the paperwork and data and such that's in

22 the file?

23 A. Correct.

24 Q. And you probably have a copy of it

25 there?

1 A. I do.
 2 Q. Is that the same stuff Mr. Welch or
 3 Ms. Gunther had when they were testifying?
 4 A. Yes. This is actually Dave Welch's
 5 case. Kathy Gunther has her own files.
 6 Q. Did you take any notes while you were
 7 looking at all these reports?
 8 A. Yes, I did.
 9 Q. Do you have those notes?
 10 A. I do.
 11 Q. Can you -- can I see those?
 12 A. Absolutely.
 13 Q. What day did you generate these notes
 14 on?
 15 A. I generated them over the course of
 16 past couple weeks.
 17 MR. REED: Can I have a little time to
 18 study these notes? I've received them just now.
 19 I need a minute to look at them.
 20 THE COURT: Are you suggesting a break
 21 or pause?
 22 MR. REED: I might take five minutes.
 23 I'd like to at least read them before I ask her
 24 questions about them.
 25 I just found out about it just now in

38

1 Court.
 2 [Whereupon, the court admonished the
 3 jury.]
 4 [Recess taken.]
 5 THE COURT: The continuation of C12968,
 6 State versus Joseph Alexander Henderson. Record
 7 reflect the presence of the Defendant and his
 8 counsel, Mr. Reed and Ms. Radosta. Ms. Kollins and
 9 Mr. Turner present for the State.
 10 Will counsel stipulate all members of
 11 the jury are present and properly seated?
 12 MS. KOLLINS: Yes, Your Honor.
 13 MS. RADOSTA: Yes.
 14 THE COURT: Ms. Murga, let me admonish
 15 you you're still under oath.
 16 Proceed, please.
 17 BY MR. REED:
 18 Q. The notes that you took were like on a
 19 plain old piece of notebook paper, right?
 20 A. That is correct.
 21 Q. Front and back?
 22 A. That is correct.
 23 Q. You took those notes to allow you to
 24 relate to the jury basically what you reviewed from
 25 the actual records themselves?

1 A. I didn't take it with the intent in
 2 relaying it to the jury.
 3 I took it with the intent so I knew
 4 what was going on with the case; that's what I do
 5 when I review cases, look over and take notes for
 6 myself so I have a timeline of what was going on,
 7 especially something that occurs over such a large
 8 time, length of time.
 9 Q. Did you have to go back and look at
 10 these notes before testifying today?
 11 A. Yes.
 12 Q. You used them to refresh your memory?
 13 A. Yes.
 14 Q. Now, you had had -- you had testified
 15 that you looked at the extraction process on the top
 16 sheet.
 17 What extraction process was used by
 18 Ms. Gunther on the top bed sheet back in 2005?
 19 A. She used a kiagen [phonetic]
 20 extraction methodology.
 21 Q. Can you explain to the jury briefly
 22 what that is?
 23 A. Kiagen is a methodology where when you
 24 have a substraight you can actually cut out that
 25 substraight or take off the swab, whatever it may

40

1 be, add some chemicals, the DNA is then aladded
 2 [phonetic] off of the substraight and you have your
 3 extraction ready for the next step in DNA analysis
 4 called amplification.
 5 Q. Fair to say there's different ways to
 6 extract DNA?
 7 A. Absolutely.
 8 Q. And that different examiners might use
 9 different methods?
 10 A. That is correct.
 11 Q. That would have been the decision that
 12 was made by Ms. Gunther at the time?
 13 A. Yes.
 14 Q. Now, have you reviewed any other DNA
 15 cases from the years preceding your employment at
 16 the Las Vegas Metropolitan Police Department?
 17 A. I have.
 18 Q. Does that include any cases that have
 19 been around for at least four years or more?
 20 A. Yes.
 21 Q. Do you do that frequently or do you do
 22 that on occasion?
 23 A. I do that on occasion.
 24 Q. When you do that is that done in
 25 anticipation of testifying before a jury?

1 A. Well, sometimes yes and then sometimes
2 I'm going back to look at other older methodologies,
3 stats, and stuff that was done to kind of see the
4 evolution of where we were and where we are today.

5 Q. But in that second review it's more
6 for learning than it is to make sure they did the
7 job right?

8 A. Correct.

9 Q. That's fair to say?

10 A. Correct, yes.

11 Q. And obviously you didn't know who the
12 technical -- maybe you do.

13 Do you know who the technical leader
14 was back in 2004?

15 A. I believe was Birch Henry.

16 Q. And then there was a peer review done,
17 too?

18 A. Yes.

19 Q. So all of these steps that are
20 normally taken in the lab were all done years before
21 you even came into the case?

22 A. That is correct.

23 Q. Dave Welch testified that despite all
24 the peer review and technical review it isn't that
25 flawless a process.

1 Do you concur with that?

2 A. Yes, I concur.

3 MR. REED: Pass the witness.

4 THE COURT: Re-direct?

5 MS. KOLLINS: Couple questions.

6

7

8

9 RE-EXAMINATION

10 BY MS. KOLLINS:

11 Q. Mr. Welch is no longer employed with
12 your laboratory; is that correct?

13 A. Yes. He retired in December 2007.

14 Q. Some of these requests of older cases
15 that you've been asked to review, have you done that
16 in anticipation of his perhaps unavailability to
17 come back to this jurisdiction?

18 A. That is correct.

19 I routinely review Dave Welch's cases
20 when subpoenas come in. I might have to testify for
21 him.

22 Q. And Birch Henry is also no longer with
23 the lab?

24 A. Yes. Birch Henry left I believe April
25 or May of 2006.

1 Q. The person that did this peer review
2 for Mr. Welch is also no longer at your laboratory?

3 A. That is correct.

4 Q. And do you review cases that he
5 reviewed in case you may have to testify from his
6 results for a trial?

7 A. That is correct.

8 Q. I'm sorry, one second, please.

9 This report -- well, it's not a
10 report -- your personal notes that you took in this
11 case, this was not something that was shared, in
12 other words, the State did not have a copy of this
13 before today either?

14 A. That is correct.

15 Q. These were notes personal to you?

16 A. Yes.

17 Q. They were not part of the original
18 workup on the case?

19 A. No.

20 Q. Anything that's contained within here
21 is contained within Dave Welch's and Kathy Gunther's
22 original files; is that correct?

23 A. That is correct.

24 Q. This is just condensed information
25 from those files?

1 A. Yes.

2 Q. And nothing new appears in this
3 document that you shared with Mr. Reed and myself
4 this morning?

5 A. No.

6 It's a summation of the timeline for
7 both Dave Welch and Kathy Gunther's processes.

8 Q. Is this something you would routinely
9 do for yourself when you are preparing, in the event
10 that you would have to testify for somebody that's
11 not in the jurisdiction any longer?

12 A. Yes.

13 Q. Or at least not employed by the
14 jurisdiction any longer?

15 A. Even my own cases that I do I do that.

16 MS. KOLLINS: No more questions.

17 THE COURT: Anything further?

18

19

20 RE-EXAMINATION

21 BY MR. REED:

22 Q. Despite the fact Dave Welch is a
23 retired fisherman, he came back to testify, correct?

24 A. Correct.

25 Q. Examiners leave and retire but it

1 doesn't mean they are unavailable, necessarily,
2 right?

3 A. I mean --

4 Q. Dave Welch was here?

5 A. Yes, he was here, but I know he's also
6 taken a series of lengthy trips and I've been called
7 to testify several times for Dave Welch.

8 Q. But not in this case?

9 A. Not in this case.

10 Initially, I was, but he was available
11 at the last minute, I believe.

12 Q. He cleared up one of his fishing
13 trips?

14 A. Yes.

15 MR. REED: Thanks. That's it.

16 THE COURT: Anything further?

17 MS. KOLLINS: No.

18 THE COURT: Thank you very much.
19 Further witnesses?

20 MS. KOLLINS: No, Your Honor.

21 I would check to see that everything
22 the State has offered save and except what the court
23 declined to admit has been admitted into evidence.

24 COURT CLERK: Those things I showed
25 you -- those photos in the two envelopes.

1 MS. KOLLINS: Court's indulgence.
2 With that confirmation the State is
3 prepared to rest.

4 THE COURT: Counsel approach, please.
5 (DISCUSSION OFF THE RECORD)

6 THE COURT: Ladies and Gentlemen,
7 counsel and I are going to work on some items we
8 need to prepare. It's going to take us a little
9 time.

10 I'm going to recess and have you exit
11 the court room and I'll indicate I'll have you back
12 quarter after three.

13 [Whereupon, the court admonished the
14 jury.]

15 THE COURT: The record will indicate
16 the jury has exited the courtroom.

17 Mr. Reed?

18 MR. REED: Your Honor, on behalf of
19 Mr. Henderson at this point we'd make a motion for
20 mistrial or in the alternative to strike the
21 testimony of Kim Murga.

22 That request is based on the
23 following: Kim Murga was noticed as an expert
24 witness by the State 20 days prior to trial, albeit
25 it's only one day short.

1 Nevertheless, the Supreme Court has
2 said unless good cause can be shown that they are
3 strictly enforcing the 21 day rule regarding expert
4 witnesses.

5 THE COURT: Is there a good cause?

6 MS. KOLLINS: Your Honor, there is.

7 When Mr. Welch testified in the last
8 trial for the District Attorney's Office the bill
9 went to the county.

10 The county did not pay him in a timely
11 fashion, and he was back and forth whether he was
12 going to testify for us in this case.

13 I spent probably an hour and a half on
14 the phone with him trying to get him to agree to
15 come in for this case.

16 In addition, in April 2007, when we
17 were here on the calendar call for the last date
18 that was vacated for the defense, I think that was
19 about the 28th or 29th trial setting, I told Mr.
20 Reed verbally that we may have to use Kim Murga
21 because Dave Welch's availability has been very
22 happenstance over the course of the last six or
23 eight months for the District Attorney's Office.

24 He said he understood. There wasn't a
25 problem. That conversation was had.

1 I still didn't know 21 days ago
2 whether Dave Welch was going to testify. In an
3 effort to make sure I preserved probably the ninth
4 or 10th trial setting that was continued by the
5 public defender's office.

6 I made sure that I had an expert on
7 board. I didn't want to walk in here and say I
8 could not present my DNA evidence.

9 That is good cause.

10 I didn't know whether Dave Welch was
11 going to be in the jurisdiction such that I could
12 serve him a subpoena and whether or not his travel
13 plans he's very reluctant to share were going to be
14 shared with the District Attorney's Office such that
15 I knew where he was even going to be.

16 He is no longer a Metro employee.
17 He's like any other civilian right now. If I catch
18 him, I can serve him.

19 I don't have his sargents or
20 lieutenants directing him as I do the rest of these
21 lab individuals to come down here and testify.

22 He has been less than amenable, I will
23 say, to coming in and testifying on behalf of the
24 State.

25 I know someone else has him in a trial

1 next week or on the 7th and he is not going to come
2 in for that and they are in a position where they
3 have to use Kim Murga.

4 MR. REED: Reply to that. What counsel
5 said is absolutely correct.

6 My understanding was that Dave Welch
7 would be used -- Ms. Murga would be used in the
8 place and instead of Mr. Welch for -- if he were to
9 be unavailable then she would be the substitute for
10 him.

11 That didn't in fact happen.

12 We had that conversation way more than
13 21 days prior to trial. Additionally, judge, it is
14 more now the nature of Ms. Murga's testimony that
15 becomes prejudicial to Mr. Henderson.

16 What they have now done is actually
17 basically introduced rebuttal testimony into their
18 case in chief to help buttress the opinions of Mr.
19 Welch and Ms. Gunther, and in doing so the
20 additional problem we have with this testimony in
21 doing so is there is no report or record of any of
22 the work that is done by Ms. Murga at all, until I
23 walk in here in the middle of a case and begin to
24 cross-examine her in front of the jury and notes are
25 produced and I have to literally take a break and

1 read these notes which I cannot now confer with my
2 expert regarding any of these notes, and to be able
3 to properly cross-examine them on it.

4 We have the complexity of not only the
5 prejudicial nature of her testimony, but we also
6 have a discovery violation.

7 I realize the State is going say,
8 because they elicited it on re-direct examination,
9 we were not aware of these notes.

10 With all due respect to the District
11 Attorney, so what?

12 The discovery rules say that they have
13 an ongoing responsibility to provided all discovery
14 especially when it comes to expert witnesses.

15 Any new notes or any new reports that
16 are generated by the Las Vegas Metropolitan Police
17 Department forensic lab must be timely turned over
18 to the Defense.

19 They had three weeks to do it and now
20 I'm completely surprised by this and have to
21 cross-examine Ms. Murga the best I can with these
22 notes.

23 The notes are basically a summary,
24 that is true, of what was already done by Mr. Welch
25 and Ms. Gunther.

1 However, there is also -- and we've
2 made it a court exhibit and I'm going to ask it be
3 introduced as a court exhibit, there is also
4 mathematical calculations on there and other
5 notations regarding her analysis all of which I
6 would like to show to my expert to say are these
7 numbers correct?

8 Are they reasonable?

9 Did she do this right?

10 I can't do that in the middle of the
11 trial.

12 MS. KOLLINS: If I may -- and I don't
13 know if the Court has looked at the document. We've
14 made the copy on the a court exhibit.

15 What is on here is the event number,
16 the statistic one in six hundred billion that was on
17 every report.

18 She just testified all this
19 information was taken for her to put together a
20 chronology. She lists what things were in the
21 sexual assault kit which is also on a report by
22 David Welch and Kathy Gunther, she talks about when
23 the code hit, which we're all precluded from talking
24 about, and she talks about when the match was done
25 in the convicted offender database.

1 She talks about the supplemental DNA
2 report. She puts the dates of each of the reports
3 that are on here. She does the dates, wrote her
4 report, did her testing, got her requests.

5 She looks at the math that was
6 contained within Kathy Gunther's report. I did not
7 elicit the actual mathematics that Mr. Reed wants to
8 quibble about right now.

9 One in 36 quadrillion, I mean, the
10 numbers she gets to that are out of Kathy Gunther's
11 report are actually --

12 MR. REED: Those are not in the report.

13 MS. KOLLINS: Those calculations are
14 done.

15 MR. REED: They are not reflected in
16 the report, nor in her notes.

17 MS. KOLLINS: I haven't interrupted
18 you.

19 THE COURT: Let her finish.

20 Go ahead.

21 MS. KOLLINS: She draws the same --
22 puts the same statistic on, one in six hundred
23 billion, talks about the 13 losi tests and the 15
24 losi tests from the July report.

25 This is -- these are a chronological

1 list of things for her to familiarize herself with
2 the file.

3 This is like me writing down notes for
4 a witness I'm going to question. This is not
5 anything substantive that they have been deprived
6 of, nor is it any new information.

7 It's not new discovery. There is no
8 new conclusions in here. There is no new evidence.

9 There is nothing can be gleaned from
10 this two-page report that is not part and parcel of
11 the entire file that they and their expert whose
12 report I never received, by the way, have been going
13 over for the last four months since April or
14 whenever they obtained that file from Metro.

15 I assume it's sometime before April
16 because April they came in here and said they didn't
17 have a re-test.

18 They have had access to the full and
19 complete analyses. Sometime after they came in here
20 last August and said that they were going to
21 re-test.

22 They decided, in April, not to.

23 I assume sometime between August of
24 2007 and and April of 2008 they obtained a full and
25 complete copy of every charted piece of evidence.

1 This is a summary for this witness to
2 testify and there is nothing in here prejudicial.
3 It all mimics what is already contained in
4 discovery.

5 This is to make a record.

6 MR. REED: Can I reply?

7 THE COURT: Yes.

8 MR. REED: Here is the problem.

9 Specifically on the mathematical
10 calculations, they break it down into caucasion,
11 black, I assume, Hispanic and white. It's hard to
12 tell from these indications.

13 Nowhere in any report or in any record
14 contained in Ms. Gunther's file are these
15 mathematical calculations present.

16 This is the first time, and this is
17 the only time that I have them. If counsel
18 disagrees with that, then I'd ask her to show me
19 where these specific numbers are represented in the
20 data compiled by Ms. Gunther.

21 Additionally, if we keep talking about
22 this, my expert -- I have an expert consultant.
23 There is no report. If I am not offering her as a
24 witness I am not obligated to give the State
25 anything.

1 MS. KOLLINS: You know what?

2 You're obligated by the reciprocal
3 discovery rules.

4 MR. REED: Which says if I intend to
5 use her as a witness. That's an aside.

6 THE COURT: Let me ask you, you said
7 something about caucasion and black here. According
8 to my reading, the black designation is one in 2.1
9 quadrillion.

10 MR. REED: Correct.

11 THE COURT: It's higher in the
12 caucasion realm; is that correct? One in 36
13 quadrillion; is that right?

14 MR. REED: I didn't ask these questions
15 because I wasn't prepared to do so, but I think it's
16 actually the opposite.

17 I'm a novice. I don't know.

18 MS. KOLLINS: It certainly isn't
19 exculpatory. We didn't talk about ethnicity
20 anywhere in this case.

21 THE COURT: How is this beneficial to
22 your case, Mr. Reed, assuming that you did inquire
23 of the witness about these notes?

24 MR. REED: That's a good question.
25 If I could ask my expert I might be

1 able to answer that question. I can't. I don't
2 know the answer to that question.

3 THE COURT: All right.

4 First of all, as to the late
5 designation of expert, I think there has been shown
6 good cause for the excusal of the one day shortfall,
7 certainly, under the circumstances set forth.

8 As to the discovery argument, these
9 are just what the lady says, looks to me like
10 confirmation of Mr. Welch's and Ms. Gunther's work.

11 It is, according to the witness and
12 from what I can glean in looking at it, the
13 supervisor's checklist of what occurred in the
14 chronology of that which was set out in these
15 reports.

16 We heard from Mr. Welch that is the
17 usual procedure whereby there are several checks.
18 This is evidently evidence of one and I don't see
19 there's any new information here that militates in
20 favor of the defense or in any way prejudices the
21 defense.

22 Most of it I can recognize -- and I'm
23 certainly not a trained eye here as to stuff we've
24 heard of -- and it just recites the events that took
25 place in the analysis of it is DNA. I don't think

1 It's prejudicial at all.

2 I think there was some suggestion
3 somehow that one witness could not vouch for
4 another. That's not true with the expert witnesses.

5 You can have multiple experts that
6 concur or vary in different ways.

7 Anything else to be said?

8 MR. REED: To make sure I have a
9 complete record, this motion is made and based on
10 the Fifth and Sixth Amendment to the United States
11 Constitution as well as Article 1, sections three
12 and eight of the Nevada Constitution.

13 Additionally, in case I didn't make
14 this clear, I would have liked to have a continuance
15 as well to be able to consult with my expert to see
16 the relevancy of this newly produced data and how it
17 would impact my client.

18 THE COURT: That's understood,
19 certainly. I'm going to deny a continuance and
20 disallow any of the objections.

21 MS. KOLLINS: For the record, there was
22 no motion to strike Kim Murga previously made.
23 Prior to today, prior to her testifying there was no
24 formal written motion to strike Kim Murga.

25 THE COURT: That's true.

1 MR. REED: That's correct.

2 THE COURT: Stand, Mr. Henderson. I'll
3 admonish you of important rights that you have.

4 You have the right under the
5 Constitution of the United States and Constitution
6 of the State of Nevada not to be compelled to
7 testify in this case.

8 Do you understand that?

9 THE DEFENDANT: Yes.

10 THE COURT: You may if you wish give up
11 this right and take the stand and testify. If you
12 do, you'll be subject to cross-examination by the
13 District Attorney and anything that you may say, be
14 it on direct or cross-examination, would be the
15 subject of fair comment when the District Attorney
16 speaks to the jury in his or her final argument.

17 Do you understand that?

18 THE DEFENDANT: Yes.

19 THE COURT: If you choose not to
20 testify the Court will not permit to District
21 Attorney to make any comments to the jury concerning
22 the fact that you've not testified.

23 In other words, they couldn't say "He
24 didn't say he didn't do it so," you know, that kind
25 of thing. Nothing like that can be said.

1 Do you understand?

2 THE DEFENDANT: Yes.

3 THE COURT: If you elect not to testify
4 the Court will instruct the jury, if your attorneys
5 request, the following instruction or something very
6 similar to this.

7 "The law does not compel a Defendant
8 in a criminal case to take the stand and testify or
9 offer any evidence if he chooses not to and no
10 presumption may be raised and no inference of any
11 kind can be drawn from the failure of the Defendant
12 to testify."

13 I would read that along with the
14 another instructions to the jury if your attorney's
15 request I read it.

16 There are strategies involved as to
17 whether or not they would request that. You might
18 want to discuss that with them.

19 Any questions?

20 THE DEFENDANT: No, sir.

21 THE COURT: Lastly, if you elect to
22 testify the District Attorney can inquire of you as
23 to any criminal convictions you have from this point
24 to the last 10 years that are of a felony, in
25 nature.

1 They can't go into it at great length
2 but certainly can inquire if you were convicted on a
3 certain date in a certain location of whatever it
4 was. If you say yes, it's on the record.

5 If you say no they can bring a record
6 up and impeach your testimony. That kind of thing
7 would come out if it exists. I don't know what your
8 record might be.

9 Do you understand?

10 THE DEFENDANT: Yes.

11 THE COURT: What I tell people every
12 time whether you testify or not is your decision.
13 There is a whole lot of things that go into this
14 that you might not appreciate, not being a lawyer, a
15 lot of strategies, a lot of doors that can be opened
16 if you testify and various things can occur one way
17 or the other.

18 There is a lot to it. I tell people
19 it's your decision. You might want to discuss it
20 with your attorneys and listen to what they say.
21 There's some real strong arguments both ways.

22 Do you understand?

23 THE DEFENDANT: Yes.

24 THE COURT: I'll leave it with you.
25 Counsel, anything else before we

1 retire to my chambers to look at instructions?

2 MR. REED: No, Your Honor.

3 MS. KOLLINS: No, judge.

4 THE COURT: Very good. Court is in
5 recess.

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21 ATTEST that this is a true and

22 complete transcript of the proceedings.

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J. A. D'AMATO CCR17

1 [Jury instructions settled and read in
2 open court.]

3 [Closing arguments of counsel.]

4 [Jury retired for deliberations.]

5 THE COURT: The continuation of
6 C212968, State versus Joseph Alexander Henderson.
7 Record reflects the presence of the Defendant, his
8 counsel, Mr. Reed and Ms. Radosta. Ms. Kollins and
9 Mr. Turner present for the State.

10 Ms. Clerk, will you call the roll of
11 the jury, please?

12 [Whereupon, the clerk of the court
13 called the roll of the jury.]

14 THE CLERK: The panel is present, Your
15 Honor, minus the alternates.

16 THE COURT: Very well.

17 Mr. Randall, you are the foreman of
18 the jury?

19 FOREMAN RANDALL: Yes.

20 THE COURT: Has the jury reached a
21 verdict in this matter?

22 FORMAN RANDALL: Yes, we have, Your
23 Honor.

24 THE COURT: Please hand it to the
25 bailiff.

1 of deadly weapon, guilty.

2 COUNT IX: Sexual assault with use of
3 deadly weapon, guilty.

4 COUNT X: Conspiracy to commit robbery,
5 guilty.

6 COUNT XI: Robbery with use of deadly
7 weapon, guilty.

8 COUNT XII: Robbery with use of deadly
9 weaon, guilty.

10 COUNT XIII: Open or gross lewdness,
11 guilty.

12 COUNT XIV: Battery with use of deadly
13 weapon resulting in substantial bodily harm, guilty.

14 Dated this 27th day of June, 2008,
15 Eric Randall, foreperson.

16 Ladies and Gentlemen of the Jury, are
17 these your verdicts as read so say you one so say
18 you all?

19 [Whereupon, the entire jury panel
20 affirmed.]

21 THE COURT: Does either counsel wish to
22 have the jury polled?

23 MS. KOLLINS: State does not.

24 MR. REED: Yes, Your Honor.

25 [Whereupon, the clerk of the court

1 Ms. Clerk, will you read aloud the
2 verdict and inquire of the jury if it is, in fact,
3 their verdict?

4 THE CLERK: District Court, Clark
5 County, Nevada, the State of Nevada, Plaintiff,
6 versus Joseph Alexander Henderson, defendant. Case
7 C212968, Department XIV.

8 VERDICT: We the jury in the
9 above-entitled case find the Defendant, Joseph
10 Alexander Henderson as follows:

11 COUNT I: Conspiracy to commit
12 burglary, guilty.

13 COUNT II: Burglary while in
14 possession of firearm, guilty.

15 COUNT III: Conspiracy to commit first
16 degree kidnapping, guilty.

17 COUNT IV: First Degree Kidnapping
18 with use of deadly weapon, guilty.

19 COUNT V: First Degree Kidnapping with
20 use of deadly weapon, guilty.

21 COUNT VI: Conspiracy to commit sexual
22 assault, guilty.

23 COUNT VII: Sexual assault with use of
24 deadly weapon, guilty.

25 COUNT VIII: Sexual assault with use

1 individually polled the jury and each juror so
2 affirmed their verdicts.]

3 THE CLERK: The panel has answered in
4 the affirmative, Your Honor.

5 THE COURT: Very well.

6 The Defendant will remain in custody.
7 No bail afforded. Sentencing will be had in
8 approximately 30 days. A Presentence Investigation
9 Report is ordered.

10 THE CLERK: August 6th at nine a.m.

11 THE COURT: Thank you. You can take
12 the defendant.

13 THE COURT: Ladies and Gentlemen, I
14 know it's late. I won't belabor the matter. I want
15 to thank you for your service.

16 These matters are not simple. We're
17 used to it, counsel and I, but we realize this is a
18 unique experience for you. We appreciate your
19 service.

20 You are at liberty to discuss this
21 matter with anyone you'd care to from this point on.
22 If anyone one would persist in discussing it with
23 you, over your objection, I'd ask you to see me
24 about that.

25 I would see that that would cease.

1 I will send you a letter
2 approximately 60 days from now, formally thanking you
3 for your service, but more importantly perhaps
4 giving you the information as to the sentence.

5 You have a right to know what the
6 sentence would be. Certainly that information will
7 be given to you. Thank you.

8 The bailiff has arranged for the
9 vouchers, even though the lateness of the hour, they
10 have arranged it downstairs. Thank you. Court is
11 adjourned.

12 [Whereupon, the jury exited the court
13 room.]

14 MR. REED: One matter for the record
15 outside the presence of the jury.

16 THE COURT: Record reflect the jury
17 has exited the court room.

18 Yes, Mr. Reed?

19 MR. REED: I'll waive Mr. Henderson's
20 presence for this purpose.

21 The Nevada Supreme Court has said
22 whenever we make a motion for mistrial we must do it
23 on the record if we feel there's been prosecutorial
24 misconduct.

25 I made objections on the record during

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1 the course of the opening statements and, therefore,
2 now would make -- during the closing arguments of
3 the District Attorneys statements to the jury -- and
4 now will make a motion for mistrial based on the
5 statements in the opening portions done by
6 Mr. Turner.

7 He not once, but twice, referred to
8 comparable being more important than even a
9 confession and more scientific and better than a
10 confession.

11 The Nevada Supreme Court has
12 repeatedly and consistently said that the District
13 Attorneys are not allowed to comment on or in any
14 way infer the possibility of the Defendant waiving
15 that right, that valuable Constitutional, right
16 under the Fifth Amendment.

17 The jury could have construed that to
18 mean that there was the potential Mr. Henderson made
19 a confession or somehow made a statement to the
20 police.

21 The Nevada Supreme Court has said many
22 times that that is impermissible to comment on our
23 failure to present evidence, more specifically under
24 the Fifth Amendment, a defendant's failure to
25 testify. I objected both times.

1 Your Honor overruled those objections,
2 but just to preserve the record I now move for a
3 mistrial under article one, sections three and
4 eight, of the Nevada Constitution as well as the
5 Fifth, Sixth and 14th amendment to the federal
6 Constitution.

7 THE COURT: Mr. Turner?

8 MR. TURNER: Judge, I think the Court
9 correctly ruled. My argument was DNA is better than
10 any type of evidence, including witness statements,
11 and confessions. I never related to the defendant's
12 statements.

13 In fact, I think I put on the record
14 that there was no evidence of that. I simply
15 related the fact that this type of evidence,
16 scientific evidence, is better than when you're
17 dealing with witnesses, any witnesses, any suspects,
18 any witness, anyone else, DNA, because it's
19 scientific, it's better than that type of evidence
20 and it related to my argument in terms of one in six
21 hundred billion.

22 I never commented on the Defendant's
23 statement that was never given or the fact that he
24 ever gave one.

25 THE COURT: All right.

69

1 Well, my take on it at the time was,
2 as you say, Mr. Turner, I did not construe what you
3 said, in any fashion, to suggest that the Defendant
4 had made a confession or that he should have or
5 perhaps did or one of the co-defendants made a
6 confession, or anything of that ilk.

7 The way I looked at it it was much as
8 we see in closing arguments where counsel comments
9 on the weight of the evidence and compares, we'll
10 say, direct evidence and circumstantial evidence.
11 This is the difference.

12 This is why one is better than the
13 other or vice versa, whatever it is. Clearly,
14 that's what you were trying to do.

15 I had no sense at all there was any
16 reference to the defendant's making some sort of
17 confession. That's the reason I ruled the way I
18 did, Mr. Reed.

19 I appreciate your making your motion
20 and thank you for your service. Court is adjourned.

21 ATTEST that this is a true and correct
22 transcript of the proceedings held.

23
24
25


J. A. D'AMATO CCR17

FILED

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAR 05 2010

Tracie Lindeman
CLERK OF COURT

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 52573

District Court Case No. C212968

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of conviction AFFIRMED."

Judgment, as quoted above, entered this 3rd day of February, 2010.

IN WITNESS WHEREOF, I have subscribed my name and affixed
the seal of the Supreme Court at my Office in Carson City,
Nevada, this 2nd day of March, 2010.

Tracie Lindeman, Supreme Court Clerk

By: _____
Deputy Clerk

A. Ingersoll



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MAR 04 2010

CLERK OF THE COURT

10-2969

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52573

FILED

FEB 03 2010

ORDER OF AFFIRMANCE

TRACEE K. LINDEMAN
CLERK OF SUPREME COURT
BY [Signature]
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit burglary, burglary with the use of a firearm, conspiracy to commit first-degree kidnapping, two counts of first-degree kidnapping with the use of a deadly weapon, conspiracy to commit sexual assault, three counts of sexual assault with the use of a deadly weapon, conspiracy to commit robbery, two counts of robbery with the use of a deadly weapon, open or gross lewdness, and battery with a deadly weapon resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. Appellant Joseph Henderson raises four claims of error.

First, Henderson claims that the district court erred by denying his motion to dismiss the information and alternative motion to preclude the State's DNA evidence based on the State's alleged consumption of all of the available DNA material. Because Henderson's claim that the State did not preserve DNA material from each sample for defense retesting is belied by the record, we conclude that the district court did not abuse its discretion. See Hill v. State, 124 Nev. ___, ___, 188 P.3d 51, 54 (2008).

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CLERK OF THE COURT

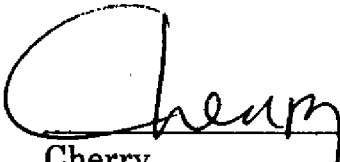
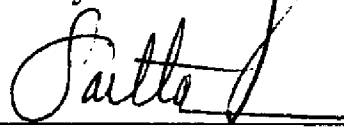

Second, Henderson claims that the district court erred by denying his pretrial motion to preclude the improper use of DNA evidence. Henderson does not allege that any improper DNA evidence or argument was presented to the jury, and therefore we conclude that this claim is wholly without merit.

Third, Henderson claims that the district court erred by denying a motion for mistrial and an alternative motion to strike the testimony of expert witness Kim Murga. Henderson's motion was based on three grounds: (1) Murga was noticed as a witness one day late, (2) her notes were not disclosed to the defense prior to her testimony, and (3) she improperly vouched for another witness. We conclude that the district court did not clearly abuse its discretion when it denied the motion and determined that (1) the State had good cause for its one-day delay in noticing Murga as a witness, (2) the State was not required to disclose Murga's personal summary of official reports already provided to the defense, and (3) Murga's testimony that another expert followed proper procedures in performing his DNA analysis was not improper. See Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001); Hernandez v. State, 124 Nev. ___, ___, 188 P.3d 1126, 1131 (2008).

Finally, Henderson claims that the district court erred when it required him to voice his peremptory challenges in open court. Although we have previously stated "our strong preference that . . . peremptory challenges during jury selection [be] exercised and considered outside the presence of the jury," Foster v. State, 121 Nev. 165, 174, 111 P.3d 1083, 1089 (2005), we have never mandated such procedures. And because Henderson fails to show prejudice, we deny relief on this claim.

Having considered Henderson's claims and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

 J.
Cherry
 J.
Saitta
 J.
Gibbons

cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

CERTIFIED COPY

This document is a full, true and correct copy of
the original on file and of record in my office.

DATE: MARCH 2, 2010

Supreme Court Clerk, State of Nevada

A. Ingerow Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 52573

District Court Case No. C212968

REMITTITUR

TO: Steven D. Grierson, Clark District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: March 2, 2010

Tracie Lindeman, Clerk of Court

By: _____
Deputy Clerk

A. Ingerson

cc (without enclosures):

Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the
REMITTITUR issued in the above-entitled cause, on MAR 05 2010.

Deputy HEATHER LOFQUIST

District Court Clerk

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MAR 04 2010

CLERK OF THE COURT

FILED

MAR 23 9 00 AM '10

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR
THE COUNTY OF CLARK

Ag. William
COURT

JOSEPH A HENDERSON

Petitioner/Plaintiff,

vi.

STATE OF NEVADA

Respondent/Defendant.

Case No. C-212968Dept. No. # XVDocket No. 52573

4/8/10

**MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD OR IN THE
ALTERNATIVE, REQUEST FOR RECORDS/COURT CASE DOCUMENTS**

COMES NOW, Petitioner/Plaintiff, MR JOSEPH A HENDERSON, pro per,
and respectfully moves this Honorable Court for it's Order withdrawing MR KELVICK
BASSETT, Esq., as the Attorney of Record in the above-entitled matter.

This Motion is made and based upon Nev. Rev. Stat. 7.055, and Nev. Sup. Ct. Rules 166(4), 173,
176, and 203, and Rules 11 and 20 of the Rules of the District Courts of the State of Nevada.

POINTS AND AUTHORITIES

Nev. Rev. Stat. 7.055, provides that:

An attorney who has been discharged by his client shall, upon demand...immediately deliver to the client all papers, documents, pleadings and items of tangible personal property which belong to or were prepared for that client.

See also Nev. Sup. Ct. Rule 166(4):

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ...surrendering papers and property to which the client is entitled..."

Petitioner/Plaintiff would respectfully point out to this Court and the attorney of record that there

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MAR 26 2010

CLERK OF THE COURT

is controlling law on this issue. This citation of authority is precautionary only. In the cases of In Re Yount, 93 Ariz. 322, 380 P.2d 780 (1963), and State v. Alvey, 215 Kan. 460, 524 P.2d 747 (1974), both cases dealt with a factual situation involving a withdrawn attorney refusing to deliver to a former client his documents after being requested to do so by the client. The Court in Yount, supra, ordered the attorney disbarred, while in Alvey, supra, the Court had the attorney censured.

In most situations it is obviously not necessary to notify the parties when the attorney withdraws from a case, but when the client wishes to remove his attorney and represent himself in person, it is required by these Statutes and Rules that the client request the Court of action to issue a certificate releasing the attorney of record. Under such statutes it is necessary for the party to present his request for the change in order for the court in making an order withdrawing the attorney of record, and to make formal demand to the Attorney for the return of all papers and property.

Therefore, let this Court be so notified that this is the desire of the Petitioner/Plaintiff herein that the aforementioned attorney of record be withdrawn and the same shall be for any other attorney(s) which could possibly be subscribed and documented as attorney(s) of record in this case, so that further actions in the above-entitled cause can be conducted by the Petitioner/Plaintiff in proper person.

Further, Petitioner/Plaintiff hereby makes formal demand upon MR KEDRICK
BASSETT, Esq., for the return of his entire file, including, but not limited to all papers, documents, pleadings and items of tangible personal property which belong to or were prepared on my behalf to me at the address set forth in this pleading.

Further, it is requested of this Court that it issue an Order directing the named attorney of record that he turn over to the Petitioner/Plaintiff the entire case file, without costs, including, but not limited to, the trial transcripts or guilty plea transcript, all briefs on appeal, and all other papers and police reports relating to this matter, so that Petitioner/Plaintiff may prosecute an appeal/post-conviction with a minimum amount of delay.

CONCLUSION

WHEREFORE, all of the above stated reasons, Petitioner/Plaintiff respectfully requests this Honorable Court to grant his Motion for Withdrawal of Attorney of Record in accordance with this Court's fair and just consideration of the facts of the case.

DATED this 24th day of MARCH, 20010

Respectfully submitted,

Joseph Henderson
Petitioner/Plaintiff

CERTIFICATE OF SERVICE

I hereby certify pursuant to N.R.C.P. 5(b) that I am the Petitioner/Plaintiff in the foregoing Notice of Motion and Motion for Withdrawal of Attorney of Record or in the Alternative, Request for Records/Court Case Documents on this 24th day of MARCH, 20010 I did serve a true and correct copy of the above mentioned document, by giving it to a prison official at the Ely State Prison to deposit in the U.S. Mail, sealed in an envelope, postage pre-paid, and addressed as follows:

CLERK OF THE COURT
200 LEWIS AVE 3RD FLR
LAS VEGAS NV 89155-1601

STATE BAR OF NEVADA
1000 E CHARLESTON BLVD
LAS VEGAS NV. 89106

DATED this 24th day of MARCH, 20010

Joseph Henderson
Petitioner/Plaintiff

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding MOTION FOR

WITHDRAWAL OF ATTORNEY OF RECORD.

(Title of Document)

filed in District Court Case No. C-212968

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

NA

(State specific law)

-OR-

B. For the administration of a public program or
for an application for a federal or state grant.

NA

Joseph Henderson
(Signature)

3-24-2010

(Date)

REQUEST FROM: Joseph Henderson #67224

REGARDING: Trial-Transcripts/Documents

DATE OF: March 24th. 2010

Dear Kedric Bassett,

I apologise for taking so long to get back with you concerning your February 11th letter about the "ORDER OF AFFIRMANCE".

As you know in your mind and mine that, I don't know anything about the law but, I'm having my room-mate work on my case because he have been doing criminal over 12 years and he have gotten resualts resently from the 9th Cir as well as the U.S. District Court.

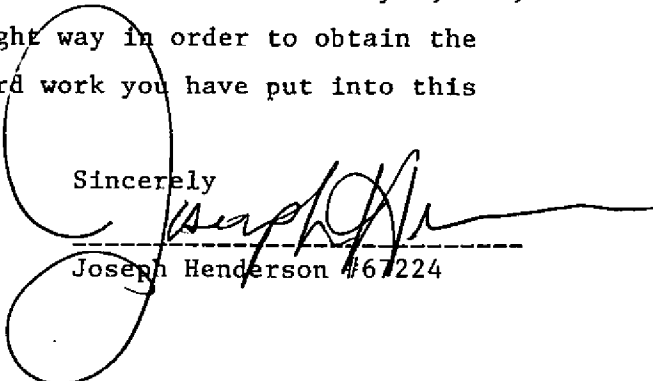
I am currently starting my Post-Conviction/Habeas Corpus, I will need the following documents as I have listed for you;

- 1). Trial-Transcripts
- 2). Direct Appeal
- 3). Jury-Instructions
- 4). DNA Profile On Everything
- 5.) And Your Honesty At Heart

Mr.Bassett, I truely thank you for the out-standing job you have done on my Opening Brief; The information you done in the brief is enough for me to start my Post-Conviction on the Ineffective Assistance of Counsel towards my Trial lawyer.

I want you to understand that everything I do must be recorded with the paper trail and sent to the following agencies listed below in this letter to you; Sir, it's just Business that must be conducted the right way in order to obtain the necessary Documents. Again; Thank you for the hard work you have put into this case:

Sincerely


Joseph Henderson #67224

CLERK OF THE COURT
200 Lewis Ave. 3rd Floor
Las Vegas,NV 89155-1601

STATE BAR OF NEVADA
600 E.Charleston Blvd.
Las Vegas,NV 89106

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR
THE COUNTY OF CLARK

JOSEPH A HENDERSON

Petitioner/Plaintiff,

v.

STATE OF NEVADA

Respondent/Defendant.

Case No. C-212968

Dept. No. 16

Docket No. 52573

NOTICE OF MOTION

TO: THE STATE OF NEVADA, Respondent/Defendant, _____

_____, County District Attorney, and MIR KENDRICK BASSETT
_____, Esq.

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on the _____ day of _____
_____, 200__, at the hour of 9:00 O'clock A.M., or as soon thereafter as
the parties may be heard, the undersigned will bring on for hearing the attached **MOTION FOR
WITHDRAWAL OF ATTORNEY OF RECORD**, before the above-entitled Court, at the
_____, Courthouse, in _____, Nevada, in
Department No. _____, thereof.

DATED this _____ day of _____, 200__.

Respectfully submitted,

Joseph A Henderson
Petitioner/Plaintiff
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

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MAR 26 2007
CLERK OF THE COURT

MR JOSEPH FENNERSON 67224
D.B. BOX 1988
ELY NV
89301

CLEARLY OF THE COURT
200 LEWIS AVE 3RD FLOOR
LAS. VEGAS 89155-1601

[Faint circular postmark, possibly "NEW YORK"]

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FILED
MAY 20 2010
CLERK OF COURT

MOT
JOSEPH HENDERSON, # 67224
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

Defendant in Pro Per

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

JOSEPH HENDERSON,

Defendant.

)
) CASE NO.: C212968
) DEPT NO.: XIV
)
) DEFENDANT'S NOTICE OF MOTION
) AND MOTION FOR PRODUCTION OF
) ADDITIONAL RECORDS

6/3/10

TO: Plaintiff, The State of Nevada, and your attorney of Record, David Rodger, Clark
County District Attorney:

YOU AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will
bring the above and foregoing Notice of Motion and Motion for Production of Additional
Records for hearing before the Eighth Judicial District Court, located at 200 Lewis Avenue, Las
Vegas, Nevada 89155-2311, on the 13TH day of MAY, 2010, at 9 : 23 pm., in Department
XIV of said court.

COMES NOW, Defendant, JOSEPH HENDERSON (hereinafter referred to as
"Defendant"), in pro per, and respectfully moves this Honorable Court to order the Plaintiff to
provide Defendant with copies of the following: (1) all the DNA the State obtained from the
EVIDS that was used against him at trial, including but not limited to any samples, documents,

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CLERK OF THE COURT

1 test results, memorandums, information or paperwork relating to the DNA collection, testing and
2 analysis in case C212968, which are needed for the prosecution of Defendant's writ of habeas
3 corpus (post conviction) and other matters.

4 This Motion is made and based upon the Supporting Points and Authorities attached
5 hereto, as well as all the papers, pleading and other documents on file herein.

6 **POINTS AND AUTHORITIES**

7 **I.**

8 **STATEMENT OF ADDITIONAL FACTS**

9
10 Defendant previously filed a Motion for Withdrawal of Attorney of Record and Request
11 for Records/Court Case Documents.

12 Defendant has received his files from his attorney, Kendric Bassett. Not contained in
13 these files were the following: all the DNA the State obtained from the FEDS that was used
14 against him at trial, including but not limited to any samples, documents, test results,
15 memorandums, information or paperwork relating to the DNA collection, testing and analysis in
16 case C212968. These documents are needed by the Defendant in order for him to prosecute his
17 writ of habeas corpus (post conviction) and other matters. It appears that these were not and are
18 not part of the files produced to him and are in the possession custody and control of the
19 Plaintiff.

20 **II.**

21 **LEGAL AUTHORITY AND ARGUMENT**

22
23 Defendant incorporates the legal authority cited to in his Motion for Withdrawal of
24 Attorney of Record and Request for Records/Court Case Documents as though fully set forth
25 herein. In addition to the case law and authority this Court already considered in ruling in favor

1 for the Defendant in granting the original Motion on March 22, 2010, the Defendant offers the
2 following:

3 In Griffin v. Illinois, 351 U.S. 12, 23, 76 S.Ct. 585, 100 L.Ed. 891 (1956) the United
4 States Supreme Court held that it violates the due process and equal protection clauses of the
5 Fourteenth Amendment when a state denies an indigent Defendant the transcripts necessary for
6 his appeal. The Court held:

7
8 There can be no equal justice where the kind of a trial a man gets depends upon the
9 amount of money he has. Destitute Defendants must be afforded as adequate appellate
10 review as Defendants who have money enough to buy transcripts. * * * Plainly the ability
11 to pay costs in advance bears no rational relationship to the Defendant's guilt or
12 innocence and could not be used as an excuse to deprive a Defendant of a fair trial."

13 This Griffin principle has been applied in other U.S. Supreme cases as well. See, Burns
14 v. Ohio, 360 U.S. 252, 258, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959) (Applicable to state collateral
15 proceedings); See, also, Smith v. Bennett, 365 U.S. 708, 713-714, 81 S.Ct. 895, 6 L.Ed.2d 39
16 (1961) (No requirement of paying statutory filing fees). The Nevada Supreme Court has also
17 adopted the Griffin principle in Nevada cases. See, State ex rel. Marshall v. Eighth Judicial Dist.
18 Court, In and For Clark County, 80 Nev. 478, 396 P.2d 680 (Nev. 1964) and George v. State,
19 122 Nev. 1, 127 P.3d 1055 (Nev. 2006).

20 Here, Defendant, who is indigent, has done all he is capable from prison to obtain the
21 necessary witnesses, documents and evidence he needs in order to properly formulate
22 meritorious issues on his writ of habeas corpus (post conviction). The documents he is
23 requesting be produced by the Plaintiff (State) are necessary and were also specifically
24 mentioned in his original motion ("... and all papers and police reports relating to this matter"
25 See, page 3) and already ruled upon by this Court be produced.

1 Therefore, Defendant is simply seeking to have this Court Order the State to produce
2 documents, already ruled relevant and discoverable, and should be in their possession custody
3 and control as part of their case files on Defendant relating to his criminal prosecution.

4 Finally, since Defendant is indigent, he respectfully requests these documents be
5 produced at no cost to him since he is indigent and these are documents related to his criminal
6 appeal. See, Griffin, supra.

7
8 **III.**

9 **CONCLUSION**

10 WHEREFORE, based upon the above stated points and authorities and arguments,
11 Defendant respectfully requests this Court issue an Order:

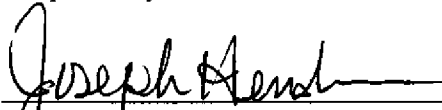
12 1. Granting Defendant's Request that the Plaintiff (State) produce the following to
13 him at no cost:

14 All the DNA the State obtained from the FEDS that was used against him at trial,
15 including but not limited to any samples, documents, test results, memorandums,
16 information or paperwork relating to the DNA collection, testing and analysis in case
C212968; and

17 2. Any additional relief this Court deems necessary under the facts and
18 circumstances of this case.

19 DATED this 31 day of MAY, 2010.

20 Respectfully submitted,

21 
22 JOSEPH HENDERSON, # 67224

23 Ely State Prison
24 P.O. Box 1989
Ely, Nevada 89301

25 Defendant in Pro Per

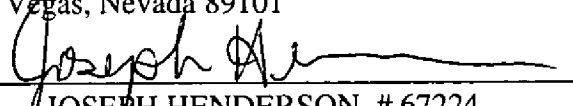
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CERTIFICATE OF SERVICE BY MAIL

I, JOSEPH HENDERSON, hereby certifies pursuant to N.R.C.P. 5(b), that on this
13TH day of MAY, 2010, I mailed a true and correct copy of **DEFENDANT'S**
NOTICE OF MOTION AND MOTION FOR ADDITIONAL RECORDS, by giving same to
a guard at the Ely State Prison to deposit in the U.S. Mail, sealed in an envelope, postage pre-
paid, addressed to the following:

David Roger, Esq.
Clark County District Attorney
200 Lewis Street - Suite 3305
Las Vegas, Nevada 89101

By:


JOSEPH HENDERSON, # 67224

Ely State Prison
P.O. Box 1989
Ely, Nevada 89301
Defendant in Pro Per

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding **DEFENDANT'S NOTICE OF**
MOTION AND MOTION FOR ADDITIONAL RECORDS, and all supporting documents
does not contain the social security number of any person.

Dated: MAY, 13TH, 2010
(Month) (Day)

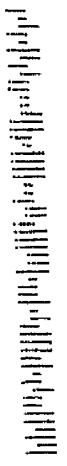
By:


JOSEPH HENDERSON, # 67224

Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

Defendant in Pro Per

MR JOSEPH HENRIKSON *67224
P.O. BOX 1989 (E.S.P.)
ELY NV 89301



WED 19 MAY 2010 PM




CLERK OF THE COURT

OPPS
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
STACY KOLLINS
Chief Deputy District Attorney
Nevada Bar #005391
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
	)	CASE NO: C212968
Plaintiff,)	
	)	DEPT NO: XV
-vs-)	
)	
JOSEPH HENDERSON,)	
#1502730)	
)	
Defendant.)	

STATE'S OPPOSITION TO DEFENDANT'S MOTION
FOR PRODUCTION OF ADDITIONAL RECORDS

DATE OF HEARING: JUNE 3, 2010
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through STACY KOLLINS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion for Production of Additional Records.

This opposition 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.

//

//

//

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On July 11, 2005, Joseph Henderson, hereinafter "Defendant," was charged by way of
4 Information with Count 1 - Conspiracy to Commit Burglary, Count 2- Burglary While in
5 Possession of a Firearm, Count 3 - Conspiracy to Commit First Degree Kidnapping, Counts
6 4 and 5 - First Degree Kidnapping With Use of a Deadly Weapon, Count 6 - Conspiracy to
7 Commit Sexual Assault, Counts 7, 8, and 9 - Sexual Assault With Use of a Deadly Weapon,
8 Count 10 - Conspiracy to Commit Robbery, Counts 11 and 12 - Robbery With Use of a
9 Deadly Weapon, Count 13 - Open or Gross Lewdness, and Count 14 - Battery With Use of a
10 Deadly Weapon Resulting in Substantial Bodily Harm. On June 27, 2008, Defendant was
11 found guilty by a jury of all counts.

12 On August 28, 2008, Defendant was sentenced as follows: As to Count 1 – to Twelve
13 (12) Months in the Clark County Detention Center; As to Count 2 – to a Maximum of One
14 Hundred Fifty-Six (156) Months with a Minimum Parole Eligibility of Sixty-Two (62)
15 Months, to run Concurrent with Count 1; As to Count 3 – to a Maximum of Sixty (60)
16 Months with a Minimum Parole Eligibility of Twenty-Four (24) Months, to run Consecutive
17 to Count 2; As to Count 4 – to Life with a Minimum Parole Eligibility after Sixty (60)
18 Months, plus and Equal and Consecutive term of Life with a Minimum Parole Eligibility
19 after Sixty (60) Months for the Use of a Deadly Weapon, to run Consecutive to Count 3; As
20 to Count 5 – to Life with a Minimum Parole Eligibility after Sixty (60) Months, plus and
21 Equal and Consecutive term of Life with a Minimum Parole Eligibility after Sixty (60)
22 Months for the Use of a Deadly Weapon, to run Consecutive to Count 4; As to Count 6 – to
23 a Maximum of Sixty (60) Months with a Minimum Parole Eligibility of Twenty-Four (24)
24 Months, to run Consecutive to Count 5; As to Count 7 - to Life with a Minimum Parole
25 Eligibility of One Hundred Twenty (120) Months, plus an Equal and Consecutive term of
26 Life with a Minimum Parole Eligibility of One Hundred Twenty (120) Months for the Use of
27 a Deadly Weapon, to run Concurrent with Count 6; As to Count 8 - to Life with a Minimum
28 Parole Eligibility of One Hundred Twenty (120) Months, plus an Equal and Consecutive

1 term of Life with a Minimum Parole Eligibility of One Hundred Twenty (120) Months for
2 the Use of a Deadly Weapon, to run Consecutive to Count 7; As to Count 9 – to Life with a
3 Minimum Parole Eligibility of One Hundred Twenty (120) Months, plus an Equal and
4 Consecutive term of Life with a Minimum Parole Eligibility of One Hundred Twenty (120)
5 Months for the Use of a Deadly Weapon, to run Consecutive to Count 8; As to Count 10 – to
6 a Maximum of Sixty (60) Months with a Minimum Parole Eligibility of Twenty-Four (24)
7 Months, to run Consecutive to Count 9; As to Count 11 – a Maximum of One Hundred
8 Eighty (180) Months with a Minimum Parole Eligibility of Seventy-Two (72) Months, plus
9 and Equal and Consecutive term of Maximum of One Hundred Eighty (180) Months with a
10 Minimum Parole Eligibility of Seventy-Two (72) Months for the Use of a Deadly Weapon,
11 to run Concurrent with Count 10; As to Count 12 – to a Maximum of One Hundred Eighty
12 (180) Months with a Minimum Parole Eligibility of Seventy-Two (72) Months, plus and
13 Equal and Consecutive term of Maximum of One Hundred Eighty (180) Months with a
14 Minimum Parole Eligibility of Seventy-Two (72) Months for the Use of a Deadly Weapon,
15 to run Consecutive to Count 11; As to Count 13 – to Twelve (12) Months in the Clark
16 County Detention Center, to run Concurrent with Count 12; As to Count 14 – a Maximum of
17 One Hundred Fifty-Six (156) Months with a Minimum Parole Eligibility of Sixty-Two (62)
18 Months, to run Consecutive to Count 13; with One Two Hundred Fifty-One (1,251) Days
19 credit for time served. Further Ordered, a Special Sentence of Lifetime Supervision is
20 imposed to commence upon release from any term of imprisonment, probation or parole.

21 Defendant's Judgment of Conviction (Jury Trial) was filed on September 24, 2008.
22 Defendant filed a Notice of Appeal on October 9, 2008. The Nevada Supreme Court
23 affirmed Defendant's conviction on February 3, 2010. Remittitur issued on March 2, 2010.
24 Defendant filed the instant motion on May 20, 2010. The State's opposition is as follows.

25 //

26 //

27 //

28 //

1 **ARGUMENT**

2 **I. DEFENDANT IS NOT ENTITLED TO POST-CONVICTION**
3 **DISCOVERY.**

4 In so much as Defendant is requesting post-conviction discovery, such discovery is
5 not available except on a showing of good cause after a writ has been granted.

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

9 N.R.S. 34.780(2). In this case, no writ has been granted. Furthermore, Defendant has failed
10 to delineate any good cause for such discovery. As such, his motion should be denied.

11 **CONCLUSION**

12 Based on the foregoing arguments, Defendant’s motion should be DENIED.

13 DATED this 2nd day of June, 2010.

14 Respectfully submitted,

15 DAVID ROGER
16 Clark County District Attorney
Nevada Bar #002781

17
18 BY /s/ STACY KOLLINS

19 STACY KOLLINS
20 Chief Deputy District Attorney
Nevada Bar #005391

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CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 2nd day of June, 2010, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JOSEPH HENDERSON, BAC#67224
ELY STATE PRISON
P.O. BOX 1989
ELY, NV 89301

/s/ HOWARD CONRAD
Secretary for the District Attorney's Office

hjc/SVU

ORDR

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
STACY KOLLINS
Chief Deputy District Attorney
Nevada Bar #005391
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED

JUN 18 12 45 PM '10

Ann L. Shuman
CLERK OF THE COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,
Plaintiff,

-vs-

JOSEPH HENDERSON,
#1502730

Defendant.

Case No. C212968
Dept No. XV

**ORDER DENYING DEFENDANT'S MOTION FOR PRODUCTION
OF ADDITIONAL RECORDS**

DATE OF HEARING: 06/03/10
TIME OF HEARING: 9:00 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 3rd day of June, 2010, the Defendant not being present, in proper person, the Plaintiff being represented by DAVID ROGER, District Attorney, through STACY KOLLINS, Chief Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefore,

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JUN 18 2010


CLERK OF THE COURT

1 IT IS HEREBY ORDERED that the Defendant's Motion for Production of Additional
2 Records, shall be, and it is denied.

3 DATED this 16 day of June, 2010.

4
5 
6 DISTRICT JUDGE **Abbi Silver**
7

8 DAVID ROGER
9 DISTRICT ATTORNEY
10 Nevada Bar #002781

11 
12 STACY KOLLINS
13 Chief Deputy District Attorney
14 Nevada Bar #005391
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28 mmw/SVU

Joseph A. Henderson #67224
ELY STATE PRISON (ESP)
P.O. Box 1989
Ely, Nevada 89301
Petitioner in Pro-se...

FILED

2010 AUG 28 A 7 02

DISTRICT COURT
CLARK COUNTY, NEVADA

John A. Henderson
CLERK OF THE COURT

Joseph A. Henderson,)
 Petitioner,)
))
))
-vs-))
))
))
STATE OF NEVADA,)
 Defendants,)
_____)

Case No: C212968

Dept No: XIV

05C212968
REQT
Request
911476



REQUEST FOR PRODUCTION OF DOCUMENTS

E.T.C.. UNDER RULE 34

Plaintiff, Joseph A. Henderson, requests defendants STATE OF NEVADA, to respond within 30 days to following requests:

(1) That defendant produce and permit plaintiff to inspect and to copy each of the following documents:

A.) All codis data and reports concerning case C212968

B.) All reports from (FBI) concerning "E Mails" about the forensic lab testing to the STATE PROSECUTION from the DNA received by forensic specialist David Welch.

C.) All David Welch's (Reports and Data Findings) on the test he ran from the DNA that came from the crime scene.

D.) All reviews and reports of forensic specialist David Welch and Kathy Gunther finalized by BURCH HENRY.

E.) Any and all conclusions about the DNA done by David Welch and the findings of the conclusion from Burch Henry.

F.) All notes and information from forensic specialist Kathy Gunther on the conformation she had with California about DNA they pasted on to her about the match findings, data and statements.

The information that petitioner is requesting is vital information because the petitioner is currently moving forward with his (POST-CONVICTION/HABEAS CORPUS) and will need the following information to complete his MOTION in the Eighth Judicial District Court before the deadline is due the first part of the year.

Dated this 22nd day of AUGUST 2010.

By

Joseph A. Henderson
Joseph A. Henderson #67224

ELY STATE PRISON (ESP)

P.O. BOX 1989

Ely, Nevada 89301

DISTRICT COURT
CLARK COUNTY, NEVADA

Joseph A. Henderson,)
 Petitioner,)
-vs-)
STATE OF NEVADA,)
 Defendant(s),)
_____)

Case No: C212968
Dept No: XIV

ORDER

It is requested that the **STATE OF NEVADA** defendants turn over all requested documents to the Petitioner for his research to fulfill his POST-CONVICTION/HABEAS CORPUS so that he Joseph Henderson can move forward in this court with the grounds and issues that was not raised in his trial.

It is so **ORDERED** that on this ~~2011~~ day of ~~January~~ 2010 the above-entitled **REQUEST FOR PRODUCTION OF DOCUMENTS E.T.C..** **UNDER RULE 34** be honored and hand over to the petitioner for the reviewing and the accomplishment of his POST-CONVICTION/HABEAS CORPUS, so that this case may be heard before this court on the newly raised Grounds and Issues.

_____, Courthouse, in _____, Nevada
in Department No: _____, thereof.

Dated this ____ day of _____, 2010.

Honorable Judge

Requested By

Joseph Henderson
Joseph A. Henderson #67224
P.O. Box 1989 (ESP)
Ely, Nevada 89301

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

Request for production of document
(Title of Document)

filed in District Court Case No. 212968

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

RULE 34
(State specific law)

-OR-

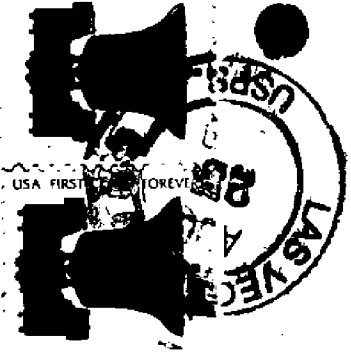
B. For the administration of a public program or
for an application for a federal or state grant.

Joseph Wender
(Signature)

8-22-2010
(Date)

MR JOSEPH A HENDERSON X67224
P.O. BOX 1989
ELY N.V. 89301

USA FIRST-CLASS FOREVER



MR STEVEN GRIERSON
(CLERK OF THE COURT)
200 LEWIS AVE 3RD FLOOR
LAS VEGAS. N.V. 89155-1140

EV STATE PRISON

AUG 24 2010

U S

Case No. C212968

Dept. No. 15

FILED

JAN 11 2011

John L. Blum
CLERK OF COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

05C212968
PWHC
Petition for Writ of Habeas Corpus
1163643



JOSEPH A. HENDERSON
Petitioner,

v.

STATE OF NEVADA
Respondent.

**PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)**

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

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JAN 11 2011

CLERK OF THE COURT

34

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: ELY STATE PRISON WHITEPINE NEVADA

2. Name and location of court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT

3. Date of judgment of conviction: SEPTEMBER 24th 2008

4. Case number: G212968

5. (a) Length of sentence: 10 LIFE SENTENCES PLUS 40 years to 90 years

(b) If sentence is death, state any date upon which execution is scheduled: _____

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes _____ No X

If "yes", list crime, case number and sentence being served at this time: _____

7. Nature of offense involved in conviction being challenged: ROBBERY, KIDNAP, ASSULT, SEXUAL ASSULT, BURGLARY, CONSPIRACY:

8. What was your plea? (check one):

(a) Not guilty X (b) Guilty _____ (c) Nolo contendere _____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details: _____

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury X (b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No X

12. Did you appeal from the judgment of conviction? Yes X No _____

13. If you did appeal, answer the following:

(a) Name of Court: EIGHTH JUDICIAL DISTRICT COURT #16

(b) Case number or citation: G212968

(c) Result: FOUND GUILTY BY JURY

(d) Date of result: JUNE 26th 2008

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: _____

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?

Yes X No _____

16. If your answer to No. 15 was "yes", give the following information:

(a)(1) Name of court: EIGHTH JUDICIAL DISTRICT COURT #16

(2) Nature of proceeding: MOTION TO DISMISS COUNSEL; MOTION FOR DISCOVERY;

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes _____ No X

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes _____ No _____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such a result: _____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes _____ No _____

Citation or date of decision: _____

(2) Second petition, application or motion? Yes _____ No _____

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes _____ No _____

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) _____

(a) Which of the grounds is the same: _____ NA

(b) The proceedings in which these grounds were raised: NA

NA

NA

NA

If yes, state what court and case number:

VALERIE RADOSTA: NORMAN REED: SEDRICK BASSETTE

If yes, specify where and when it is to be served, if you know:

4

(a) Ground One: The State deprived Petitioner of his right to be confronted with the evidence and witnesses against him in violation of the 6th and 14th Amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(b) Ground Two: The State elicited perjured testimony from its expert witness, Guenther and failed to correct the known perjury in violation of Petitioner's 6th and 14th amendment rights to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(c) Ground Three: The State failed to meet its burden of proving Petitioner guilty of each element of each offense, beyond a reasonable doubt, in violation of Petitioner's rights under the 6th and 14th amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

(d) Ground Four: Petitioner suffered ineffective assistance of counsel at trial in violation of the 6th and 14th Amendments to the U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.):

**PLEADING
CONTINUES
IN NEXT
VOLUME**

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: 05C212968

Docket No: 85367

RECORD ON APPEAL VOLUME 2

ATTORNEY FOR APPELLANT
JOSEPH HENDERSON # 67224,
PROPER PERSON
P.O. BOX 650
INDIAN SPRINGS, NV 89070

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

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3	11/25/2008	Transcript of Hearing Held on June 23, 2008	553 - 597
2	6/27/2008	Transcript of Hearing Held on June 24, 2008	265 - 275
2	11/25/2008	Transcript of Hearing Held on June 24, 2008 (Continued)	447 - 481
3	11/25/2008	Transcript of Hearing Held on June 24, 2008 (Continuation)	482 - 499
3	11/25/2008	Transcript of Hearing Held on June 25, 2008	621 - 661
3	11/25/2008	Transcript of Hearing Held on June 26, 2008	500 - 552
3	11/25/2008	Transcript of Hearing Held on June 27, 2008	598 - 620
3	4/16/2009	Transcript of Hearing Held on June 27, 2008	665 - 683
1	8/5/2005	Transcript of Hearing Held on June 29, 2005	160 - 166
3	11/25/2008	Transcript of Hearing Held on March 19, 2008	662 - 664
4	11/13/2012	Transcript of Hearing Held on October 22, 2012	890 - 951

I N D E X

<u>VOL</u>	<u>DATE</u>	<u>PLEADING</u>	<u>PAGE NUMBER:</u>
4	4/12/2011	Unfiled Document(s) - Motion for Extension of Time to Submit Rebuttal to States Answer for Petitioners Writ of Habeas Corpus (Post-Conviction)	840 - 845
2	6/27/2008	Verdict	331 - 334


CLERK OF THE COURT

OPP
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
STACY L. KOLLINS
Chief Deputy District Attorney
Nevada Bar #005391
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)		
	)	Case No.	C212968
Plaintiff,)		
	)	Dept No.	XIV
-vs-)		
)		
JOSEPH ALEXANDER HENDERSON,)		
#1502730)		
)		
Defendant.)		

**STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS
FOR DESTRUCTION OF EVIDENCE**

DATE OF HEARING: 06-17-08
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through STACY L. KOLLINS, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to Dismiss for Destruction of Evidence.

This opposition 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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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF FACTS**

3 Defendant, JOSEPH ALEXANDER HENDERSON, is charged by way of Criminal
4 Information with the crimes of CONSPIRACY TO COMMIT BURGLARY (Gross
5 Misdemeanor - NRS 199.480, 205.060); BURGLARY WHILE IN POSSESSION OF A
6 FIREARM (Felony - NRS 205.060); CONSPIRACY TO COMMIT FIRST DEGREE
7 KIDNAPPING (Felony - NRS 199.480, 200.310, 200.320); FIRST DEGREE
8 KIDNAPPING WITH USE OF A DEADLY WEAPON (Felony - NRS 200.310, 200.320,
9 193.165); CONSPIRACY TO COMMIT SEXUAL ASSAULT (Felony - NRS 199.480,
10 200.364, 200.366); SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Felony -
11 NRS 200.364, 200.366, 193.165); CONSPIRACY TO COMMIT ROBBERY (Felony - NRS
12 199.480, 200.380); ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS
13 200.380, 193.165); OPEN OR GROSS LEWDNESS (Gross Misdemeanor - NRS 201.210);
14 and BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL
15 BODILY HARM (Felony - NRS 200.481.2e). The crimes occurred on about the 3rd day of
16 September, 2004.

17 On the night of September 3, 2004, at approximately thirty minutes after midnight, a
18 person described as a "Middle Eastern" man rang the doorbell of Julie Kim and Dr. Eric
19 Bernzweig's residence at 7833 Lonesome Harbor Avenue. Eric answered the door and was
20 told by the Middle Eastern man that he lived in the house adjacent to his and his son had
21 thrown his keys into the backyard. The Middle Eastern man requested to have access to
22 search for the keys. Eric closed and locked the door and in an effort to help, went to the
23 backyard, turned the lights on and attempted to find the keys to no avail. Eric then returned
24 to the front door and told the Middle Eastern man that he could not find the keys. The
25 Middle Eastern man then asked Eric if he could go to the backyard at which time Eric and
26 Julie accompanied him there to search for the keys again, to no avail.

27 At this point they came back to the house and the Middle Eastern man told Eric that
28 he needed to go to his car which was parked in front of the house. While the Middle Eastern

1 man was outside, Eric went to the garage to obtain a flashlight to better aid in looking for the
2 keys. When Eric returned from the garage, the Middle Eastern man was in the house along
3 with Defendant and another masked black male adult. The Middle Eastern man tied Julie's
4 hands behind her back. Defendant remained with her while the Middle Eastern man and the
5 other individual took Eric to the upstairs portion of the house.

6 The Middle Eastern man demanded to know where the safe was. Eric told them he
7 did not have a safe and instead gave them a thousand dollars he had in a bedroom. The
8 perpetrators then handcuffed Eric with a pair of fake (which was unknown to them at the
9 time) handcuffs and laid him on the floor. Eric eventually worked loose from the handcuffs
10 and while scuffling with one of the perpetrators was attacked and pistol whipped in the head
11 causing him to bleed profusely.

12 During this time Defendant was downstairs with Julie. Defendant held her at
13 gunpoint, put a pair of her husband's swim trunks over her head and threatened to "blow her
14 head off" if she screamed. He then began to fondle her and placed his mouth on her breasts
15 and then sexually assaulted her by inserting his fingers into her vagina. He then instructed
16 her to spread her legs. Being in fear for her life, she complied. Defendant then sexually
17 assaulted her by inserting his penis into her vagina.

18 Defendant was distracted by the commotion in the upstairs part of the house.
19 Defendant then took Julie upstairs to the master bedroom, placed her face down on the bed
20 and again sexually assaulted her by inserting his penis into her vagina. After Defendant was
21 done he smoked a cigarette.

22 Defendant and the Middle Eastern man then tied Julie's legs and left the residence.
23 Julie worked her way loose and went to her husband who was lying in a pool of blood and
24 untied him. She then went downstairs and called police.

25 Both victims were taken to the hospital where Julie Kim underwent a sexual assault
26 examination at UMC, which included buccal swabs, vaginal swabs and breast swabs from
27 the area of her breasts where Defendant put his mouth. Additionally, crime scene
28 investigators collected a grey and white fitted and top sheet from the bed in the upstairs

1 master bedroom.

2 Foreign DNA material from an unknown male was detected on the breast swabs of
3 the victim. The DNA profile from the unknown male was searched against the local DNA
4 Index System and no matches were found. The DNA profile was then uploaded to the
5 National DNA Index System for comparison. Later, a "CODIS HIT" was discovered and
6 came back to Defendant, who was in custody at the Clark County Detention Center.
7 LVMPD Detective M. Jeffries obtained a search warrant for a buccal swab from Defendant,
8 to confirm the DNA was true and correct.

9 On March 21, 2005, Defendant was officially confirmed as the source of the DNA
10 taken from Julie Kim, at which time he was re-booked on the instant charges.

11 Additionally, on July 25, 2005, criminalist, Kathy M. Guenther, completed a DNA of
12 Julie Kim's sexual assault kit. The examination included a buccal swab and vaginal swabs
13 of Julie Kim, as well as the top and bottom bedsheet removed from the bed in the master
14 bedroom, and a bathrobe found in the master bedroom.

15 Semen was detected on two stains on the top bedsheet, and male DNA was detected
16 on the vaginal swab as well. Tests results indicate that Defendant cannot be excluded as
17 being a source of the semen detected from the top bedsheet and the male DNA detected in
18 the vaginal swabs, with the estimated DNA profile in the population being rarer than 1 in
19 600 billion.

20 On June 3, 2008, Defendant filed a Motion to Dismiss for Destruction of Evidence.
21 The State's Opposition follows.

22 LEGAL ARGUMENT

23 **I. Defendant Is Not Prejudiced By the Government's Consumption of the DNA** 24 **Material As the Extraction Samples and/or Actual Swabs and Bed Sheets** 25 **Remain Available for Additional Testing**

26 The State's loss or destruction of evidence constitutes a due process violation only if
27 Defendant can show that, either that the State acted in bad faith or that the defendant
28 suffered undue prejudice and the exculpatory value of the evidence was apparent before it
was lost or destroyed. Sheriff v. Warner, 112 Nev. 1234, 926 P.2d 775 (1996); Leonard v.

1 State, 117 Nev. 53, 17 P.3d 397 (2001). The defendant must show that it could be reasonably
2 anticipated that the evidence sought would be exculpatory and material to the defense. Id. It
3 is not sufficient to show merely a hoped-for conclusion or that examination of the evidence
4 would be helpful in preparing a defense. Id.

5 The State has neither lost nor destroyed any evidence in this case. Thus, absolutely
6 none of the case law cited by Defendant in his brief is even remotely applicable in this case.
7 The DNA summary chart prepared in this case specifically indicates that there is a sufficient
8 sample of the buccal swabs of Julie Kim remaining for retest; that there is sufficient sample
9 of Julie Kim's vaginal swabs (epithelial fraction – E1) remaining for retesting; that there is a
10 sufficient sample of Julie Kim's vaginal swabs (sperm fraction –ER) remaining for testing;
11 and, that the extraction of the breast swabs remains available for retesting, as does do the
12 actual swabs themselves, in each of the areas.

13 A telephone call placed to LVMPD Criminalist, Kathy Guenther, confirmed that there
14 is sufficient sample available for testing for everything. Kathy Guenther established that
15 only an extract of the breast swabs exists; however, it can be retested. Furthermore, all of
16 the original swabs and bed clothing is currently available for testing, had the defense been
17 serious about the matter.

18 Defendant's motion suggests that a defense expert has reviewed all of the records of
19 reports provided by the Forensic Crime Lab and found that, "there are several areas where
20 the extraction and examination of the DNA are in question." (Defendant's motion, p. 4).
21 Obviously, this kind of assertion does not quite fit the "lost or destroyed" evidence theory,
22 and can adequately be addressed by Defendant's direct examination of the fault finding
23 expert, at the time of trial.

24 It appears that Defendant's instant motion is without merit. As such, Defendant's
25 motion must be denied.

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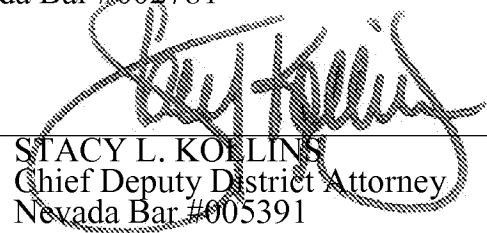
CONCLUSION

Based on the foregoing, the State respectfully requests that this Court deny the instant Motion to Dismiss for Destruction of Evidence.

DATED this 16th day of June, 2008.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY



STACY L. KOHLINS
Chief Deputy District Attorney
Nevada Bar #005391

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Opposition to Defendant's Motion to Dismiss for Destruction of Evidence, was made this 16th of June, 2008, by facsimile transmission to:

VIOLET RADOSTA, DPD
NORMAN J. REED, DPD
Fax #366-1177

BY Shellie Warner
Employee of the District Attorney's Office

sms/SVU


CLERK OF THE COURT

OPP
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
STACY L. KOLLINS
Chief Deputy District Attorney
Nevada Bar #005391
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)		
	)	Case No.	C212968
Plaintiff,)		
	)	Dept No.	XIV
-vs-)		
)		
JOSEPH ALEXANDER HENDERSON,)		
#1502730)		
)		
Defendant.)		

**OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO PRECLUDE
PROSECUTOR'S FALLACY, ARGUMENTS REGARDING DNA MATERIAL**

DATE OF HEARING: 06-17-08
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through STACY L. KOLLINS, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion In Limine to Preclude Prosecutor's Fallacy, Arguments Regarding DNA Material.

This opposition 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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24 to the front door and told the Middle Eastern man that he could not find the keys. The
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10 and while scuffling with one of the perpetrators was attacked and pistol whipped in the head
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16 on the vaginal swab as well. Tests results indicate that Defendant cannot be excluded as
17 being a source of the semen detected from the top bedsheet and the male DNA detected in
18 the vaginal swabs, **with the estimated DNA profile in the population being rarer than 1**
19 **in 600 billion (Identity assumed).**

20 On June 3, 2008, Defendant filed a Motion In Limine to Preclude “Prosecutor’s
21 Fallacy, Arguments Regarding DNA Material. The State’s Opposition follows.

22 LEGAL ARGUMENT

23 **I. The State Has No Intention Presenting Prosecutor’s Fallacy Arguments**

24 The State is aware of the Ninth Circuit’s recent decision in Brown v. Farwell 525
25 F.3d 787, 08 Cal. Daily Op. Serv. 5353 (Nev. 2008). The State would point out that in that
26 case, the prosecutor elicited testimony from the expert that there was a 99.99967 percent
27 chance that Defendant’s DNA was the same DNA found in the victim’s underwear, which
28 created the “prosecutor’s fallacy” because it confused the source probability with random

1 match probability. Id. at 795. In explaining the error the Ninth Circuit stated:

2 Here, Romero initially testified that Troy's DNA matched the
3 DNA found in Jane's underwear, and that 1 in 3,000,000 people
4 randomly selected from the population would also match the
5 DNA found in Jane's underwear (random match probability).
6 After the prosecutor pressed her to put this another way, Romero
7 testified that there was a 99.99967 percent chance that the DNA
8 found in Jane's underwear was from Troy's blood (source
9 probability). This testimony was misleading, as it improperly
10 conflated random match probability with source probability. In
11 fact, the former testimony (1 in 3,000,000) is the probability of a
12 match between an innocent person selected randomly from the
13 population; this is not the same as the probability that Troy's
14 DNA was the same as the DNA found in Jane's underwear,
15 which would prove his guilt. Statistically, the probability of guilt
16 given a DNA match is based on a complicated formula known as
17 Bayes's Theorem, *see id.* at 170-71 n. 2, and the 1 in 3,000,000
18 probability described by Romero is but one of the factors in this
19 formula. Significantly, another factor is the strength of the non-
20 DNA evidence. Here, Romero improperly conflated random
21 match and source probability, an error that is especially profound
22 given the weakness of the remaining evidence against Troy. In
23 sum, Romero's testimony that Troy was 99.99967 percent likely
24 to be guilty was based on her scientifically flawed DNA analysis,
25 which means that Troy was most probably convicted based on
26 the jury's consideration of false, but highly persuasive, evidence.

19 Id. at 795-796.

20 The State has no intention of presenting testimony or arguments regarding the DNA
21 evidence in this matter which would evince the likelihood of Defendant's guilt rather than
22 the odds of the evidence having been found in a randomly selective sample, which in this
23 case is 1 in 600 Billion. With a statistic such as that present in this case, 1 in 600 billion,
24 identity is presumed. 600 billion is 10 times the earth's population. For scientific purposes,
25 that is identity.

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CONCLUSION

Based on the foregoing, the State respectfully requests that this Court deny the instant Motion In Limine to Preclude "Prosecutor's Fallacy Arguments, Regarding DNA Material" be denied.

DATED this 16th day of June, 2008.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY



STACY L. KOLLINS
Chief Deputy District Attorney
Nevada Bar #005391

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Opposition to Defendant's In Limine to Preclude "Prosecutor's Fallacy, Arguments Regarding DNA Material", was made this of June, 2008, by facsimile transmission to:

VIOLET RADOSTA, DPD
NORMAN J. REED, DPD
Fax #366-1177

BY Shellie Warner
Employee of the District Attorney's Office

sms/SVU

ORIGINAL

FILED

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PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

2008 JUN 20 P 2:40

DISTRICT COURT

Cheryl L. Smith
CLERK OF THE COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

JOSEPH ALEXANDER HENDERSON,

Defendant.

CASE NO. C212968X

DEPT. NO. XIV

DATE: June 23, 2008

TIME: 1:30 p.m.

PROPOSED VOIR DIRE QUESTIONS PURSUANT TO EDCR 7.70

COMES NOW, the Defendant, JOSEPH ALEXANDER HENDERSON, by and through VIOLET R. RADOSTA, Deputy Public Defender and hereby submits these proposed voir dire questions to the Court.

DATED this 20 day of June, 2008.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By

Violet Radosta
VIOLET R. RADOSTA, #5747
Deputy Public Defender

RECEIVED

JUN 20 2008

CLERK OF THE COURT

1. Have you read any book, articles or magazines concerning DNA analysis?
2. Have you followed any court cases involving DNA analysis?
3. What is your view concerning the reliability of DNA analysis to accurately identify a person as the possible source of material found at the crime scene?
4. Have you ever consulted with an expert other than a medical doctor?
If yes, when was the last time you contacted an expert, other than a medical doctor?
5. How did you go about finding the expert you contacted?
6. After consulting with the first expert, did you consult with another expert?
7. What factors would you use to determine whether an expert was qualified or not?
8. Have you ever given sample blood to your doctor for testing?
If yes, have you ever felt uncomfortable with the results?
9. Have you ever provided a urine sample to be analyzed for any purpose?
If yes, have you ever felt uncomfortable with the results?
10. Do you have any specialized training in medicine, biology or science?
If yes, please describe.
11. Did you take any science or math courses in college?
If yes, please explain.
12. Does the fact that this incident occurs inside the victim's home affect your ability to be fair and impartial?
13. Does the violent nature of a robbery affect your ability to be fair and impartial?
14. Does the violent nature of sexual assault affect your ability to be fair and impartial?
15. Does the violent nature of a kidnapping affect your ability to be fair and impartial?

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NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion on for hearing before the Court on the 23rd day of June, 2008, at 1:30 p.m..

DATED this 20 day of June, 2008.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By *Violet Radosta*
VIOLET R. RADOSTA, #5747
Deputy Public Defender

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Proposed Voir Dire Questions Pursuant to EDCR 7.70 is hereby acknowledged this ~~21~~ 20 day of June, 2008.

CLARK COUNTY DISTRICT ATTORNEY

By *Eileen Monville*

ORIGINAL

1 INFO
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 STACY KOLLINS
6 Chief Deputy District Attorney
7 Nevada Bar #005391
8 200 South Third Street
9 Las Vegas, Nevada 89155-2212
10 (702) 455-4711
11 Attorney for Plaintiff

FILED IN OPEN COURT

JUN 23 2008

20

CHARLES J. SHORT
CLERK OF THE COURT

[Signature]
LINDA SKINNER DEPUTY

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,)

11 Plaintiff,)

12 -vs-)

13 JOSEPH ALEXANDER HENDERSON,)
14 #1502730)

15 Defendant.)

Case No: C212968
Dept No: XIV

AMENDED
INFORMATION

16 STATE OF NEVADA)
17 COUNTY OF CLARK) ss.

18 DAVID ROGER, District Attorney within and for the County of Clark, State of
19 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

20 That JOSEPH ALEXANDER HENDERSON, the Defendant above named, having
21 committed the crimes of CONSPIRACY TO COMMIT BURGLARY (Gross
22 Misdemeanor - NRS 199.480, 205.060); BURGLARY WHILE IN POSSESSION OF A
23 FIREARM (Felony - NRS 205.060); CONSPIRACY TO COMMIT FIRST DEGREE
24 KIDNAPPING (Felony - NRS 199.480, 200.310, 200.320); FIRST DEGREE
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28 WEAPON (Felony - NRS 200.364, 200.366, 193.165); CONSPIRACY TO COMMIT

1 **ROBBERY (Felony - NRS 199.480, 200.380); ROBBERY WITH USE OF A DEADLY**
2 **WEAPON (Felony - NRS 200.380, 193.165); OPEN OR GROSS LEWDNESS (Gross**
3 **Misdemeanor - NRS 201.210); and BATTERY WITH USE OF A DEADLY WEAPON**
4 **RESULTING IN SUBSTANTIAL BODILY HARM (Felony - NRS 200.481.2e), on or**
5 **about the 3rd day of September, 2004, within the County of Clark, State of Nevada, contrary**
6 **to the form, force and effect of statutes in such cases made and provided, and against the**
7 **peace and dignity of the State of Nevada,**

8 **COUNT 1 - CONSPIRACY TO COMMIT BURGLARY**

9 did then and there meet with Unknown Individuals and between themselves, and each
10 of them with the other, wilfully and unlawfully conspire and agree to commit the crime of
11 burglary, and in furtherance of said conspiracy, Defendant did commit the acts as set forth in
12 Count 2, said acts being incorporated by this reference as though fully set forth herein.

13 **COUNT 2 - BURGLARY WHILE IN POSSESSION OF A FIREARM**

14 did then and there wilfully, unlawfully, and feloniously enter, while in possession of a
15 firearm, and with intent to commit larceny and/or robbery and/or sexual assault, that certain
16 building occupied by JULIE KIM and/or ERIC BERNZWEIG, located at 7833 Lonesome
17 Harbor, Las Vegas, Clark County, Nevada.

18 **COUNT 3 - CONSPIRACY TO COMMIT FIRST DEGREE KIDNAPPING**

19 did then and there meet with unknown individuals and between themselves, and each
20 of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit
21 the crime of first degree kidnapping, and in furtherance of said conspiracy, Defendant did
22 commit the acts as set forth in Counts 4 and 5, said acts being incorporated by this reference
23 as though fully set forth herein.

24 **COUNT 4 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON**

25 did wilfully, unlawfully, feloniously, and without authority of law, seize, confine,
26 inveigle, entice, decoy, abduct, conceal, kidnap, or carry away JULIE KIM, a human being,
27 with the intent to hold or detain the said JULIE KIM against her will, and without her
28 consent, for the purpose of committing sexual assault and/or robbery, said Defendant using a

1 deadly weapon, to-wit: a firearm, during the commission of said crime, the Defendant being
2 responsible under one or more of the following principles of criminal liability; to-wit: (1) by
3 the Defendant directly committing the acts set forth; and/or (2) the Defendant and Unknown
4 Individuals conspiring with each other to commit the offense of First Degree Kidnapping
5 with Use of a Deadly Weapon whereby the defendant and Unknown Individuals are each
6 vicariously liable for the crimes intended; and/or (2) the Defendant and Unknown
7 Individuals aiding or abetting in the commission of the crime by accompanying each other
8 to the crime scene where (they bound Julie Kim at gunpoint and separated her from Eric
9 Bernzweig whereupon she was sexually assaulted and/or robbed, the Defendant and
10 Unknown Individuals encouraging one another throughout by actions and words; acting in
11 concert throughout and fleeing the scene together.

12 COUNT 5 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

13 did wilfully, unlawfully, feloniously, and without authority of law, seize, confine,
14 inveigle, entice, decoy, abduct, conceal, kidnap, or carry away ERIC BERNZWEIG, a
15 human being, with the intent to hold or detain the said ERIC BERNZWEIG against his will,
16 and without his consent, for the purpose of committing robbery, said Defendant using a
17 deadly weapon, to-wit: a firearm, during the commission of said crime, the Defendant being
18 responsible under one or more of the following principles of criminal liability; to-wit: (1) by
19 the Defendant directly committing the acts set forth; and/or (2) the Defendant and Unknown
20 Individuals conspiring with each other to commit the offense of First Degree Kidnapping
21 with Use of a Deadly Weapon whereby the defendant and Unknown Individuals are each
22 vicariously liable for the crimes intended; and/or (2) the Defendant and Unknown
23 Individuals aiding or abetting in the commission of the crime by accompanying each other
24 to the crime scene where they bound Eric Bernzweig at gunpoint and separated him from
25 Julie Kim whereupon he was robbed, the Defendant and Unknown Individual encouraging
26 one another throughout by actions and words; acting in concert throughout and fleeing the
27 scene together.

28 //

1 COUNT 6 - CONSPIRACY TO COMMIT SEXUAL ASSAULT

2 did then and there meet with unknown individuals and between themselves, and each
3 of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit
4 the crime of sexual assault, and in furtherance of said conspiracy, Defendant did commit the
5 acts as set forth in Counts 7, and 8, said acts being incorporated by this reference as though
6 fully set forth herein.

7 COUNT 7 - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

8 did then and there wilfully, unlawfully, and feloniously sexually assault and subject
9 JULIE KIM, a female person, to sexual penetration, to-wit: sexual intercourse, by placing
10 his penis into the genital opening of the said JULIE KIM, against her will, said Defendant
11 using a deadly weapon, to-wit: a firearm, during the commission of said crime.

12 COUNT 8 - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

13 did then and there wilfully, unlawfully, and feloniously sexually assault and subject
14 JULIE KIM, a female person, to sexual penetration, to-wit: sexual intercourse, by placing
15 his penis into the genital opening of the said JULIE KIM, against her will, said Defendant
16 using a deadly weapon, to-wit: a firearm, during the commission of said crime.

17 COUNT 9 - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

18 did then and there wilfully, unlawfully, and feloniously sexually assault and subject
19 JULIE KIM, a female person, to sexual penetration, to-wit: digital penetration, by placing
20 his finger(s) into the genital opening of the said JULIE KIM, against her will, said Defendant
21 using a deadly weapon, to-wit: a firearm, during the commission of said crime.

22 COUNT 10 - CONSPIRACY TO COMMIT ROBBERY

23 did then and there meet with unknown individuals and between themselves, and each
24 of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit
25 the crime of robbery, and in furtherance of said conspiracy, Defendant did commit the acts
26 as set forth in Counts 10, and 11, said acts being incorporated by this reference as though
27 fully set forth herein.

28 //

1 COUNT 11 - ROBBERY WITH USE OF A DEADLY WEAPON

2 did then and there wilfully, unlawfully, and feloniously take personal property, to-wit:
3 lawful money of the United States, from the person of JULIE KIM, or in her presence, by
4 means of force or violence or fear of injury to, and without the consent and against the will
5 of the said JULIE KIM, said Defendant using a deadly weapon, to-wit: a firearm, during the
6 commission of said crime, the Defendant being responsible under one or more of the
7 following principles of criminal liability; to-wit: (1) by the Defendant directly committing
8 the acts set forth; and/or (2) the Defendant and Unknown Individuals conspiring with each
9 other to commit the offense of Robbery with Use of a Deadly Weapon whereby the
10 defendant and Unknown Individuals are each vicariously liable for the reasonably
11 foreseeable acts of the other conspirators when the acts were in furtherance of the
12 conspiracy; and/or (2) the Defendant and Unknown Individuals aiding or abetting in the
13 commission of the crime by accompanying each other to the crime scene where they bound
14 Julie Kim at gunpoint and separated him from Eric Bernzweig whereupon she was robbed,
15 encouraging one another throughout by actions and words; acting in concert throughout and
16 fleeing the scene together.

17 COUNT 12- ROBBERY WITH USE OF A DEADLY WEAPON

18 did then and there wilfully, unlawfully, and feloniously take personal property, to-wit:
19 lawful money of the United States, from the person of ERIC BERNZWEIG, or in his
20 presence, by means of force or violence or fear of injury to, and without the consent and
21 against the will of the said ERIC BERNZWEIG, said Defendant using a deadly weapon, to-
22 wit: a firearm, during the commission of said crime, the Defendant being responsible under
23 one or more of the following principles of criminal liability; to-wit: (1) by the Defendant
24 directly committing the acts set forth; and/or (2) the Defendant and Unknown Individuals
25 conspiring with each other to commit the offense of Robbery with Use of a Deadly Weapon
26 whereby the defendant and Unknown Individuals are each vicariously liable for the
27 reasonably foreseeable acts of the other conspirators when the acts were in furtherance of the
28 conspiracy; and/or (2) the Defendant and Unknown Individuals aiding or abetting in the

1 commission of the crime by accompanying each other to the crime scene where they bound
2 Eric Bernzweig at gunpoint and separated him from Julie Kim whereupon he was robbed,
3 encouraging one another throughout by actions and words; acting in concert throughout and
4 fleeing the scene together.

5 COUNT 13 - OPEN OR GROSS LEWDNESS

6 did then and there wilfully and unlawfully commit an act of open or gross lewdness
7 by placing his mouth and/or tongue on the breast(s) of JULIE KIM.

8 COUNT 14 - BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN
9 SUBSTANTIAL BODILY HARM

10 did then and there wilfully, unlawfully and feloniously use force or violence upon the
11 person of another, to-wit: ERIC BERNZWEIG, with use of a deadly weapon, to-wit: a
12 firearm, by striking the said ERIC BERNZWEIG on the head with said firearm, resulting in
13 substantial bodily harm to the said ERIC BERNZWEIG.

14 DAVID ROGER
15 DISTRICT ATTORNEY
16 Nevada Bar #002781

17 BY

18 STACY KOLLINS
19 Chief Deputy District Attorney
20 Nevada Bar #005391
21
22
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26
27
28

1 Names of witnesses known to the District Attorney's Office at the time of filing this
2 Information are as follows:

3	<u>NAME</u>	<u>ADDRESS</u>
4	BERCH, HENRY – LVMPD	
5	BERNZWEIG, ERIC – 3886 BILTMORE BAY, LVN 89147	
6	CUSTODIAN OF RECORDS – LVMPD RECORDS	
7	EBBERT, LINDA – UNIVERSITY MEDICAL CENTER	
8	GUENTHER, KATHY – LVMPD P#6109	
9	JEFFRIES, MICHAEL – LVMPD P#5302	
10	KIM, JULIE – 3886 BILTMORE BAY, LVN 89147	
11	WELCH, DAVID – LVMPD P#1418	

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23
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25 DA#05F05146X/mmw/SVU
26 LVMPD EV#0409030152
27 CONSP;BURG W/WPN;1ST
28 DEG KIDNAP W/WPN;SEX
ASLT W/WPN; ROBB W/WPN;
OG LEWD;BWDW W/SBH - GM/F
(TK5)

1 JURL

ORIGINAL

FILED IN OPEN COURT
JUN 24 2008 20

CHARLES J. SHORT
CLERK OF THE COURT

DISTRICT COURT

BY Linda Skinner
DEPUTY

CLARK COUNTY, NEVADA

LINDA SKINNER

7 STATE OF NEVADA

8 Plaintiff(s),

CASE NO. C212968

9 -VS-

DEPT. NO. XIV

10 JOSEPH ALEXANDER HENDERSON

11 Defendant(s).

14 JURY

15 1. JOHN RUIZ

7. RAUL RAYGOZA

16 2. JOAQUIN VELES

8. TERI DRAPER

17 3. TAYLOR GARDNER

9. CLODET CANDELARIO-GARCIA

18 4. ROBERT GREGORY

10. JUDY FRANCIS

19 5. APRIL KARALIS

11. THELMA BERMAN

20 6. DOUGLAS ABEL

12. ERIC RANDALL

22 ALTERNATES

23 1. JONATHAN HENDERSON

2.

FILED

DISTRICT COURT

CLARK COUNTY, NEVADA JUN 27 8 09 AM '08

[Signature]
CLERK OF THE COURT

THE STATE OF NEVADA,

Plaintiff,

vs.

JOSEPH ALEXANDER HENDERSON,

Defendant.

No. C212968
Dept. XIV

ORIGINAL

""ROUGH DRAFT EXCERPT""

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DONALD M. MOSLEY

June 24, 2008
1:30 p.m.
Department XIV

APPEARANCES:

For the State:
MS. STACY KOLLINS
MR. BRAD TURNER
Deputy District Attorneys

For the Defendant:
MS. VALERIE RADOSTA
MR. NORMAN REED
Deputy Public Defenders

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JUN 27 2008

CLERK OF THE COURT

Reported by:
Joseph A. D'Amato
Nevada CCR #17 for

1 review. And I'll make this bigger for you.

2 Again, Julie Kim's standard DNA
3 profile, her own DNA from the kit. The vaginal swab
4 of the male contributor, the bed sheet and the
5 swabbings of Joseph Henderson.

6 Again, they match one in six hundred
7 billion. 10 times the earth's population.

8 At the conclusion of the trial, Ladies
9 and Gentlemen, after you've heard compelling
10 testimony of Julie Kim, the testimony of her
11 husband, the testimony of our Metro Police officers,
12 our forensic analysts, we are going to ask that you
13 find the defendant guilty of conspiracy to commit
14 burglary, burglary while in possession of a firearm,
15 conspiracy to commit degree kidnapping, First Degree
16 kidnapping with use of deadly weapon, sexual assault
17 with use of deadly weapon, conspiracy to commit that
18 crime, conspiracy to commit robbery, conspiracy to
19 commit robbery with use of deadly weapon, open and
20 gross lewdness and battery with use of deadly weapon
21 with substantial bodily harm.

22 I thank you for your time.

23 THE COURT: Thank you.

24 Does defense counsel wish to make an
25 opening statement at this time or reserve your

1 right?

2 MR. REED: I will.

3 THE COURT: Go ahead.

4 MR. REED: Dioxynucleic acid.

5 That's what this case is all about.

6 That acid also known as DNA. At the
7 end of the case I will tell you do not assume.

8 Do not assume that Joseph Henderson
9 was the person who left the DNA at that scene.

10 What the evidence will show you,
11 Ladies and Gentlemen, is that the examiners in this
12 case rushed to judgment.

13 They did not do a proper blind
14 comparison of the samples in this matter.

15 As a result they came to the wrong
16 conclusion, and erroneously they accused
17 Mr. Henderson of leaving the DNA at that scene.

18 All of you, when you were hearing
19 about this case expressed little or no knowledge
20 about DNA. You'll hear a lot of terminology.

21 You'll hear about STR's, short tandem
22 repeats, and peaks and stutters and all kinds of
23 different terminology.

24 I want to take for you a few minutes
25 if I can just to walk you through the testimony that

1 you'll hear from the experts that are going to be
2 presented in this case concerning DNA.

3 As we start off, I think even Judge
4 Mosley mentioned it early on, DNA is basically
5 the -- contains inside molecules and is a basic
6 construct of what makes us up. It's what makes us
7 unique for each individual.

8 The FBI has identified there are 23
9 separate loci. Loci are a particular identifier
10 that can separate us as individuals, besides the
11 chromosomes, which determines whether we're male or
12 female.

13 In DNA testing, at least in the DNA
14 testing that is done in this case, they will narrow
15 it down to 13 loci to do the comparison. We saw a
16 chart of those basic loci.

17 The loci are each individual
18 presentations of part of our DNA. What is critical
19 in this case, when you hear the testimony, is that
20 if there's one particular comparison out of the 13
21 that is erroneous, then the one in six hundred
22 billion possibility becomes --

23 MS. KOLLINS: I'm going to object.
24 This is argument.

25 THE COURT: It is.

1 MR. REED: These are all things that
2 the evidence is going to show, judge.

3 THE COURT: You don't want to -- this
4 is going to be supplied. The jury will make the
5 determination of what the import of it is.

6 MR. REED: The evidence is going to
7 show that the testing was not done in a complete and
8 accurate manner.

9 What it's also going to show is -- and
10 they had the chart up there -- STR is short tandem
11 repeat. That is the method they use to do the
12 testing.

13 What happens is they put all the
14 information basically into a computer, not like on
15 CSI where they put it all in a computer and it spits
16 out a picture of the person.

17 It doesn't work that way in DNA
18 analysis.

19 The way it works is that there is
20 actual judgment and discretion on the part of the
21 examiner in making these determinations.

22 Counsel showed you a chart that has
23 the actual numbers. When we go through the actual
24 testimony the experts will be showing you the data,
25 the raw data which will be comprised of something

1 that will look like this.

2 What will happen is you'll see peaks
3 on a chart. And you'll see numbers across here.
4 These numbers are called RFU's.

5 The higher the number the experts will
6 tell you the better presentation of that particular
7 person's sample of that loci, that one little
8 indicator with the bigger the spike, the bigger the
9 point the more there is a representation of DNA
10 being present in that.

11 What happened in this case, as an
12 example, the vaginal swab which counsel mentioned in
13 her opening statement, it is a mixture of DNA. It
14 is not one, individual DNA.

15 In doing so the expert then has to
16 determine the mixture.

17 How do I separate out the two?

18 What they will do in the testimony is
19 they will show you they will have these two
20 different peaks which could be potentially two
21 different people.

22 Do a mathematical comparison. It's
23 not that complicated.

24 Based on this number the first peak
25 and the second peak, they will tell you they do a

1 mathematical percentage.

2 The experts will also tell you any
3 time there is a 60 percent or higher, in other
4 words, there is a 60 percent difference in the peak,
5 between the first peak and the second peak, they
6 will then have to analyze it to determine whether or
7 not this second part is another individual and, if
8 so, what conclusions they can make from that.

9 They will also tell you -- when you
10 saw on counsel's chart, as for example, let's
11 take -- and you'll hear about D13. D13 is one of
12 those 13 loci.

13 You will see in the charts that there
14 will be an A15. There is not going to be just one
15 person.

16 What you'll hear the examiner say is
17 that she will make a conclusion based on her
18 analysis that in the end it was a 13/15.

19 What she didn't do, objectively -- she
20 did not eliminate a possibility of a 13, 13, a 15,
21 13 -- sorry, I'm scribbling down there -- or a
22 15/15.

23 This happens not just once, not just
24 twice, but in at least five separate loci. So as
25 you're hearing the testimony from the experts keep

1 this in mind.

2 Again, I promise that -- I said it's
3 all not that complicated. If I have complicated
4 it -- let me back up for second and tell you
5 basically the procedure that they go through in the
6 collection. This is more of the science of the
7 analysis.

8 In every case -- excuse me -- get some
9 water -- in every case there is and there was
10 mentioned already there are going to be a number of
11 factors that you have to watch out for in how we get
12 to the final result.

13 Factor number one, collection.

14 Was the sample collected properly and
15 stored properly?

16 Step number two, does the person who
17 is testifying have the proper qualifications to do
18 the testing and analysis?

19 Step number three, was the DNA
20 extracted properly?

21 MS. KOLLINS: Judge, I'm going to
22 object -- objection. Argument.

23 Are we talking about --

24 MR. REED: These are things that are
25 going to get testified to.

1 THE COURT: I know. You're not to
2 testify at this time.

3 Say what you're going to say, but
4 don't draw any conclusion. When you say it was
5 improperly done, that's a conclusion.

6 MR. REED: I don't think I said that.

7 THE COURT: Explain what you're going
8 to present.

9 MR. REED: What will be presented is
10 they -- first it will be collected. Look at the
11 manner and method which it was collected.

12 Was it preserved properly?

13 Secondly, does the individual have the
14 proper qualifications in order to do the analysis?

15 Third, which you will hear them testify
16 about, you'll hear evidence of the extraction and
17 the extraction method. You'll hear there are a
18 couple of different extraction methods that they
19 place.

20 Did the DNA get extracted, that is
21 taken from the crime scene, brought to the lab and
22 then removed from the sample itself and put on the
23 little swab?

24 Was that process done correctly?

25 Next, was the analysis done right?

1 What happens is, like I said, they are
2 going to spit out a whole bunch of data. They will
3 tell you that the computer gave them these loci,
4 these numbers.

5 There is judgment that has to be made
6 by the experts in this regard.

7 There will be evidence presented to
8 show to you that when they did this they had to make
9 judgment calls.

10 There will be evidence presented to
11 you that will show you that they are supposed to be
12 objective and not make improper judgment calls.

13 They are supposed to be fair and
14 impartial. And they didn't do that when they made
15 these judgment calls.

16 Keep in in mind as you hear the
17 evidence what they will tell you is that it is not
18 the type of science in which you can automatically
19 make assumptions from statistical data.

20 There is some analysis, some
21 discretion that has to take place in that.

22 Then the final step, the actual final
23 step would then be the mathematical calculations
24 that they will tell you about, assuming that they
25 have done all the first four steps correctly, then

1 they will indicate that there is a one in six
2 hundred billion chance that Mr. Henderson is the
3 person who left the DNA at the scene.

4 No one disputes that this was not a
5 violent, serious offense. No one disputes what
6 happened out in that house. That is not what's at
7 issue.

8 What is at issue is do not assume.

9 The DNA analysis -- did the DNA
10 analysis get the proper person?

11 We will show you at the conclusion of
12 this case -- and you should also not assume that
13 they have it right.

14 We'll ask you to find Joseph Henderson
15 not guilty of these serious charges.

16 Thank you.

17 THE COURT: Thank you, Mr. Reed.

1 **ORDER**

2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 STACY KOLLINS
6 Chief Deputy District Attorney
7 Nevada Bar #005391
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

ORIGINAL FILED

JUN 27 4 06 PM '08

Chris Ellis
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,)

9 Plaintiff,)

10 -vs-)

11 JOSEPH HENDERSON,
12 #1502730)

13 Defendant.)

CASE NO: C212968

DEPT NO: XIV

ORDER FOR DAILY TRANSCRIPT

14 Upon the ex-parte application of the State of Nevada, represented by DAVID
15 ROGER, District Attorney, by and through, STACY KOLLINS, Chief Deputy District
16 Attorney, and good cause appearing therefor,

17 IT IS HEREBY ORDERED that a transcript of the trial heard on the 24th day of June,
18 2008, be prepared by JOE D'AMATO, Court Reporter/Recorder for the above-entitled
19 Court.

20 DATED this 26th day of June, 2008.

21 *Donald W. Murley*
22 DISTRICT JUDGE

23 DAVID ROGER
24 District Attorney
25 Nevada Bar #002781

26 BY

27 *Stacy Kollins*
28 STACY KOLLINS
Chief Deputy District Attorney
Nevada Bar #005391

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JUN 27

CLERK OF THE COURT

1 INST

FILED IN OPEN COURT
JUN 27 2008

CHARLES J. SHORT
CLERK OF THE COURT

Linda Skinner
DEPUTY
LINDA SKINNER

DISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 JOSEPH ALEXANDER HENDERSON,

12 Defendants.

CASE NO: C212968

DEPT NO: XIV

13 INSTRUCTIONS TO THE JURY (INSTRUCTION NO. 1)

14 MEMBERS OF THE JURY:

15 It is now my duty as judge to instruct you in the law that applies to this case. It is
16 your duty as jurors to follow these instructions and to apply the rules of law to the facts as
17 you find them from the evidence.

18 You must not be concerned with the wisdom of any rule of law stated in these
19 instructions. Regardless of any opinion you may have as to what the law ought to be, it
20 would be a violation of your oath to base a verdict upon any other view of the law than that
21 given in the instructions of the Court.

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

An Information is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.

In this case, it is charged in an Amended Information that on or about the 3rd day of September, 2004, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada, **CONSPIRACY TO COMMIT BURGLARY (Gross Misdemeanor - NRS 199.480, 205.060); BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony - NRS 205.060); CONSPIRACY TO COMMIT FIRST DEGREE KIDNAPPING (Felony - NRS 199.480, 200.310, 200.320); FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Felony - NRS 200.310, 200.320, 193.165); CONSPIRACY TO COMMIT SEXUAL ASSAULT (Felony - NRS 199.480, 200.364, 200.366); SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Felony - NRS 200.364, 200.366, 193.165); CONSPIRACY TO COMMIT ROBBERY (Felony - NRS 199.480, 200.380); ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165); OPEN OR GROSS LEWDNESS (Gross Misdemeanor - NRS 201.210); and BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Felony - NRS 200.481.2e), to-wit:**
COUNT 1 - CONSPIRACY TO COMMIT BURGLARY

did then and there meet with Unknown Individuals and between themselves, and each of them with the other, wilfully and unlawfully conspire and agree to commit the crime of burglary, and in furtherance of said conspiracy, Defendant did commit the acts as set forth in Count 2, said acts being incorporated by this reference as though fully set forth herein.

COUNT 2 - BURGLARY WHILE IN POSSESSION OF A FIREARM

did then and there wilfully, unlawfully, and feloniously enter, while in possession of a firearm, and with intent to commit larceny and/or robbery and/or sexual assault, that certain building occupied by JULIE KIM and/or ERIC BERNZWEIG, located at 7833 Lonesome Harbor, Las Vegas, Clark County, Nevada.

1 COUNT 3 - CONSPIRACY TO COMMIT FIRST DEGREE KIDNAPPING

2 did then and there meet with unknown individuals and between themselves, and each
3 of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit
4 the crime of first degree kidnapping, and in furtherance of said conspiracy, Defendant did
5 commit the acts as set forth in Counts 4 and 5, said acts being incorporated by this reference
6 as though fully set forth herein.

7 COUNT 4 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

8 did wilfully, unlawfully, feloniously, and without authority of law, seize, confine,
9 inveigle, entice, decoy, abduct, conceal, kidnap, or carry away JULIE KIM, a human being,
10 with the intent to hold or detain the said JULIE KIM against her will, and without her
11 consent, for the purpose of committing sexual assault and/or robbery, said Defendant using a
12 deadly weapon, to-wit: a firearm, during the commission of said crime, the Defendant being
13 responsible under one or more of the following principles of criminal liability; to-wit: (1) by
14 the Defendant directly committing the acts set forth; and/or (2) the Defendant and Unknown
15 Individuals conspiring with each other to commit the offense of First Degree Kidnapping
16 with Use of a Deadly Weapon whereby the defendant and Unknown Individuals are each
17 vicariously liable for the crimes intended; and/or (2) the Defendant and Unknown
18 Individuals aiding or abetting in the commission of the crime by accompanying each other
19 to the crime scene where (they bound Julie Kim at gunpoint and separated her from Eric
20 Bernzweig whereupon she was sexually assaulted and/or robbed, the Defendant and
21 Unknown Individuals encouraging one another throughout by actions and words; acting in
22 concert throughout and fleeing the scene together.

23 COUNT 5 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

24 did wilfully, unlawfully, feloniously, and without authority of law, seize, confine,
25 inveigle, entice, decoy, abduct, conceal, kidnap, or carry away ERIC BERNZWEIG, a
26 human being, with the intent to hold or detain the said ERIC BERNZWEIG against his will,
27 and without his consent, for the purpose of committing robbery, said Defendant using a
28 deadly weapon, to-wit: a firearm, during the commission of said crime, the Defendant being

1 responsible under one or more of the following principles of criminal liability; to-wit: (1) by
2 the Defendant directly committing the acts set forth; and/or (2) the Defendant and Unknown
3 Individuals conspiring with each other to commit the offense of First Degree Kidnapping
4 with Use of a Deadly Weapon whereby the defendant and Unknown Individuals are each
5 vicariously liable for the crimes intended; and/or (2) the Defendant and Unknown
6 Individuals aiding or abetting in the commission of the crime by accompanying each other
7 to the crime scene where they bound Eric Bernzweig at gunpoint and separated him from
8 Julie Kim whereupon he was robbed, the Defendant and Unknown Individual encouraging
9 one another throughout by actions and words; acting in concert throughout and fleeing the
10 scene together.

11 COUNT 6 - CONSPIRACY TO COMMIT SEXUAL ASSAULT

12 did then and there meet with unknown individuals and between themselves, and each
13 of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit
14 the crime of sexual assault, and in furtherance of said conspiracy, Defendant did commit the
15 acts as set forth in Counts 7, and 8, said acts being incorporated by this reference as though
16 fully set forth herein.

17 COUNT 7 - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

18 did then and there wilfully, unlawfully, and feloniously sexually assault and subject
19 JULIE KIM, a female person, to sexual penetration, to-wit: sexual intercourse, by placing
20 his penis into the genital opening of the said JULIE KIM, against her will, said Defendant
21 using a deadly weapon, to-wit: a firearm, during the commission of said crime.

22 COUNT 8 - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

23 did then and there wilfully, unlawfully, and feloniously sexually assault and subject
24 JULIE KIM, a female person, to sexual penetration, to-wit: sexual intercourse, by placing
25 his penis into the genital opening of the said JULIE KIM, against her will, said Defendant
26 using a deadly weapon, to-wit: a firearm, during the commission of said crime.

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1 COUNT 9 - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

2 did then and there wilfully, unlawfully, and feloniously sexually assault and subject
3 JULIE KIM, a female person, to sexual penetration, to-wit: digital penetration, by placing
4 his finger(s) into the genital opening of the said JULIE KIM, against her will, said Defendant
5 using a deadly weapon, to-wit: a firearm, during the commission of said crime.

6 COUNT 10 - CONSPIRACY TO COMMIT ROBBERY

7 did then and there meet with unknown individuals and between themselves, and each
8 of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit
9 the crime of robbery, and in furtherance of said conspiracy, Defendant did commit the acts
10 as set forth in Counts 10, and 11, said acts being incorporated by this reference as though
11 fully set forth herein.

12 COUNT 11 - ROBBERY WITH USE OF A DEADLY WEAPON

13 did then and there wilfully, unlawfully, and feloniously take personal property, to-wit:
14 lawful money of the United States, from the person of JULIE KIM, or in her presence, by
15 means of force or violence or fear of injury to, and without the consent and against the will
16 of the said JULIE KIM, said Defendant using a deadly weapon, to-wit: a firearm, during the
17 commission of said crime, the Defendant being responsible under one or more of the
18 following principles of criminal liability; to-wit: (1) by the Defendant directly committing
19 the acts set forth; and/or (2) the Defendant and Unknown Individuals conspiring with each
20 other to commit the offense of Robbery with Use of a Deadly Weapon whereby the
21 defendant and Unknown Individuals are each vicariously liable for the reasonably
22 foreseeable acts of the other conspirators when the acts were in furtherance of the
23 conspiracy; and/or (2) the Defendant and Unknown Individuals aiding or abetting in the
24 commission of the crime by accompanying each other to the crime scene where they bound
25 Julie Kim at gunpoint and separated him from Eric Bernzweig whereupon she was robbed,
26 encouraging one another throughout by actions and words; acting in concert throughout and
27 fleeing the scene together.

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1 COUNT 12- ROBBERY WITH USE OF A DEADLY WEAPON

2 did then and there wilfully, unlawfully, and feloniously take personal property, to-wit:
3 lawful money of the United States, from the person of ERIC BERNZWEIG, or in his
4 presence, by means of force or violence or fear of injury to, and without the consent and
5 against the will of the said ERIC BERNZWEIG, said Defendant using a deadly weapon, to-
6 wit: a firearm, during the commission of said crime, the Defendant being responsible under
7 one or more of the following principles of criminal liability; to-wit: (1) by the Defendant
8 directly committing the acts set forth; and/or (2) the Defendant and Unknown Individuals
9 conspiring with each other to commit the offense of Robbery with Use of a Deadly Weapon
10 whereby the defendant and Unknown Individuals are each vicariously liable for the
11 reasonably foreseeable acts of the other conspirators when the acts were in furtherance of the
12 conspiracy; and/or (2) the Defendant and Unknown Individuals aiding or abetting in the
13 commission of the crime by accompanying each other to the crime scene where they bound
14 Eric Bernzweig at gunpoint and separated him from Julie Kim whereupon he was robbed,
15 encouraging one another throughout by actions and words; acting in concert throughout and
16 fleeing the scene together.

17 COUNT 13 - OPEN OR GROSS LEWDNESS

18 did then and there wilfully and unlawfully commit an act of open or gross lewdness
19 by placing his mouth and/or tongue on the breast(s) of JULIE KIM.

20 COUNT 14 - BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN
21 SUBSTANTIAL BODILY HARM

22 did then and there wilfully, unlawfully and feloniously use force or violence upon the
23 person of another, to-wit: ERIC BERNZWEIG, with use of a deadly weapon, to-wit: a
24 firearm, by striking the said ERIC BERNZWEIG on the head with said firearm, resulting in
25 substantial bodily harm to the said ERIC BERNZWEIG.

26 It is the duty of the jury to apply the rules of law contained in these instructions to the
27 facts of the case and determine whether or not Defendant is guilty of one or more of the
28 offenses charged.

1 A conspiracy is an agreement between two or more persons for an unlawful purpose.
2 To be guilty of conspiracy, a defendant must intend to commit, or to aid in the commission
3 of, the specific crime agreed to. The crime is the agreement to do something unlawful; it
4 does not matter whether it was successful or not.
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6 A person who knowingly does any act to further the object of a conspiracy, or
7 otherwise participates therein, is criminally liable as a conspirator. However, mere
8 knowledge or approval of, or acquiescence in, the object and purpose of a conspiracy
9 without an agreement to cooperate in achieving such object or purpose does not make one a
10 party to conspiracy. Conspiracy is seldom susceptible of direct proof and is usually
11 established by inference from the conduct of the parties. In particular, a conspiracy may be
12 supported by a coordinated series of acts, in furtherance of the underlying offense, sufficient
13 to infer the existence of an agreement.

14 A conspiracy to commit a crime does not end upon the completion of the crime. The
15 conspiracy continues until the co-conspirators have successfully gotten away and concealed
16 the crime.
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2 It is not necessary in proving a conspiracy to show a meeting of the alleged
3 conspirators or the making of an express or formal agreement. The formation and existence
4 of a conspiracy may be inferred from all circumstances tending to show the common intent
5 and may be proved in the same way as any other fact may be proved, either by direct
6 testimony of the fact or by circumstantial evidence, or by both direct and circumstantial
7 evidence.
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2 Once a person joins a conspiracy, that person remains a member until he withdraws
3 from it. A person can withdraw from a conspiracy by taking some positive action which
4 disavowed or defeated the purpose of the conspiracy. It is not enough if the evidence shows
5 that the defendant merely ceased his own activities in furtherance of the conspiracy.

6 The State has the burden of proving beyond a reasonable doubt the defendant did not
7 withdraw from the conspiracy.
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Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if the act or the declaration is in furtherance of the object of the conspiracy.

The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators. Every conspirator is legally responsible for a specific intent crime of a co-conspirator that follows as one of the probable and natural consequences of the object of the conspiracy so long as the specific intent crime was intended by the co-conspirator. A conspirator is also legally responsible for a general intent crime that follows as one of the probable and natural consequence of the object of the conspiracy even if it was not intended as part of the original plan and even if he was not present at the time of the commission of such act.

Evidence that a person was in the company or associated with one or more other persons alleged or proven to have been members of a conspiracy is not, in itself, sufficient to prove that such person was a member of the alleged conspiracy. However, you are instructed that presence, companionship, and conduct before, during and after the offense are circumstances from which one's participation in the criminal intent may be inferred.

Where two or more persons are accused of committing a crime together, their guilt may be established without proof that each personally did every act constituting the offense charged.

All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, with the intent that the crime be committed, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.

A person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime with the intention that the crime be committed.

The State is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

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2 Mere presence at the scene of the crime and knowledge that a crime is being
3 committed are not sufficient to establish that the defendant aided and abetted the crime,
4 unless you find beyond a reasonable doubt that the defendant is a participant and not merely
5 a knowing spectator. However, the presence of one at the commission of a crime of another
6 is evidence which can be considered in determining whether or not he is guilty of aiding or
7 abetting, as well as the defendant's presence, companionship, and conduct before, during and
8 after the participation in the criminal act.
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INSTRUCTION NO. 11

Every person who, by day or night, enters any house, room, tenement, shop, store, other building, or vehicle with the intent to commit a larceny and/or robbery therein is guilty of Burglary.

INSTRUCTION NO. 12

Larceny is defined as the stealing, taking and carrying away of the personal goods or property of another with the intent to permanently deprive the owner thereof.

Consent to enter is not a defense to the crime of burglary so long as it is shown that entry was made with the specific intent to commit a larceny and/or robbery therein. Force or a "breaking" as such is not a necessary element of the crime.

The intention with which entry was made is a question of fact which may be inferred from the defendant's conduct and all other circumstances disclosed by the evidence.

INSTRUCTION NO. 14

Every person who commits the crime of burglary, who has in his possession or gains possession of any firearm or deadly weapon at any time during the commission of the crime, at any time before leaving the structure, or upon leaving the structure, is guilty of burglary while in possession of a weapon.

If more than one person commits a crime, and one of them possesses a deadly weapon in the commission of that crime, each may be convicted of while in possession of the deadly weapon if the unarmed offender had knowledge of the possession of the deadly weapon.

INSTRUCTION NO. 15

Every person who, in the commission of a burglary, commits any other crime, may be prosecuted for each crime separately.

Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. A taking is by means of force or fear if force or fear is used to:

- (a) Obtain or retain possession of the property;
- (b) Prevent or overcome resistance to the taking; or
- (c) Facilitate escape.

The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property. A taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear. Robbery is a general intent crime.

The value of property or money taken is not an element of the crime of Robbery, and it is only necessary that the State prove the taking of some property or money.

Robbery is not confined to a fixed location or time and may span considerable and varying periods of time and location. All matters immediately antecedent to and having direct casual connection with the robbery are deemed so closely connected with it as to form in reality a part of the occurrence. Thus, although acts of violence and intimidation preceded the actual taking of the property and may have been primarily intended for another purpose. It is enough to support the charge of robbery when a person takes the property by taking advantage of the situation he created.

INSTRUCTION NO. 19

Personal property is "in the presence" of a person, in respect to robbery, when it is within the person's reach, inspection, observation or control, and the person could (if not prevented by intimidation or threat of violence) retain possession of the property.

Every person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person for the purpose of committing robbery upon or from the person is guilty of Kidnapping in the First Degree, a specific intent crime.

A charge of kidnapping and an associated offense will lie only where movement of the victim is over and above that required to complete the associated crime charged.

When associated with the charge of robbery, kidnapping does not occur if the movement is incidental to the robbery and does not increase the risk of harm over and above that necessarily present in the commission of such offense.

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2 You are instructed that if you find that the State has established that the defendant has
3 committed first degree kidnapping you shall select first degree kidnapping as your verdict.
4 The crime of first degree kidnapping includes the crime of second degree kidnapping. You
5 may find the defendant guilty of second degree kidnapping if:

6 1. You have not found, beyond a reasonable doubt, that the defendant is guilty of
7 kidnapping of the first degree, and

8 2. All twelve of you are convinced beyond a reasonable doubt the defendant is guilty
9 of the crime of second degree kidnapping.

10 If you are convinced beyond a reasonable doubt that the crime of kidnapping has been
11 committed by the defendant, but you have a reasonable doubt whether such kidnapping was
12 of the first or of the second degree, you must give the defendant the benefit of that doubt and
13 return a verdict of kidnapping of the second degree.

INSTRUCTION NO. 23

Every person who willfully and without authority of law seizes, inveigles, takes, carries away or kidnaps another person with the intent to keep the person secretly imprisoned within the state, or for the purpose of conveying the person out of the state without authority of law, or in any manner held to service or detained against his will, is guilty of kidnapping in the second degree.

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2 A person who subjects another person to sexual penetration, or who forces another
3 person to make a sexual penetration on himself or on another, against the victim's will or
4 under conditions in which the perpetrator knows or should know that the victim is mentally
5 or physically incapable of resisting or understanding the nature of his conduct, is guilty of
6 sexual assault.

7 "Sexual penetration" includes digital penetration, or any intrusion, however slight, of
8 any part of a person's body, including sexual intercourse in its ordinary meaning. Evidence
9 of ejaculation is not necessary.

10 Digital penetration is the placing, however slight, of one or more fingers into the
11 genital opening of another person.

12 Sexual intercourse is the intrusion, however slight, of the penis into the genital
13 opening of another person.

Where multiple sexual acts occur as part of a single criminal encounter a defendant may be found guilty for each separate or different act of sexual assault and/or lewdness.

Where a defendant commits a specific type of act constituting sexual assault and/or lewdness he may be found guilty of more than one count of that specific type of act of sexual assault if:

1. there is an interruption between the acts which are of the same specific type,
2. where the acts of the same specific type are interrupted by a different specific type of sexual assault or

3. For each separate object manipulated or inserted into the genital or anal opening of another.

Only one sexual assault occurs when a defendant's actions were of one specific type of sexual assault and those acts were continuous and did not stop between the acts of that specific type.

Physical force is not necessary in the commission of sexual assault. The crucial question is not whether a person was physically forced to engage in a sexual assault but whether the act was committed without his/her consent or under conditions in which the defendant knew or should have known, the person was incapable of giving his/her consent or understanding the nature of the act. There is no consent where a person is induced to submit to the sexual act through fear of death or serious bodily injury.

INSTRUCTION NO. 27

A person is not required to do more than her age, strength, surrounding facts and attending circumstances make it reasonable for him/her to do to manifest opposition to a sexual assault.

INSTRUCTION NO. 28

Submission is not the equivalent of consent. While consent inevitably involves submission, submission does not inevitably involve consent. Lack of protest by a victim is simply one among the totality of circumstances to be considered by the jury.

There is no requirement that the testimony of a victim of sexual assault be corroborated, and her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty.

Open and Gross Lewdness is defined as any indecent, obscene or vulgar act of a sexual nature that:

1. is intentionally committed in a public place, even if the act is not observed; or
2. is committed in a private place, but in an open manner, as opposed to a secret manner, and with the intent to be offensive to the observer.

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2 Although your verdict must be unanimous as to the charge, you do not have to agree
3 on the theory of guilt. Therefore, even if you cannot agree on whether the facts establish
4 liability as directly committing the crime, as an aider and abettor, or a co-conspirator, so long
5 as all of you agree that the evidence establishes the defendant's guilt of the charge, your
6 verdict shall be guilty of the charge.
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2 You are instructed that if you find a defendant guilty of Robbery, First or Second
3 Degree Kidnapping, or Sexual Assault you must also determine whether or not a deadly
4 weapon was used in the commission of this crime.

5 If you find beyond a reasonable doubt that a deadly weapon was used in the
6 commission of such an offense, then you shall return the appropriate guilty verdict reflecting
7 "With Use of a Deadly Weapon".

8 If, however, you find that a deadly weapon was not used in the commission of such an
9 offense, but you find that it was committed, then you shall return the appropriate guilty
10 verdict reflecting that a deadly weapon was not used.

"Deadly weapon" means any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death, or, any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

You are instructed that a firearm is a deadly weapon and proof of its deadly capabilities is not required.

INSTRUCTION NO. 34

The State is not required to have recovered the deadly weapon used in an alleged crime, or to produce the deadly weapon in court at trial, to establish that a deadly weapon was used in the commission of the crime.

If more than one person commits a crime, and one of them uses a deadly weapon in the commission of that crime, each may be convicted of using the deadly weapon if the unarmed offender had knowledge of the use of the deadly weapon.

In order to "use" a deadly weapon, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of the deadly weapon in aiding the commission of the crime.

INSTRUCTION NO. 36

A Battery With a Deadly Weapon is any willful and unlawful use of force or violence upon the person of another with the use of a deadly weapon.

INSTRUCTION NO. 37

If you find the defendant guilty of Battery With Use of a Deadly Weapon, you must also determine whether or not the victim suffered substantial bodily harm as a result thereof.

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Substantial bodily harm is defined as bodily injury which causes prolonged physical pain.

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

1
2 The Defendant is presumed innocent until the contrary is proved. This presumption
3 places upon the State the burden of proving beyond a reasonable doubt every material
4 element of the crime charged and that the Defendant is the person who committed the
5 offense.

6 A reasonable doubt is one based on reason. It is not mere possible doubt but is such a
7 doubt as would govern or control a person in the more weighty affairs of life. If the minds of
8 the jurors, after the entire comparison and consideration of all the evidence, are in such a
9 condition that they can say they feel an abiding conviction of the truth of the charge, there is
10 not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or
11 speculation.

12 If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a
13 verdict of not guilty.
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2 It is a constitutional right of a defendant in a criminal trial that he may not be
3 compelled to testify. Thus, the decision as to whether he should testify is left to the
4 defendant on the advice and counsel of his attorney. You must not draw any inference of
5 guilt from the fact that he does not testify, nor should this fact be discussed by you or enter
6 into your deliberations in any way.
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2 You are here to determine whether the Defendant is guilty or not guilty from the
3 evidence in the case. You are not called upon to return a verdict as to the guilt or innocence
4 of any other person. So, if the evidence in the case convinces you beyond a reasonable
5 doubt of the guilt of the Defendant, you should so find, even though you may believe one or
6 more persons are also guilty.
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In you deliberation you may not discuss or consider the subject of punishment, as that is a matter which lies solely with the court. Your duty is confined to the determination of whether the defendant is guilty or not guilty.

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence; direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the Defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

Any evidence of a statement made by one alleged conspirator other than at this trial shall not be considered by you as against another alleged conspirator unless you shall first determine from other independent evidence that at the time the statement was made a conspiracy to commit a crime existed and unless you shall further determine that the statement was made during the course and in furtherance of the conspiracy.

Whenever there is slight evidence that a conspiracy existed, and that the defendant was one of the members of the conspiracy, then the statements and the acts by any member of the conspiracy may be considered by the jury as evidence in the case as to the defendant. This is true even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

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2 A witness who has special knowledge, skill, experience, training or education in a
3 particular science, profession or occupation is an expert witness. An expert witness may
4 give his opinion as to any matter in which he is skilled.

5 You should consider such expert opinion and weigh the reasons, if any, given for it.
6 You are not bound, however, by such an opinion. Give it the weight to which you deem it
7 entitled, whether that be great or slight, and you may reject it, if, in your judgment, the
8 reasons given for it are unsound.

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2 Although you are to consider only the evidence in the case in reaching a verdict, you
3 must bring to the consideration of the evidence your everyday common sense and judgment
4 as reasonable men and women. Thus, you are not limited solely to what you see and hear as
5 the witnesses testify. You may draw reasonable inferences from the evidence which you feel
6 are justified in the light of common experience, keeping in mind that such inferences should
7 not be based on speculation or guess.

8 A verdict may never be influenced by sympathy, prejudice or public opinion. Your
9 decision should be the product of sincere judgment and sound discretion in accordance with
10 these rules of law.
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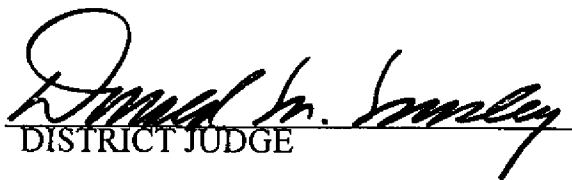
When you retire to consider your verdict, you must select one of your number to act as foreperson who will preside over your deliberation and will be your spokesperson here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

GIVEN:


DISTRICT JUDGE

6-27-08

1 VER

FILED IN OPEN COURT

JUN 27 2008

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DISTRICT COURT

CHARLES J. SHORT
CLERK OF THE COURT

CLARK COUNTY, NEVADA

BY Linda Skinner

LINDA SKINNER DEPUTY

THE STATE OF NEVADA,

Plaintiff,

-vs-

JOSEPH ALEXANDER HENDERSON,

Defendant.

CASE NO: C212968

DEPT NO: XIV

VERDICT

We, the jury in the above entitled case, find the Defendant JOSEPH ALEXANDER HENDERSON, as follows:

COUNT 1 – CONSPIRACY TO COMMIT BURGLARY

(please check the appropriate box, select only one)

☒ Guilty of Conspiracy To Commit Burglary

☐ Not Guilty

COUNT 2 – BURGLARY WHILE IN POSSESSION OF A FIREARM

(please check the appropriate box, select only one)

☒ Guilty of Burglary While in Possession of a Firearm

☐ Guilty of Burglary

☐ Not Guilty

COUNT 3 – CONSPIRACY TO COMMIT FIRST DEGREE KIDNAPPING

(please check the appropriate box, select only one)

☒ Guilty of Conspiracy to Commit First Degree Kidnapping

☐ Not Guilty

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1 **COUNT 4** – FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

2 *(please check the appropriate box, select only one)*

- 3 ☒ Guilty of First Degree Kidnapping With Use of a Deadly Weapon
4 ☐ Guilty of First Degree Kidnapping
5 ☐ Guilty of Second Degree Kidnapping With Use of a Deadly Weapon
6 ☐ Guilty of Second Degree Kidnapping
7 ☐ Not Guilty

8 **COUNT 5** – FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

9 *(please check the appropriate box, select only one)*

- 10 ☒ Guilty of First Degree Kidnapping With Use of a Deadly Weapon
11 ☐ Guilty of First Degree Kidnapping
12 ☐ Guilty of Second Degree Kidnapping With Use of a Deadly Weapon
13 ☐ Guilty of Second Degree Kidnapping
14 ☐ Not Guilty

15 **COUNT 6** – CONSPIRACY TO COMMIT SEXUAL ASSAULT

16 *(please check the appropriate box, select only one)*

- 17 ☒ Guilty of Conspiracy to Commit Sexual Assault
18 ☐ Not Guilty

19 **COUNT 7** – SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

20 *(please check the appropriate box, select only one)*

- 21 ☒ Guilty of Sexual Assault With Use of a Deadly Weapon
22 ☐ Guilty of Sexual Assault
23 ☐ Not Guilty

24 **COUNT 8** – SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

25 *(please check the appropriate box, select only one)*

- 26 ☒ Guilty of Sexual Assault With Use of a Deadly Weapon
27 ☐ Guilty of Sexual Assault
28 ☐ Not Guilty

1 **COUNT 9** – SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

2 *(please check the appropriate box, select only one)*

3 ☒ Guilty of Sexual Assault With Use of a Deadly Weapon

4 ☐ Guilty of Sexual Assault

5 ☐ Not Guilty

6 **COUNT 10** – CONSPIRACY TO COMMIT ROBBERY

7 *(please check the appropriate box, select only one)*

8 ☒ Guilty of Conspiracy to Commit Robbery

9 ☐ Not Guilty

10 **COUNT 11** – ROBBERY WITH USE OF A DEADLY WEAPON

11 *(please check the appropriate box, select only one)*

12 ☒ Guilty of Robbery With Use of a Deadly Weapon

13 ☐ Guilty of Robbery

14 ☐ Not Guilty

15 **COUNT 12** – ROBBERY WITH USE OF A DEADLY WEAPON

16 *(please check the appropriate box, select only one)*

17 ☒ Guilty of Robbery With Use of a Deadly Weapon

18 ☐ Guilty of Robbery

19 ☐ Not Guilty

20 **COUNT 13** – OPEN OR GROSS LEWDNESS

21 *(please check the appropriate box, select only one)*

22 ☒ Guilty of Open or Gross Lewdness

23 ☐ Not Guilty

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1 **COUNT 14** – BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN
2 SUBSTANTIAL BODILY HARM

3 *(please check the appropriate box, select only one)*

4 ☒ Guilty of Battery With Use of a Deadly Weapon Resulting in Substantial
5 Bodily Harm

6 ☐ Guilty of Battery With Use of a Deadly Weapon

7 ☐ Guilty of Battery

8 ☐ Not Guilty

9 DATED this 27 day of June, 2008

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DISTRICT COURT

2008 JUL -3 P 3:17

CLARK COUNTY, NEVADA

Charles J. Short
CLERK OF THE COURT

STATE OF NEVADA

Plaintiff(s),

CASE NO. C212968

-vs-

DEPT. NO. XIV

JOSEPH ALEXANDER HENDERSON

Defendant(s).

DEFENDANT'S PROPOSED JURY INSTRUCTIONS NOT USED AT TRIAL

Attached hereto are the proposed jury instructions which were offered to the Court, but not submitted to the jury in the above entitled action.

DATED: This 2nd day of July, 2008.

Charles J. Short, Clerk of the Court

By

Linda Skinner

Linda Skinner, Deputy Clerk

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3
4 You have heard testimony about frequency estimates calculated for matches between
5 known DNA samples and items of evidence in this case. The random match probability statistic
6 used by DNA experts is not the equivalent of a statistic that tells you the likelihood of whether a
7 defendant committed a crime. The random match probability statistic is the likelihood that a
8 random person in the population would match the characteristics ~~that a random person in the~~
9 ~~population would match the characteristics~~ that were found in the crime scene evidence and in the
10 reference sample. These frequency estimates were presented for the limited purpose of assisting
11 you in the determining what significance to attach to the testing results. Frequency estimates and
12 laboratory errors are different phenomena. Both should be considered in determining what
13 significance to attach to the testing results.
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Instruction No. _____

You have heard evidence that breast swabs were recovered from Julie Kim. You have also heard evidence that the material on the swabs was consumed, and that only and extract remains. You are instructed that the defense did not have the opportunity to do their own extraction procedure on the original sample, and as such you must assume that the procedure was not done properly and in accordance with acceptable laboratory standards.

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The Court has admitted physical evidence and expert opinion concerning the analysis of such physical evidence. You are the sole judges of whether any such evidence has a tendency and reason to prove any fact in issue in this case. You should carefully review and consider all the circumstances surrounding each item of evidence, including, but not limited to, its discovery, collection, storage and analysis. If you find any item of evidence does not have a tendency and reason to prove any element of the crimes charged or the identity of the perpetrator(s) of such of the crimes charged, you must disregard such evidence.

DS
C.

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DISTRICT COURT

Edna A. Fina

CLERK OF THE COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

CASE NO. C212968

-vs-

DEPT. NO. XIV

JOSEPH ALEXANDER HENDERSON
#1502730

Defendant.

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – CONSPIRACY TO COMMIT BURGLARY (Gross Misdemeanor) in violation of NRS 199.480, 205.060; COUNT 2 – BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony) in violation of NRS 205.060; COUNT 3 – CONSPIRACY TO COMMIT FIRST DEGREE KIDNAPING (Category B Felony) in violation of NRS 199.480, 200.310, 200.320; COUNT 4 – FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.310, 200.320, 193.165; COUNT 5 – FIRST DEGREE KIDNAPING WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.310, 200.320, 193.165; COUNT 6 –

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CLERK OF THE COURT

1 CONSPIRACY TO COMMIT SEXUAL ASSAULT (Category A Felony) in violation of
2 NRS 199.480, 200.364, 200.366, of COUNT 7 – SEXUAL ASSAULT WITH USE OF A
3 DEADLY WEAPON (Category A Felony) in violation of NRS 200.364, 200.366,
4 193.165; COUNT 8 – SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON
5 (Category A Felony) in violation of NRS 200.364, 200.366, 193.165; COUNT 9 –
6 SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony) in
7 violation of NRS 200.364, 200.366, 193.165; COUNT 10 – CONSPIRACY TO COMMIT
8 ROBBERY (Category B Felony) in violation of NRS 199.480, 200.380; COUNT 11 –
9 ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of
10 NRS 200.380, 193.165; COUNT 12 – ROBBERY WITH USE OF A DEADLY WEAPON
11 (Category B Felony) in violation of NRS 200.380, 193.165; COUNT 13 – OPEN OR
12 GROSS LEWDNESS (Gross Misdemeanor) in violation of NRS 201.210; COUNT 14 –
13 BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL
14 BODILY HARM (Category B Felony) in violation of NRS 200.481(2)(e), and the matter
15 having been tried before a jury and the Defendant having been found guilty of the
16 crimes of COUNT 1 – CONSPIRACY TO COMMIT BURGLARY (Gross Misdemeanor)
17 in violation of NRS 199.480, 205.060; COUNT 2 – BURGLARY WHILE IN
18 POSSESSION OF A FIREARM (Category B Felony) in violation of NRS 205.060;
19 COUNT 3 – CONSPIRACY TO COMMIT FIRST DEGREE KIDNAPING (Category B
20 Felony) in violation of NRS 199.480, 200.310, 200.320; COUNT 4 – FIRST DEGREE
21 KIDNAPING WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of
22 NRS 200.310, 200.320, 193.165; COUNT 5 – FIRST DEGREE KIDNAPING WITH USE
23 OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.310, 200.320,
24 193.165; COUNT 6 – CONSPIRACY TO COMMIT SEXUAL ASSAULT (Category A

1 Felony) in violation of NRS 199.480, 200.364, 200.366, of COUNT 7 – SEXUAL
2 ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of
3 NRS 200.364, 200.366, 193.165; COUNT 8 – SEXUAL ASSAULT WITH USE OF A
4 DEADLY WEAPON (Category A Felony) in violation of NRS 200.364, 200.366,
5 193.165; COUNT 9 – SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON
6 (Category A Felony) in violation of NRS 200.364, 200.366, 193.165; COUNT 10 –
7 CONSPIRACY TO COMMIT ROBBERY (Category B Felony) in violation of NRS
8 199.480, 200.380; COUNT 11 – ROBBERY WITH USE OF A DEADLY WEAPON
9 (Category B Felony) in violation of NRS 200.380, 193.165; COUNT 12 – ROBBERY
10 WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.380,
11 193.165; COUNT 13 – OPEN OR GROSS LEWDNESS (Gross Misdemeanor) in
12 violation of NRS 201.210; COUNT 14 – BATTERY WITH USE OF A DEADLY
13 WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony) in
14 violation of NRS 200.481(2)(e); thereafter, on the 28th day of August, 2008, the
15 Defendant was present in court for sentencing with his counsel, VIOLET RADOSTA,
16 Deputy Public Defender, and good cause appearing,

17
18 THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense(s) and, in
19 addition to the \$25.00 Administrative Assessment Fee, \$150.00 DNA Analysis Fee
20 including testing to determine genetic markers, and \$50,000.00 Restitution, the
21 Defendant is SENTENCED as follows: AS TO COUNT 1 - TO TWELVE (12) MONTHS
22 in the Clark County Detention Center (CCDC); AS TO COUNT 2 - TO A MAXIMUM of
23 ONE HUNDRED FIFTY-SIX (156) MONTHS with a MINIMUM Parole Eligibility of
24 SIXTY-TWO (62) MONTHS in the Nevada Department of Corrections (NDC), to run
25 CONCURRENT with COUNT 1; AS TO COUNT 3 - TO A MAXIMUM of SIXTY (60)
26
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1 MONTHS with a MINIMUM Parole Eligibility of TWENTY-FOUR (24) MONTHS in the
2 Nevada Department of Corrections (NDC), to run CONSECUTIVE to COUNT 2; AS TO
3 COUNT 4 – TO LIFE with a MINIMUM Parole Eligibility after SIXTY (60) MONTHS, plus
4 an EQUAL and CONSECUTIVE term of LIFE with a MINIMUM of SIXTY (60) MONTHS
5 for the Use of a Deadly Weapon in the Nevada Department of Corrections (NDC), to run
6 CONSECUTIVE to COUNT 3; AS TO COUNT 5 – TO LIFE with a MINIMUM Parole
7 Eligibility after SIXTY (60) MONTHS, plus an EQUAL and CONSECUTIVE term of LIFE
8 with a MINIMUM of SIXTY (60) MONTHS for the Use of a Deadly Weapon, in the
9 Nevada Department of Corrections (NDC), to run CONSECUTIVE to COUNT 4; AS TO
10 COUNT 6 - TO A MAXIMUM of SIXTY (60) a MINIMUM Parole Eligibility of TWENTY-
11 FOUR (24) MONTHS in the Nevada Department of Corrections (NDC), to run
12 CONSECUTIVE to COUNT 5; AS TO COUNT 7 - TO LIFE with a MINIMUM Parole
13 Eligibility of ONE HUNDRED TWENTY (120) MONTHS, plus an EQUAL and
14 CONSECUTIVE term of LIFE with a MINIMUM of ONE HUNDRED TWENTY (120)
15 MONTHS for the Use of a Deadly Weapon in the Nevada Department of Corrections
16 (NDC), to run CONCURRENT with COUNT 6; AS TO COUNT 8 - TO LIFE with a
17 MINIMUM Parole Eligibility of ONE HUNDRED TWENTY (120) MONTHS, plus an
18 EQUAL and CONSECUTIVE term of LIFE with a MINIMUM of ONE HUNDRED
19 TWENTY (120) MONTHS for the Use of a Deadly Weapon in the Nevada Department
20 of Corrections (NDC), to run CONSECUTIVE to COUNT 7; AS TO COUNT 9 - TO LIFE
21 with a MINIMUM Parole Eligibility of ONE HUNDRED TWENTY (120) MONTHS, plus
22 an EQUAL and CONSECUTIVE term of LIFE with a MINIMUM of ONE HUNDRED
23 TWENTY (120) MONTHS for the Use of a Deadly Weapon in the Nevada Department
24 of Corrections, to run CONSECUTIVE to COUNT 8; AS TO COUNT 10 - TO A

1 MAXIMUM of SIXTY (60) MONTHS with a MINIMUM Parole Eligibility of TWENTY-
2 FOUR (24) MONTHS in the Nevada Department of Corrections (NDC), to run
3 CONSECUTIVE to COUNT 9; AS TO COUNT 11 - TO A MAXIMUM of ONE HUNDRED
4 EIGHTY (180) MONTHS with a MINIMUM Parole Eligibility of SEVENTY-TWO (72)
5 MONTHS, plus an EQUAL and CONSECUTIVE term of ONE HUNDRED EIGHTY (180)
6 MAXIMUM and SEVENTY-TWO (72) MONTHS MINIMUM for the Use of a Deadly
7 Weapon in the Nevada Department of Corrections (NDC), to run CONCURRENT with
8 COUNT 10; AS TO COUNT 12 - TO A MAXIMUM of ONE HUNDRED EIGHTY (180)
9 MONTHS with a MINIMUM Parole Eligibility of SEVENTY-TWO (72) MONTHS, plus an
10 EQUAL and CONSECUTIVE term of ONE HUNDRED EIGHTY (180) MAXIMUM and
11 SEVENTY-TWO (72) MINIMUM for the Use of a Deadly Weapon in the Nevada
12 Department of Corrections, to run CONSECUTIVE to COUNT 11; AS TO COUNT 13 -
13 TO TWELVE MONTHS (12) in the Clark County Detention Center (CCDC), to run
14 CONCURRENT with COUNT 12; AS TO COUNT 14 - A MAXIMUM of ONE HUNDRED
15 FIFTY-SIX (156) MONTHS with a MINIMUM Parole Eligibility of SIXTY-TWO (62)
16 MONTHS in the Nevada Department of Corrections (NDC), to run CONSECUTIVE to
17 COUNT 13; with ONE THOUSAND, TWO HUNDRED, FIFTY-ONE (1,251) DAYS credit
18 for time served.

19 FURTHER ORDERED, a SPECIAL SENTENCE of LIFETIME SUPERVISION is
20 imposed to commence upon release from any term of imprisonment, probation or
21 parole.

22 ///

23 ///

ADDITIONALLY, the Defendant is ORDERED to REGISTER as a sex offender in accordance with NRS 179D.460 within FORTY-EIGHT (48) HOURS after any release from custody.

DATED this 24th day of September, 2008

Donald M. Mosley
DONALD M. MOSLEY
DISTRICT JUDGE



NOAS

PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR No. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

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Earl D. Smith
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)
)
Plaintiff,) CASE NO. C212968X
)
v.) DEPT. NO. XIV
)
JOSEPH ALEXANDER HENDERSON,)
)
Defendant.)

NOTICE OF APPEAL

TO: THE STATE OF NEVADA

DAVID ROGER, DISTRICT ATTORNEY, CLARK COUNTY, NEVADA and
DEPARTMENT NO. XIV OF THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

NOTICE is hereby given that Defendant, Joseph Alexander
Henderson, presently incarcerated in the Nevada State Prison,
appeals to the Supreme Court of the State of Nevada from the
judgment entered against said Defendant on the 24th day of
September, 2008, whereby he was convicted of Count 1 -
Conspiracy to Commit Burglary; Count 2 - Burglary While In
Possession of a Firearm; Count 3 - Conspiracy to Commit First
Degree Kidnapping; Counts 4, 5 - First Degree Kidnapping With Use
of a Deadly Weapon; Count 6 - Conspiracy to Commit Sexual Assault;


1 Counts 7-9 - Sexual Assault With Use of a Deadly Weapon; Count 10
2 - Conspiracy to Commit Robbery; Counts 11, 12 - Robbery With Use
3 of a Deadly Weapon; Count 13 - Open or Gross Lewdness; Count 14 -
4 Battery With Use of a Deadly Weapon Resulting in Substantial
5 Bodily Harm and sentenced to Count 1 - 12 months in CCDC; Count 2
6 - 62-156 months in prison concurrent with Count 1; Count 3 - 24-60
7 months in prison consecutive to Count 2; Count 4 - 60 months to
8 Life in prison plus an equal and consecutive 60 months to Life for
9 Use of a Deadly Weapon to run consecutive to Count 3; Count 5 - 60
10 months to Life in prison plus an equal and consecutive term of 60
11 months to Life in prison for the Use of a Deadly Weapon to run
12 consecutive to Count 4; Count 6 - 24-60 months in prison
13 consecutive to Count 5; Count 7 - 120 months to Life in prison
14 plus an equal and consecutive term of 120 months to Life for the
15 use of a deadly weapon concurrent with Count 6; Count 8 - 120
16 months to Life in prison plus an equal and consecutive 120 months
17 to Life in prison for use of a deadly weapon consecutive to Count
18 7; Count 9 - 120 months to Life in prison plus an equal and
19 consecutive term of 120 months to Life in prison for use of a
20 deadly weapon consecutive to Count 8; Count 10 - 24-60 months in
21 prison to run consecutive to Count 9; Count 11 - 72-180 months in
22 prison plus an equal and consecutive term of 72-180 months in
23 prison to run concurrent with Count 10; Count 12 - 72-180 months
24 in prison plus an equal and consecutive term of 72-180 months in
25 prison for use of a deadly weapon consecutive to Count 11; Count
26 13 - 12 months in CCDC concurrent with Count 12; Count 14 - 62-156
27 months in prison consecutive to Count 13; \$50,000 restitution;
28 1,251 days CTS; must register as sex offender upon release;

lifetime supervision; \$25 Admin. fee; \$150 DNA analysis fee;
genetic testing.

DATED this 7th day of October, 2008.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By:


KEDRIC A. BASSETT, #4214
Deputy Public Defender
309 S. Third Street, Ste. 226
Las Vegas, Nevada 89155
(702) 455-4685

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I declare under penalty of perjury that the foregoing is true and correct.

Chris Cornell
An employee of the Clark County
Public Defender's Office

DAVID ROGER
CLARK COUNTY DISTRICT ATTORNEY

By: Judy Olney

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PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR No. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

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Ed [Signature]
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)
)
Plaintiff,) CASE NO. C212968X
)
v.) DEPT. NO. XIV
)
JOSEPH ALEXANDER HENDERSON,)
)
Defendant.)

CASE APPEAL STATEMENT

1. Appellant filing this case appeal statement:
Joseph Alexander Henderson.

2. Judge issuing the decision, judgment, or order
appealed from: Donald M. Mosley.

3. All parties to the proceedings in the district
court (the use of et al. To denote parties is prohibited): The
State of Nevada, Plaintiff; Joseph Alexander Henderson, Defendant.

4. All parties involved in this appeal (the use of et.
al. to denote parties is prohibited): Joseph Alexander Henderson,
Appellant; The State of Nevada, Respondent.

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CLERK OF THE COURT

1 5. Name, law firm, address, and telephone number of
2 all counsel on appeal and party or parties whom they represent:

3 PHILIP J. KOHN
4 Clark County Public Defender
309 South Third Street, #226
Las Vegas, Nevada 89155-2610

DAVID ROGER
Clark County District Attorney
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155

6 Attorney for Appellant

CATHERINE CORTEZ MASTO
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(702) 687-3538

9 Counsel for Respondent

10 6. Whether appellant was represented by appointed or
11 retained counsel in the district court: Appointed.

12 7. Whether appellant is represented by appointed or
13 retained counsel on appeal: Appointed.

14 8. Whether appellant was granted leave to proceed in
15 forma pauperis, and the date of entry of the district court order
16 granting such leave: N/A.

17 9. Date proceedings commenced in the district court
18 (e.g., date complaint, indictment, information, or petition was
19 filed): Information filed 07/11/05.

20 DATED this 7th day of September, 2008.

21 PHILIP J. KOHN
22 CLARK COUNTY PUBLIC DEFENDER

23
24 By: 

KEDRIC A. BASSETT, #4214
Deputy Public Defender
309 S. Third Street, Ste. 226
Las Vegas, Nevada 89155
(702) 455-4685

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RECEIPT OF COPY of the foregoing Case Appeal Statement
is hereby acknowledged this 9 day of ~~September~~ October, 2008.

DAVID ROGER
CLARK COUNTY DISTRICT ATTORNEY

By: Judy Rney

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED

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CLERK OF THE COURT

STATE OF NEVADA,)
)
Plaintiff,)
)
vs.)
)
JOSEPH ALEXANDER HENDERSON,)
)
Defendant.)
_____)

Case No. C212968
Dept. XIV

REPORTER'S TRANSCRIPT
OF
INITIAL ARRAIGNMENT

BEFORE THE HONORABLE DONALD M. MOSLEY

DISTRICT JUDGE

Taken on Thursday, July 14, 2005

At 9:00 a.m.

APPEARANCES:

For the State: ROSS J. MILLER, ESQ.
Deputy District Attorney

For the Defendant: JAMES J. RUGGEROLI, ESQ.
Deputy Public Defender

Reported by: Maureen Schorn, CCR No. 496, RPR

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CLERK OF THE COURT

1 LAS VEGAS, NEVADA. THURSDAY, JULY 14, 2005, 9:00 A.M.

2 * * * *

3
4 THE COURT: C212968, State versus Joseph
5 Alexander Henderson. The record will reflect the presence of
6 the defendant in custody. Mr. Ruggeroli is counsel,
7 Mr. Miller for the State. The matter is on for initial
8 arraignment.

9 Have you a copy of the charging document?

10 MR. RUGGEROLI: I do, Your Honor, and we
11 would waive its reading.

12 THE COURT: Very well. Mr. Henderson,
13 your age, please?

14 THE DEFENDANT: I'm 35, sir.

15 THE COURT: How far did you get in school?

16 THE DEFENDANT: Two years of college.

17 THE COURT: Do you understand and read and
18 write the English language?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Do you understand the nature
21 of the charges set forth in the Information?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Negotiations?

24 MR. RUGGEROLI: And there are no
25 negotiations.

1 THE COURT: What is your plea to Counts 1
2 through 14, sir; guilty or not guilty?

3 THE DEFENDANT: Not guilty, sir.

4 THE COURT: Do you waive the 60-day rule,
5 counsel?

6 MR. RUGGEROLI: We do, Your Honor.

7 THE COURT: The matter will be set in
8 ordinary course.

9 THE CLERK: Calendar call, April 4th,
10 9:00 a.m.; jury trial, April 10th at 1:30?

11 MR. RUGGEROLI: Judge, just one matter.
12 No bail is set on any of the charges. I would request
13 standard bail.

14 THE COURT: Any objection?

15 MR. MILLER: Yes, Judge. There's several
16 counts of first degree kidnapping.

17 THE COURT: Was there a no-bail warrant
18 issued? Or some determination made in the lower court?

19 MR. RUGGEROLI: The Judge just simply left
20 it to Your Honor. But he had not absconded or anything like
21 that, it's just that he wanted you to set it.

22 MR. MILLER: Judge, I'd ask if we could
23 have a written briefing on it that set out the facts.

24 THE COURT: Well, typically bail is
25 afforded in cases like this. Did somebody make a decision

1 that there would be no bail at some point?

2 MR. RUGGEROLI: No, no. He just didn't
3 want to set it in Justice Court. It was an extended hearing
4 that took a number of weeks, and he just put it in Your
5 Honor's hands.

6 THE COURT: Who is he? What Judge?

7 MR. RUGGEROLI: Judge Jansen.

8 THE COURT: Who heard extended hearings on
9 this case?

10 MR. RUGGEROLI: No. It had to be
11 continued a number of times because of witnesses.

12 THE COURT: But there was a preliminary
13 hearing?

14 MR. RUGGEROLI: Yes, sir.

15 THE COURT: And he is conversant with the
16 facts?

17 MR. RUGGEROLI: He was familiar with the
18 facts.

19 THE COURT: But he didn't want to set
20 bail?

21 MR. RUGGEROLI: He just said he would
22 leave it up to you. And it wasn't --

23 THE COURT: And I knowing nothing of the
24 case, I'm supposed to take care of this?

25 MR. RUGGEROLI: That was our position,

1 Judge, but I don't think it's appropriate to hold him with no
2 bail.

3 THE COURT: Well, I wouldn't argue that,
4 but I know nothing about the case. It's kind of hard to set
5 a bail in fairness to anyone without any knowledge.

6 Let me ask you to file a written motion and
7 I'll entertain that in a timely fashion.

8 MR. RUGGEROLI: I will do that, Judge.

9
10
11 ATTEST: Full, true and accurate transcript of proceedings.

12
13
14 
15 MAUREEN SCHORN, CCR NO. 496, RPR

FILED

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E. J. [Signature]
CLERK OF THE COURT

HIGH

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * *

STATE OF NEVADA,)
)
Plaintiff,)
)
vs.)
)
JOSEPH ALEXANDER HENDERSON,)
)
Defendant.)
_____)

Case No. C212968
Dept. XIV

REPORTER'S TRANSCRIPT
OF
DEFENDANT'S MOTIONS/CALENDAR CALL

BEFORE THE HONORABLE DONALD M. MOSLEY
DISTRICT JUDGE

Taken on Tuesday, June 17, 2008
At 9:00 a.m.

APPEARANCES:

For the State: STACY L. KOLLINS, ESQ.
Chief Deputy District Attorney
For the Defendant: NORMAN J. REED, ESQ.
Deputy Public Defender

Reported by: Maureen Schorn, CCR No. 496, RPR

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CLERK OF THE COURT

1 LAS VEGAS, NEVADA. TUESDAY, JUNE 17, 2008, 9:00 A.M.

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4 THE COURT: C212968, State versus Joseph
5 Alexander Henderson. The record will reflect the presence
6 of the defendant in custody. Mr. Reed is present as
7 Defense counsel, Ms. Kollins for the State.

8 And we have a motion to dismiss because of
9 destruction of evidence. Now, what I am learning through
10 my Clerk's perusal of the files is that the Defense says
11 there's no DNA sample left, and the Prosecution is saying
12 there is a sample left. Which is it?

13 MS. KOLLINS: There is an extraction left of
14 a single sperm head. And the destruction they're talking
15 about, in my belief, is just one item that was tested.

16 MR. REED: That's correct, Judge. Actually,
17 it's in two parts. Part one is, there's an extraction
18 left of the vaginal swab.

19 There is -- my reading of the discovery, unless
20 I'm reading it wrong, and we can have the DNA expert from
21 the State come in and confirm this, there is nothing left
22 concerning the swab to the breast, the saliva swab to the
23 breast. There is nothing able to be retested on that.

24 MS. KOLLINS: There are extractions from
25 every profile that was accomplished, and I double-checked

1 that last week before I responded to this motion. I had
2 the analyst go to their evidence vault, and there are
3 extractions that are capable of being reprofiled.

4 There is not enough of a sample from the original
5 swab to start a whole new profile, but there is an
6 extraction that their analyst or their expert could
7 reprofile and reexamine.

8 MR. REED: That would be assuming that the
9 extraction was done correctly, Judge. We don't even know
10 if that's true.

11 MS. KOLLINS: Well, they elected not to
12 retest back in April. In August of '07 we continued this
13 trial for them to retest. In April they came in and said
14 we're not going to retest, we're not going to have our
15 expert look at any of the procedures, we're not going to
16 do it.

17 And now on the eve of trial they're complaining
18 that they don't know if the process was done correctly.
19 The evidence has not been destroyed.

20 THE COURT: Well, that's my reading of the
21 situation, Mr. Reed. On the 2nd of April you had said,
22 no, we're not going to retest the DNA.

23 MR. REED: That's true, Judge --

24 THE COURT: Have you changed your mind?

25 MR. REED: -- because we can't.

1 THE COURT: Well, no. You didn't say, no,
2 we can't. You said you had no desire to do so, is the way
3 I took it and the way the minute order reads.

4 MR. REED: Well, if that's the way I said it
5 then I misspoke, because we didn't intent to retest it
6 simply because we could not retest it.

7 THE COURT: Well, that's still the
8 situation, isn't it?

9 MR. REED: That is still the situation.

10 MS. KOLLINS: And the impropriety of that
11 was never addressed. They withdraw their request to
12 retest. They never gave a basis for that, other than
13 that's not a trial strategy we're going to take.

14 Now, if they wanted to attack the process by
15 which these extractions were preserved, then they should
16 have had their expert look at that instead of just coming
17 in here and saying, well, it can't be done.

18 I mean, we don't have any reports from them that
19 indicate that these extractions were done inappropriately,
20 or that the extractions were insufficient for retesting.

21 MR. REED: No. That's not our burden,
22 Judge. All I can tell you is, the records that I have
23 show that there is not a sufficient amount to be retested,
24 except for the vaginal swab in which there was an
25 extraction done.

1 Now, the method and manner of extraction is not
2 produced in the records, according to my expert. There
3 was no evidence in any of the written paperwork as to how
4 the extraction method was done, and whether or not that
5 conformed with Las Vegas Metropolitan Police Department
6 and national standards concerning extraction of the
7 vaginal samples.

8 That is what I am after, Judge.

9 THE COURT: Are we disagreeing as to --

10 MS. KOLLINS: Are you talking about the
11 breast sample or the vaginal sample?

12 MR. REED: Vaginal. But my records read
13 that there's nothing left -- I'm sorry, Judge -- at all on
14 the breast sample. There is nothing else left to be
15 tested from the breast sample.

16 THE COURT: Well, that's because there
17 wasn't enough material there to gain and then to test; is
18 that right?

19 MR. REED: That's my understanding.

20 MS. KOLLINS: The defendant's epithelial
21 cells were on her breasts. There was semen in her vagina
22 matched to his sperm, as well as semen on a bed sheet
23 matched to his sperm.

24 And all of those extractions existed in the Metro
25 lab. I had them photographed to make sure that they were

1 all there.

2 THE COURT: Well, all right. There's no
3 accusation of bad faith on the part of the State here, is
4 there, Mr. Reed?

5 MR. REED: No, Judge.

6 THE COURT: You know, the facts are what
7 they are. We can't manufacture evidence, hopefully, from
8 any quarter. Certainly, the process that was followed
9 could be reviewed if your expert, Mr. Reed, takes
10 exception to the manner of inspection or whatever else,
11 you're at liberty to do so.

12 But we're not going to throw this case out just
13 because there's not enough sample so retest and go through
14 the whole process anew. So your motion to dismiss is
15 denied.

16 MR. REED: And, Judge, our alternative
17 request for relief would be since the breast swab is no
18 longer available, that that, the evidence from that
19 portion be excluded.

20 If there is still an extraction swab from the
21 vagina, then that's fine. But if there isn't one from the
22 breast, then that should be excluded.

23 MS. KOLLINS: I'm going to say one more
24 time, I was on the phone with the lab confirming that for
25 every profile that was done in this case there is an

1 extraction from the original sample that can be
2 reprofiled. So that is not a basis to disregard the rest.

3 THE COURT: That motion could be granted
4 right after the time of trial, or at the end of trial to
5 some extent if, in fact, there turns out to be no swab
6 available. She says there is.

7 MS. KOLLINS: There is not a swab available.
8 There is an extraction from the original piece of
9 evidence.

10 MR. REED: And there's nothing in the
11 records that indicate that, Judge. I'm not trying to
12 be --

13 THE COURT: I'm saying there is or there
14 isn't. We'll know at the proper time and you can renew
15 your motion if that turns out to be the situation.

16 MR. REED: Would we be able to have the
17 expert testify outside the presence of the jury regarding
18 that evidence?

19 THE COURT: Whether it's available or not?

20 MR. REED: Whether it's available, what
21 extraction method was used so we can renew our motion
22 outside the presence of the jury.

23 THE COURT: Well, I'm merely allowing you to
24 maintain the opportunity to make the motion, depending on
25 the availability of the extraction, not the method of

1 preserved or anything else.

2 So either we have it or we don't have it, and
3 your expert is going to tell us at some point here it is,
4 or we don't have it.

5 MR. REED: Well, Judge, my concern is, first
6 of all, the records don't indicate that it exists for the
7 breast swab. And I understand Ms. Kollins says her expert
8 says otherwise, but I'd like to have her put under oath
9 and be able to say that.

10 And if the extraction method is invalid that was
11 done on the remaining swab or the remaining amount to be
12 tested, then the entire process is invalid. That's my
13 point.

14 THE COURT: As to the method, if you confer
15 with your expert and you think that there is something
16 legitimate to bring before the Court as to the method, we
17 will certainly look into the possibility of hearing
18 something outside the presence in that regard.

19 MR. REED: Thank you, Judge,

20 THE COURT: Now, I don't know how simple
21 this can be. Either there is an extraction for the breast
22 area, or there isn't, and so we can determine that at the
23 proper time.

24 If your expert wants to look into this and it
25 turns out that he or she calls the lab and they say, well,

1 we don't have it, then that's that. If you do have it,
2 you do. Pretty simple, really.

3 Now, there's a matter of the way that this would
4 be presented. And I think, Ms. Kollins, you indicated
5 that you don't intend to make an improper judgment of the
6 Defense's argument as to the percentage of probability and
7 all that?

8 MS. KOLLINS: No. I mean, the match in this
9 case is one in 600 billion people would have this profile.
10 That's ten times greater than the earth's population.
11 Scientifically that is identity presumed in a DNA case.

12 That is radically different from a one in three
13 million statistic that's in that case, which means to say
14 three people in New York City would have that same
15 profile.

16 This is one in 600 billion. It's identity
17 presumed and will not give them a percentage number, but
18 that is the statistic that is scientifically acceptable
19 and what our lab uses. I think now, actually, the
20 standard is one in 650 billion.

21 So we're talking about different numbers here
22 than that case. I mean, I'm not going to argue it
23 improperly, but we have identity presumed here.

24 MR. REED: And, Judge, maybe we're both in
25 agreement as to what the expert can testify to.

1 Obviously, they're agreeing that they can't testify
2 concerning percentages.

3 But the other part of that Ninth Circuit case
4 says that they cannot, regardless of the mathematical
5 probability, say identity is assumed.

6 They can only testify that there is a one in 600
7 billion chance that it's Mr. Henderson, or whatever
8 statistical number their expert is comfortable with. They
9 can never say identity is assumed, according to that Ninth
10 Circuit case.

11 MS. KOLLINS: And I respectfully disagree
12 with Mr. Reed. That's not what that case says. That case
13 is on a specific set of circumstances where the DNA
14 profile that was presented was one in three million.

15 The surrounding circumstantial case was very
16 weak, and the Prosecutor asked a question that elicited an
17 answer where the DNA expert said it is assumed that the
18 material found in the victim's underwear is a fluid of the
19 defendant.

20 In this case scientifically the numbers give you
21 identity is presumed, which is radically different from
22 one in three million. One in three million is not a great
23 DNA profile. They must have been missing quite a few
24 alleles, I would imagine.

25 Here we have one in 600 billion. One in ten

1 times the earth's population would have that DNA profile,
2 the profile of Mr. Henderson, which is radically
3 different.

4 MR. REED: Nowhere in the Ninth Circuit case
5 does it say anything that they're going to draw the line
6 that how many people per population is identity assumed.
7 Is it three million? Is it 100 million? Is it two
8 billion?

9 They don't draw that line. They just say that
10 that is impermissibly suggestive and goes beyond that,
11 which is within the province of the jury.

12 MS. KOLLINS: On the facts of that case and
13 that -- Mr. Reed has tried enough DNA cases to know that
14 one in 600 billion is an identity presumed case and is
15 radically different from a DNA profile that says one in
16 three million people have this DNA profile. I mean --

17 THE COURT: Well, my understanding of that
18 case as I went over it this morning, or I have to admit it
19 was the Clerk, the Prosecutor in his closing argument said
20 something like it's 99.98 percent presumed that it's the
21 defendant's, something of that nature.

22 MS. KOLLINS: And that complicated the error
23 in that case.

24 MR. REED: But there was also testimony from
25 the expert in that regard.

1 THE COURT: Let me ask you, Mr. Reed, what
2 are you objecting to? That sort of testimony from the
3 expert? Or that sort of conclusion made in closing?

4 MR. REED: Both.

5 THE COURT: Now, are you saying that
6 Ms. Kollins or someone in her position in closing cannot
7 say that the evidence is such that it is presumed the DNA
8 of the individual?

9 MR. REED: That is correct. She can only
10 say there was a one in 600 billion possibility that it is
11 Mr. Henderson.

12 THE COURT: What do you say to that,
13 Ms. Kollins?

14 MS. KOLLINS: That is an absolute incorrect
15 reading of that case.

16 THE COURT: Well, I tend to agree with
17 Ms. Kollins in the sense that, as you know, Mr. Reed, in
18 closing an attorney can't offer their opinion and they
19 can't offer evidence, but they can discuss the weight of
20 the evidence, and so the way that the evidence would
21 encompass this presumption.

22 Now, we may be arguing about nothing. I don't
23 know if the word "presumption" would be used. But I think
24 when you talk about one in 600 billion, it's a pretty
25 obvious situation. But whether you use the word

1 "presumption" or not, it's rather strong.

2 But I don't know if the Ninth Circuit in this
3 case intended to preclude a Prosecutor from commenting on
4 the evidence in closing.

5 MS. KOLLINS: Well, I don't think --

6 MR. REED: In the alternative, Judge, I
7 don't believe that the DNA expert can say identity is
8 assumed like they do in their reports. They can just give
9 the statistical numbers.

10 MS. KOLLINS: Well, that is the science
11 though. A match of one in 600 billion is the accepted
12 standard in almost every DNA lab across the country. That
13 is the science.

14 That case does not preclude them from saying that
15 identity is presumed. The facts of that case were he had
16 close siblings whose DNA was not tested, who they were
17 kind of pointing at those people as alternative suspects.

18 The rest of the case was weak and the DNA profile
19 was extremely weak. I've never presented a DNA case with
20 a one in three million match. I mean, that's just not
21 done.

22 THE COURT: Well, let me ask you this. In
23 that case did the expert offer the opinion that there was
24 a presumption as a legal presumption, or his personal
25 opinion?

1 MS. KOLLINS: I read it as a scientific
2 opinion.

3 THE COURT: His opinion.

4 MR. REED: He gave a scientific opinion that
5 identity was assumed.

6 MS. KOLLINS: Well, no. That's not what he
7 said.

8 THE COURT: Any time you have an expert
9 isn't he called upon to give an opinion?

10 MR. REED: Absolutely.

11 THE COURT: Then why is this different?

12 MR. REED: Because they're assuming that it
13 is, in fact, true regardless of the statistic.

14 THE COURT: Assuming what's true?

15 MR. REED: That it is him on the DNA.
16 They can give the statistical probability, but that cannot
17 say absolutely, 100 percent it is him according to the
18 Ninth Circuit case. That's my reading.

19 MS. KOLLINS: Well, that's apples and
20 oranges though. They can give their opinion to a degree
21 of scientific certainty that the semen and the epithelial
22 cells on Julie Kim matched the defendant. I mean, they
23 can say that.

24 THE COURT: Well, that's what experts say.
25 I mean, if he uses the word "presumption," that somehow

1 makes it invalid? Or he shouldn't use that language?

2 MR. REED: Well, it's the language "identity
3 assumed" that's in the report, which is also in the
4 language in the Ninth Circuit case that they denounced.

5 And, again, Judge, we're going to be challenging
6 the DNA in this case, obviously. The DNA is pretty much
7 the sole piece of evidence that they have to identify
8 Mr. Henderson as the perpetrator, so it's even more
9 prejudicial in that regard.

10 THE COURT: Well, you're not saying that the
11 expert could not be asked in his opinion does this match;
12 the one sample match the other, in other words?

13 MR. REED: Can you ask that question again,
14 Judge? I'm sorry.

15 THE COURT: I am assuming that the
16 Prosecutor will ask the expert at some point in his
17 opinion to a degree of medical certainty does the sample
18 taken from the victim match the defendant.

19 MR. REED: Right. And their answer should
20 be there is a one in 600 billion chance that that is
21 Joseph Henderson's DNA.

22 MS. KOLLINS: That's not what's stated.

23 THE COURT: You don't think he can say in my
24 opinion it's adduced? You don't think they can say that?

25 MR. REED: No; not according to the --

1 THE COURT: I think if the Ninth Circuit
2 said that, they must have been thinking something other
3 than what I am thinking, because that doesn't make sense.
4 But maybe we'll test it, this will be a good place. I am
5 not going to preclude the expert from giving that opinion.

6 The word "presumption" in the instructions, I
7 don't think we need to go into presumption, because that
8 begs the question are we talking about a legal presumption
9 or just common language?

10 In the first place I don't think it's very
11 descriptive, "presumption."

12 MS. KOLLINS: And I don't think that's the
13 language that's used. It's a one in 600 billion chance
14 that there's another human being with the same profile as
15 Joseph Henderson. That's what they're going to say. In
16 their DNA world that is identity presumed. I mean --

17 THE COURT: Well, is that a scientific word
18 that they typically use, "presumption"?

19 MS. KOLLINS: I think they use "assumed" in
20 their report, "identity assumed."

21 MR. REED: That's exactly the words that are
22 used in the report, Judge, "identity assumed."

23 MS. KOLLINS: And that's the standard. This
24 case is completely different from this Ninth Circuit case.

25 THE COURT: Well, I think the question more

1 properly asked would be to a degree of medical certainty,
2 you know the format: Do you, Doctor, whomever you're
3 talking about, feel that the sample found in the victim
4 matches that of the defendant?

5 And he'll say yes or no, and then he'll give
6 whatever statistic he wants to give is what he'll give.
7 Now, I don't know if I want to hear him say: Well, I
8 presume it is or I assume so, or something like that.

9 MS. KOLLINS: Well, and I guess "identity
10 assumed" is a term of art for them. I mean, I don't think
11 they're going to get up there and say: Well, I presume it
12 is or I assume it is. I mean, "identity assumed" is a
13 term of art that is used.

14 MR. REED: Well, that's the word that she
15 uses in her report, and I would agree with that.

16 THE COURT: Well, I don't particularly care
17 for that language. But I am not going to prohibit the
18 expert from giving an opinion if it's done in a way that's
19 beneficial.

20 Now, giving an opinion that he assumes doesn't
21 tell us much.

22 MS. KOLLINS: I guess the only thing I'm
23 concerned about now is any discovery from their DNA
24 expert, since I just heard that we're going to attack the
25 way the extractions were done. I assume that --

1 THE COURT: Well, I'm not real pleased with
2 the timeliness of this, frankly. On the 2nd of April this
3 was resolved in my opinion, and I don't know what language
4 you used to misunderstand it.

5 But this wasn't an issue the 2nd of April, and
6 now it's an issue at the eve of trial. This matter has
7 been going on, the arraignment was July of '05. Now, that
8 is absurd and I intend this to go forward in this court,
9 and it's going to go forward the 23rd of June.

10 And if there's anything obstructing that date, I
11 want to hear from each of you independently. There's not
12 going to be any discussions ex parte, I just want to know
13 if there's a problem. And then I'm going to get together
14 with all of you and we're going to make it work.

15 MS. KOLLINS: Judge, I'm ready for trial. I
16 have three of my witnesses out of state. I'm missing one
17 detective, but I believe we can circumvent his testimony
18 for trial.

19 Other than that I'm ready to go, 11 to 15
20 witnesses. It will probably take us a week to try.

21 MR. REED: The Defense is ready, Judge,
22 subject to the couple of little minor housekeeping
23 discovery issues with the State, which I believe were
24 resolved today.

25 Like, for example, we apparently have the wrong

1 copy of the 911, we just need a correct copy. And there
2 is potentially a Codis report. This was a cold hit case
3 in which they found Mr. Henderson's DNA through the
4 computer system.

5 And there was nothing in any of the Las Vegas
6 Metropolitan Police Department forensic information to
7 show the Codis hit, other than we know it exists.

8 So if there is a report or any records from that,
9 the State is going to get those to us because I think
10 we're entitled to have them in order to properly
11 cross-examine their experts.

12 Other than that we're ready.

13 THE COURT: Is that going to be available?

14 MS. KOLLINS: You know, I don't know that
15 that report exists, and I relayed that to Mr. Reed as well
16 as Ms. Radosta. I know that at some point there was a
17 Codis map. I don't know how that was documented. That
18 was never part of my discovery.

19 I am meeting with the lab this afternoon. If it
20 exists, they'll get it. If it doesn't, then they won't.

21 THE COURT: Well, I would point out six days
22 from now we're going to trial.

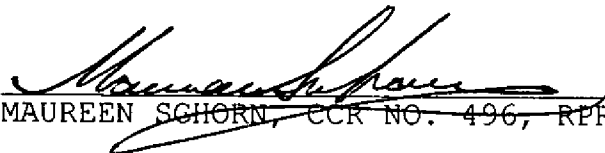
23 MR. REED: We're ready, Judge.

24 / / /

25 / / /

1 THE COURT: Thank you.

2
3 ATTEST: Full, true and accurate transcript of
4 proceedings.

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7 MAUREEN SCHORN, CCR NO. 496, RPR
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E. J. [Signature]
CLERK OF THE COURT

HIGH

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * *

STATE OF NEVADA,)
)
Plaintiff,)
)
vs.)
)
JOSEPH ALEXANDER HENDERSON,)
)
Defendant.)
_____)

Case No. C212968
Dept. XIV

REPORTER'S TRANSCRIPT
OF
STATUS CHECK: DNA

BEFORE THE HONORABLE DONALD M. MOSLEY
DISTRICT JUDGE

Taken on Wednesday, April 2, 2008

At 9:00 a.m.

APPEARANCES:

For the State: STACY L. KOLLINS, ESQ.
Chief Deputy District Attorney

For the Defendant: VIOLET R. RADOSTA, ESQ.
NORMAN J. REED, ESQ.
Deputy Public Defenders

Reported by: Maureen Schorn, CCR No. 496, RPR

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CLERK OF THE COURT

1 LAS VEGAS, NEVADA. WEDNESDAY, APRIL 2, 2008, 9:00 A.M.

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4 THE COURT: C212968, State versus Joseph
5 Alexander Henderson. The record will reflect the presence
6 of Mr. Reed and Ms. Radosta representing the defendant,
7 who is present in custody; Ms. Kollins for the State.

8 The matter is on for status check. What is the
9 status?

10 MS. KOLLINS: Judge, this is a status check
11 on the Defense's DNA expert. I was told this morning they
12 are going to use Nora Rudin out of California, and they're
13 going to provide me a copy of her CV, and that's where it
14 stands.

15 THE COURT: Is Ms. Rudin going to be able to
16 have this ready to go?

17 MR. REED: She's ready, Judge. Just for the
18 Court's edification, we're consulting with her. We don't
19 anticipate calling her as a expert, but we will provide
20 her CV to the District Attorney later today.

21 MS. KOLLINS: I guess it's their
22 representation they will not be retesting the DNA,
23 correct?

24 MR. REED: That is correct, Your Honor.

25 THE COURT: All right. So it rather moots

1 the issue, doesn't it?

2 MR. REED: It does.

3 THE COURT: So beyond that are we ready to
4 go?

5 MS. RADOSTA: Yes, Judge. We anticipate we
6 will be ready for the June 23rd trial date. The only
7 issue is, I did e-mail Ms. Kollins since the last status
8 check about some -- this file has been passed from person
9 to person in my office, and I just want to make sure that
10 I have everything in my file.

11 There were two things that I had e-mailed about
12 phone calls. I have one CD that has three or four phone
13 calls from my client to an unknown female.

14 THE COURT: From the jail?

15 MS. RADOSTA: Yes. I just want to make sure
16 that there aren't others. And, also, there is an audio
17 recording of my client speaking with the detective in this
18 case where they reference a prior conversation that I
19 don't have. But I don't know if they transcribed it or
20 audiotaped it or anything. They just refer to a prior
21 conversation.

22 MS. KOLLINS: I can't speak to whether that
23 is recorded and transcribed. I can tell you I only have
24 the one CD of jail calls. I'll look into it, and
25 Ms. Radosta and Mr. Reed are welcome to come over and look

1 at my file any time.

2 THE COURT: You might inquire of whoever
3 made that reference, because this kind of thing has a way
4 of surprising people.

5 You said a detective referenced another call?

6 MS. RADOSTA: Another conversation between
7 my client and the detective.

8 THE COURT: On a phone call?

9 MS. RADOSTA: No; where they actually came
10 to visit him at the jail and they discussed the case.

11 THE COURT: And from what you can glean from
12 it, was it the same detective that was making the
13 statement?

14 MS. RADOSTA: Yes.

15 THE COURT: So it was an inquiry then.
16 Thank you very much.

17 MR. REED: Thank you, Judge.

18

19

20 ATTEST: Full, true and accurate transcript of
21 proceedings.

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MAUREEN SCHORN, CCR NO. 496, RPR

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E. J. [Signature]
CLERK OF THE COURT

C212968

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,)
)
Plaintiff,)
)
vs.)
)
JOSEPH ALEXANDER HENDERSON,)
)
Defendant.)
_____)

Case No. C212968
C213690
Dept. XIV

REPORTER'S TRANSCRIPT
OF
SENTENCING/
PUBLIC DEFENDER'S MOTION TO WITHDRAW DUE TO CONFLICT

BEFORE THE HONORABLE DONALD M. MOSLEY
DISTRICT JUDGE

Taken on Thursday, August 28, 2008
At 9:00 a.m.

APPEARANCES:

For the State: STACY L. KOLLINS, ESQ.
Chief Deputy District Attorney
HAGAR TRIPPIEDI, ESQ.
Deputy District Attorney
For the Defendant: VIOLET R. RADOSTA, ESQ.
Deputy Public Defender

Reported by: Maureen Schorn, CCR No. 496, RPR

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1 LAS VEGAS, NEVADA. THURSDAY, AUGUST 28, 2008, 9:00 A.M.

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4 THE COURT: C212968, State versus Joseph
5 Alexander Henderson. The record will reflect the presence
6 of the defendant in custody. Ms. Radosta is Defense
7 counsel, Ms. Kollins for the State. The matter is on for
8 sentencing.

9 Are you ready to go forward, Ms. Radosta?

10 MS. RADOSTA: Yes, Your Honor. I just
11 wanted to point out there is an error on the PSI report,
12 but my client would still like to go forward today with
13 sentencing.

14 MS. KOLLINS: And, Your Honor, Court's
15 pleasure, I do have two speakers in this matter. I
16 believe the Court has been notified. I don't know if you
17 want to take this now. I was told it was being taken at
18 the end of the calendar.

19 THE COURT: That would be my desire. Are
20 you needed elsewhere, Ms. Radosta?

21 MS. RADOSTA: No, Judge.

22 THE COURT: Let's trail this. Go ahead and
23 have a seat, Mr. Henderson.

24 MS. KOLLINS: And, Your Honor, there is a
25 mistake in the PSI. Do you want to take that now, or do

1 you want to wait until later?

2 THE COURT: Well, is it something we can
3 cure?

4 MS. KOLLINS: It is just by interlineation.
5 The sentencing on the kidnapping is incorrect. It should
6 be five to life with an equal and consecutive five to
7 life.

8 MS. RADOSTA: Actually, it's on Page 2 as
9 well as the recommendation. On Page 2 they list the
10 potential penalty for first degree kidnapping with use as
11 a minimum 15 years with the possibility of parole -- I'm
12 sorry, possibility of parole after 15 to life being the
13 minimum sentence.

14 And it's actually first degree kidnapping is five
15 to life plus an equal and consecutive five to life.

16 THE COURT: We'll discuss it more fully.

17

18 (Whereupon, the matter was trailed on the calendar.)

19

20 THE COURT: C212968 State versus Joseph
21 Alexander Henderson. The record will reflect the presence
22 of Mr. Henderson in custody. Ms. Radosta is counsel for
23 the Defense, Ms. Kollins is present for the State.

24 The matter is on for sentencing, and I would also
25 indicate that there is a companion case, C213690, State

1 versus Joseph Henderson. There's a motion pending.

2 MS. RADOSTA: Judge, I'll be handling that
3 as well.

4 THE COURT: Ms. Radosta will handle that as
5 well. We will take that up after the first matter has
6 been called here.

7 Are you ready to go forward, Ms. Radosta?

8 MS. RADOSTA: Yes, Judge.

9 THE COURT: Mr. Henderson, do you have any
10 legal cause or reason why judgment should not be
11 pronounced against you at this time?

12 THE DEFENDANT: No, sir.

13 THE COURT: By virtue of the jury's
14 findings, you are adjudged guilty of Counts 1 through 14.
15 The State's position, please?

16 MS. KOLLINS: Your Honor, I have a few
17 things to say based substantially on the jury's verdict,
18 the defendant's record, the recommendation by P and P.

19 I think probably the first observation I have to
20 relay to the Court is this defendant's record is
21 abhorrent. He has never successfully completed a parole
22 or a probation period. He is a multiple time previous
23 convicted felon, including violent offenses, including
24 offenses with firearms.

25 I know you've read the PSI. P and P's

1 recommendation is absolutely spot-on. This man should
2 never, ever be out in our community again.

3 Where does he go from here? Other than the
4 crimes that were committed against Julie Kim and Eric
5 Bernzweig, the only place he has to go is up, and that's
6 murder. Because this is about as bad as it gets short of
7 a homicide.

8 Julie and Eric are never going to know any
9 tranquility in their home. They're always going to be
10 suspicious. They're going to live with this for the rest
11 of their life.

12 No one else in the community should ever, ever,
13 have to endure repeated sexual assaults, being
14 pistol-whipped, having their home invaded. No one else
15 should ever have to do or endure what the defendant put
16 that family through.

17 He's 38 years old now. He was afforded a fair
18 trial, the jury made their decision. The recommendation,
19 if you follow it, gives him 121 years and a few months on
20 the bottom. The State thinks that's absolutely
21 appropriate. He deserves nothing less, his record
22 deserves nothing less, these victims deserve nothing less.

23 If this Court is bothered by the longevity of
24 that sentence, what I would ask you to do is run every
25 life sentence that he has been convicted of consecutively.

1 That would be Count 4, first degree kidnapping
2 with use of a deadly weapon, five to life with a
3 consecutive five to life.

4 Count 5, first degree kidnapping with a deadly
5 weapon, five to life plus a consecutive five to life.

6 Counts 7, 8 and 9, each sexual assaults with a
7 deadly weapon, ten to life plus ten to life for each one
8 of those all to run consecutively.

9 If this Court is hesitant to follow the
10 recommendation, which I stand here and tell you that the
11 State believes this is absolutely appropriate given these
12 offenses, given his record, and given his proclivity from
13 other cases that we know.

14 He had a case where he was going around UNLV
15 fondling young ladies. So his sexual aberrations are
16 apparent in his history.

17 I would ask you, again, I want to reiterate the
18 120 on the bottom is absolutely appropriate, but if this
19 Court hesitates to do that, I would ask you for all of the
20 life sentences to run consecutively.

21 THE COURT: All right. Now, let me get a
22 couple of things clarified here for the edification of all
23 present. Earlier there was mention of Count 4 and Count 5
24 being an improper recommendation.

25 MS. KOLLINS: It is incorrect in the PSI.

1 It should be 60 months to life with an equal and
2 consecutive 60 months to life, instead of the 180 months.

3 THE COURT: Do you concur in that,
4 Ms. Radosta?

5 MS. RADOSTA: Yes, Judge. That, I believe,
6 is the current -- well, it was the state of the law at the
7 time that this crime was committed.

8 MS. KOLLINS: That is correct.

9 THE COURT: And that begs the next question
10 I was going to ask. Do we all understand and concur that
11 the equal and consecutive enhancement was in effect at the
12 time of this offense?

13 MS. KOLLINS: Yes, we do, Judge.

14 THE COURT: Not to do with the statute.

15 MS. RADOSTA: Right, Judge. And I believe
16 that the State Supreme Court has recently ruled that it's
17 not retroactive, that the new 1 to 20 consecutive is not
18 retroactive to the date that the deadly weapon enhancement
19 went into effect.

20 THE COURT: All right. Mr. Henderson, is
21 there anything you want to say before your attorney
22 speaks?

23 THE DEFENDANT: Yes, Your Honor. I would
24 like to say I maintain my innocence. I do feel sorry for
25 Ms. Kim and her husband. I sat in the trial and heard

1 everything that happened, and I really feel sorry for them
2 because I would not want that to happen to me.

3 And I know that the DA has a job to do, but I am
4 innocent of this crime and I plan on proving that not
5 today, because I was found guilty in this trial, but I'm
6 quite sure something will come up where I can get my life
7 back.

8 I know I have a lengthy record, but nothing like
9 what I'm being accused of, and you've got my record right
10 there. I haven't been a good boy, but I have never did a
11 robbery, I have never had a robbery case, never, ever
12 sexual assault, never, ever those type of cases with this
13 type of severe time. Maybe a little drug cases here and
14 there, but I never did nothing like this.

15 I mean, honestly, to be honest with you, Mosley,
16 I got framed, I really got framed.

17 THE COURT: Who framed you?

18 THE DEFENDANT: The police framed me. I
19 mean, either the police, somebody had to frame me. I was
20 framed.

21 THE COURT: Ms. Kollins?

22 MS. KOLLINS: I would just remind the Court
23 the DNA evidence in this case.

24 THE DEFENDANT: I was framed. I mean it
25 from my heart.

1 THE COURT: Ms. Radosta?

2 MS. RADOSTA: Judge, my client Mr. Henderson
3 did touch on one of the things that I wanted to address
4 with Your Honor. The State said he has an abhorrent
5 record. I would completely disagree with that statement.

6 Yes, he has four prior felonies, Judge, but we've
7 seen much worse than these types of felonies. There is
8 one violent felony from 18 years ago, assault with a
9 firearm on a person in 1990.

10 Other than that, Judge, it was possession of a
11 firearm and that was in 1995. And the two most recent
12 felonies are both drug related in '97 and then in '99.
13 Those are -- and that's his record.

14 Yes, an active criminal history, but it's hardly
15 an abhorrent record, Judge, where you need to treat this
16 case as somehow one of the worst you've ever seen, in all
17 honesty, Judge.

18 Ms. Kollins also stated that she felt that the
19 recommendation in this case was spot-on. Even under the
20 old sentencing guidelines for a murder case, Judge,
21 Ms. Kollins is recommending to this Court that you
22 sentence my client as though he had killed three people.

23 121 years to life would be three consecutive
24 40-to-life sentences, Judge. And while there is
25 absolutely no getting around the fact that this was an

1 incredibly painful and life-altering experience for the
2 victims in this case, Judge, the fact of the matter is,
3 it's not the worst that we've all seen, it's not to the
4 level of murder and it should not be treated in that
5 manner.

6 This is a situation where I'm remembering the
7 testimony correctly, although the jury did come back with
8 the sexual assault with use of a deadly weapon, the
9 testimony at times during the trial was that Ms. Kim
10 didn't always necessarily know where the weapon was while
11 the sexual assault was happening, so it's not as though
12 the gun was being held directly to her head while this was
13 happening.

14 And I'm certainly not suggesting to Your Honor
15 this wasn't a horrific experience for her, but it could
16 have been worse. And that's a hard thing to say, but it
17 certainly could have been worse, and I would ask Your
18 Honor to keep that in mind when making your decision in
19 this particular case.

20 To run burglary counts consecutive to robbery
21 counts consecutive to kidnapping counts, when there were
22 two victims in this particular case, Judge, to run each of
23 the -- I mean, P and P recommends of the 14 felonies and
24 gross misdemeanors that my client was convicted of, they
25 run ten of them consecutive to one another.

1 That's completely excessive in this particular
2 case. There were multiple people involved in this, Your
3 Honor, and my client on some of those counts was convicted
4 on aiding and abetting theory. So I would ask Your Honor
5 to also keep that in mind.

6 What I would suggest to Your Honor is to perhaps
7 run one of the most serious counts involving Ms. Kim, the
8 sexual assault with use of a deadly weapon, which would be
9 a 20 to life, and one of the most serious counts involving
10 her husband, Dr. Bernzweig, consecutive.

11 And that would be either the first degree
12 kidnapping, which would be a ten to life, or depending on
13 how Your Honor looks at it, the robbery with use of a
14 deadly weapon, which would be 6 to 15, plus an equal and
15 consecutive 6 to 15.

16 It doesn't have the life tail, but it does have
17 more time on the bottom end. So somewhere in the
18 neighborhood of 30 to 35 years to life would be the actual
19 sentence, being the most straightforward way of putting
20 it, Judge.

21 In the end, Your Honor, there is certainly no
22 getting around, as I stated, that this was an incredibly
23 difficult experience for the victims in this case. But
24 that being said, part of the Court's job is to keep
25 everything in perspective and not be persuaded by this one

1 victim's experience.

2 Mr. Henderson is not the worst of the worst, it's
3 just that simple. He's had very little violent contact
4 with the system prior to this, Judge, and I'd ask you to
5 keep that in kind when you sentencing him.

6 THE COURT: Now, just so we're sure we're
7 recommending what we intend to recommend, Ms. Kollins
8 suggests five to life on the kidnapping, and you're
9 suggesting ten to life.

10 MS. RADOSTA: Well, it's five to life with
11 an equal and consecutive five to life.

12 THE COURT: Just so we understand.

13 MS. RADOSTA: And I believe Ms. Kollins, I
14 think that's what she --

15 MS. KOLLINS: I concur the PSI is correctly
16 written as to the first three kidnapping counts. It's
17 five to life as required, a consecutive five to life with
18 the weapon.

19 THE COURT: Now, incidentally, I assume that
20 everybody did receive a Supplemental Presentence
21 Investigation Report?

22 MS. RADOSTA: Yes, Judge. I received it
23 this morning. Ms. Kollins gave me a copy of it.

24 MS. KOLLINS: Well, I received the original
25 PSI yesterday that was erroneous, and I called P and P and

1 they actually edited it during the day yesterday and
2 provided it this morning.

3 THE COURT: So we're satisfied we have the
4 proper document?

5 MS. RADOSTA: Yes, Judge. And for the
6 record, I did provide both the original and the
7 supplemental to Mr. Henderson.

8 THE COURT: All right. Let's have a seat
9 and hear from our speakers if they wish to be heard.

10 MS. KOLLINS: Mr. Bernzweig.

11

12 Whereupon,

13

ERIC BERNZWEIG,

14 was called as a Speaker by the State, and having been
15 first duly sworn, was examined and testified as follows:

16

17 THE COURT: Sir, would you state your full
18 name, please?

19 THE SPEAKER: Eric Bernzweig,
20 B-e-r-n-z-w-e-i-g.

21 THE COURT: Please tell us what you would
22 have us know?

23 THE SPEAKER: I just want to take a moment
24 to thank the Court and just say that the wheels of
25 American justice do grind slowly, but they grind

1 correctly. And what's happened here is the correct thing
2 and the fact that this man is guilty.

3 I've been asked to talk about the things that
4 have personally affected me, and every single facet of my
5 life has been affected. And the truth is that I'm a man
6 that has always put his life off for bigger and better
7 things, going to college, going to dental school, going to
8 postgraduate work, starting to practice out of nowhere,
9 leaving my family back at home to start anew in a strange
10 land.

11 But the truth is that the best part of my life
12 was coming. I met my future wife at that point and she
13 was going to convert to Judaism for me. We were just
14 weeks away. We were coming back home from San Diego on a
15 long weekend four years almost to the day.

16 We were coming home from San Diego. We were
17 talking about having a baby, having a big wedding, all of
18 the things that I had always put my life off for. These
19 were the things that the money and the success was
20 secondary, that I should find my wife, that I should have
21 a child.

22 But since that day that all of this happened,
23 there is no talk of children. This man raped my wife. He
24 beat me up, big deal. He's killed my unborn child. The
25 truth is that my wife and I at that time were dating.

1 Everybody says when you get married it's the happiest day
2 of your life. I found my soul mate, I really did.

3 And at this point she's not the same person that
4 she used to be. She's never going to be the same person
5 that I knew, the person that wanted to have a child. All
6 of this has been for nothing.

7 The money and the success means nothing. The
8 fact that my life and her life have been irreparably
9 damaged because somebody wanted to come to Las Vegas and
10 have a good time at the price of my wife.

11 You talk about a shortened sentenced, ma'am, you
12 can come to my house and we'll give you a play-by-play and
13 you'll tell me if you want a shortened sentence.

14 THE COURT: Sir, address me.

15 THE SPEAKER: I'm sorry, sir. The truth is
16 that we came into court the day before court and this guy
17 came in with an offer for a shortened plea, and he thumbed
18 his nose at the Court. And at the last second said, no,
19 I'll come to trial. He rolled the dice and that's what's
20 coming to him.

21 Talk about things, this is my personal life.
22 Money wise, the house that I had built was a dream house.
23 We couldn't believe we found this. We had to sell it at
24 the top of the real market, you know what's going on with
25 real estate.

1 We had to take a \$50,000 hit because we had to
2 tell the person coming in what had happened to us, the
3 embarrassment. All the people that we knew and friends
4 and the people we had made friends with now don't even
5 speak to us. We're marked.

6 Just as this was all happening we were starting
7 up. When I came to town I knew that I would be successful
8 because nothing would stand in my way. I wouldn't step
9 over anybody, but I would do what I could to make myself
10 successful.

11 We signed a lease for a second office and you,
12 Judge, let me talk to you directly. When you were just
13 like me, you went to college, you went to graduate school,
14 you didn't know if you were going to be a judge. But the
15 truth is, you had the drive. How many judges are out
16 there. You were at the top of your game.

17 That's where i was going until September 3rd,
18 2004. I had it all planned. It was a plan that was going
19 to work at the top of the economy. Now I have two offices
20 that I can't keep on top of anymore. My life is shot.

21 Let's talk about my personal being. Health, I've
22 put on 40 pounds since this all happened. I am now an
23 uncontrolled diabetic and I've got high blood pressure.
24 And the truth is that I can't give an exact date, but this
25 has easily taken ten years off of my life with the

1 everyday stress that she and I have to go through.

2 Now even just this morning the back door was
3 open. I can't leave the garage door open without freaking
4 out. When you have a nice day in Las Vegas, you open the
5 back door to get a breeze. I can't step away from the
6 door thinking that somebody is going to come into my home
7 and rape my wife.

8 The truth is that this is why I had a life
9 planned. That life plan started in 1984 when I started
10 college and continued to the day of 2004, almost to the
11 day of starting college, 20 years. Everything has been
12 put on hold over one stinking hour.

13 It was something that I didn't put into the
14 equation, which was some jerk coming into my place and --
15 whatever someone it seems to have been a targeted type of
16 thing. What did you do to make somebody do this to you?

17 The truth is, what little I know about law, I
18 know some. But I know an eye for eye and a tooth for a
19 tooth. What do you pay for two lives that have been
20 irreparably damaged?

21 THE COURT: Let me interrupt you just
22 briefly. You mentioned that you are looked down upon by
23 your friends. That's my word, something of that nature.
24 Let me make an observation here.

25 I heard the entire trial. You have nothing to be

1 ashamed of, number one. Number two, you and your wife are
2 the victims here. Anybody worth their salt would
3 understand that.

4 Number two, it's none of my business, I would
5 concede that right up front, but why this would interfere
6 with your plans to be married and have a child I do not
7 understand. I think you might reevaluate that. You have
8 a beautiful wife. There's no reason in the world why you
9 couldn't be married and have a child in my judgment, for
10 what it's worth. And, again, it's none of my business.

11 Is there anything else you want to say, sir?

12 THE SPEAKER: I just want to say that when
13 you hear the word "predator" you think of a lion or a
14 bear, and you consider that that predator kills to eat and
15 feeds children. It kills to protect its children.

16 A human predator preyed on people without remorse
17 is the truth. This guy came in knowing what he was going
18 to do. And the fact was it was 1:00 o'clock in the
19 morning in a private house, nothing was going to stop him.

20 Thank God that I was able to get out of my
21 shackles, and these guys thought I was going to die
22 because I had so much blood coming out of my head.
23 Because the party that this guy had on my wife, I can't
24 imagine, I can't imagine what could have been that the
25 fact that thank goodness that he cracked my head open, his

1 friend cracked my head open. Because the party would have
2 continued all night long in my eyes.

3 I've been told, again, this is my business, it is
4 my business, but it's not, it's the fact of the Court,
5 that possible sentence could be 20, 30, 40, even beyond.

6 But if you think about the numbers in 20 years,
7 this guy is going to be 55 years old, very much able to
8 overpower an adult, a young child or an elderly person and
9 do what he wants.

10 In 30 years he'll be 65 years old, not a young
11 man, but still in today's society still very, very young.
12 He could still -- he may not be able to overpower an
13 adult, but maybe a young child or an elderly woman or man,
14 whatever he happens to feel like that date.

15 In 40 years he'll be 75, again, still able to
16 overpower and trick a young child. Don't let this man
17 out. If you would, Your Honor, just infuse a little of
18 what we could consider a little -- well, if you could
19 throw the book at this guy, give gavel. And if you happen
20 to have a brick under your table there, that would be good
21 too.

22 But the truth is that the longer this guy is put
23 out of commission, the better.

24 THE COURT: Any questions from the State?

25 MS. KOLLINS: No, Your Honor.

1 THE COURT: Defense counsel?

2 MS. RADOSTA: No, Your Honor.

3 THE COURT: Thank you, sir.

4 THE SPEAKER: Thank you, Your Honor.

5 MS. KOLLINS: Ms. Kim, Your Honor.

6 THE COURT: Very good.

7

8 Whereupon,

9

JULIE BERNZWEIG,

10 was called as a Speaker by the State, and having been
11 first duly sworn, was examined and testified as follows:

12

13 THE COURT: State your name for the record,
14 please?

15 THE SPEAKER: Julie Bernzweig,
16 B-e-r-n-z-w-e-i-g.

17 THE COURT: You're married?

18 THE SPEAKER: Yes.

19 THE COURT: Go ahead.

20 THE SPEAKER: I wrote a speech today, but it
21 doesn't seem to quite cover all the phases after
22 everything that I've heard today. Every time I come to
23 this point I think of what happened to me four years ago,
24 and I relive that day every single month.

25 I don't know what it's like for anybody else, but

1 how can you put a cost on your own sanity? You can go on
2 and blame his past or his upbringing or whatever excuses
3 you may have for him, but nothing changes the fact of what
4 he did to me and how it's affected our lives.

5 I begged him for mercy not to do that to me, and
6 I hope you won't give him any mercy during sentencing.
7 I'm not happy to be here today. I wish this never would
8 have happened to me.

9 I keep thinking it just can't be, I've always
10 lived my life so carefully to avoid these kinds of things,
11 and I never would have thought it would have happened to
12 me in my own home.

13 And it's true I'll never be what I was, I'll
14 never be trustworthy, I'll never have peace. But,
15 hopefully, after today I will have some sort of closure
16 knowing that he's going to be put away forever. Thank
17 you.

18 THE COURT: Questions from the State?

19 MS. KOLLINS: No, Your Honor.

20 THE COURT: Defense counsel?

21 MS. RADOSTA: No.

22 THE COURT: Thank you. All right. Well,
23 it's clear that the recommendation is going to be followed
24 here.

25 Count 1, conspiracy to commit robbery, a gross

1 misdemeanor, in accordance with the law of the State of
2 Nevada, 12 months in the County Jail.

3 Count 2, burglary while in possession of a
4 firearm, 106 months in prison, eligibility of parole after
5 62 months to run concurrently with the gross misdemeanor.

6 Count 3, conspiracy to commit first degree
7 kidnapping, a felony, 60 months in prison, eligibility of
8 parole after 24 months to run consecutively.

9 Count 4, first degree kidnapping with use of a
10 deadly weapon, life imprisonment, eligibility of parole
11 after 60 months, and an identical term of what is known as
12 an enhancement to run consecutively, life imprisonment,
13 eligibility of parole after 60 months. The sentence will
14 run consecutively to the other counts.

15 Count 5, first degree kidnapping with use of a
16 deadly weapon, life imprisonment, eligibility of parole
17 after 60 months, an identical term to run consecutively by
18 operation of law, an enhancement of life imprisonment,
19 eligibility of parole after 60 months. This sentence will
20 run consecutively.

21 Count 6, conspiracy to commit sexual assault, 60
22 months in prison, eligibility of parole after 24 months,
23 again to run consecutively.

24 Count 7, sexual assault with use of a deadly
25 weapon, life imprisonment, eligibility of parole after 120

1 months, an identical term by virtue of the use of the
2 weapon, the enhancement of life imprisonment, eligibility
3 of parole after 120 months by operation of law to run
4 consecutively. This sentence, Count 7, will run
5 concurrent with the other sentences, other counts.

6 Count 8, sexual assault with use of a deadly
7 weapon, life imprisonment, eligibility of parole after 120
8 months, an identical term of life imprisonment,
9 eligibility of parole after 120 months as an enhancement
10 for the use of the deadly weapon to run consecutively.
11 Count 8 will run consecutive to the other counts.

12 Count 9, sexual assault with use of a deadly
13 weapon, life imprisonment, eligibility of parole after 120
14 months, plus an identical term as an enhancement, life
15 imprisonment, eligibility of parole after 120 months to
16 run consecutively. Count 8 will run consecutively to the
17 other counts.

18 Count --

19 MS. KOLLINS: I'm sorry, Your Honor. Was
20 that Count 9?

21 THE COURT: Count 9. Count 10, conspiracy
22 to commit robbery, 60 months in prison, eligibility of
23 parole after 24 months. Count 10 will run consecutive to
24 the other counts.

25 Count 11, robbery with use of a deadly weapon,

1 180 months in prison, eligibility of parole after 72
2 months, an identical term of 180 months in prison,
3 eligibility of parole after 72 months to run consecutively
4 as an enhancement by virtue of the use of a deadly weapon.
5 Count 11 will run concurrent to the other counts.

6 Count 12, robbery with use of a deadly weapon, a
7 term of 180 months in prison, eligibility of parole after
8 72 months. Count 12 will run consecutive to the other
9 counts.

10 Count 13, open and gross lewdness, a gross
11 misdemeanor, 12 months in the County Jail to run
12 concurrently, notwithstanding the recommendation.

13 Count 14, battery with use of a deadly weapon
14 resulting in substantial bodily harm, 156 months in
15 prison, eligibility of parole after 62 months.
16 Restitution in the amount of \$50,000.

17 And there is substantial credit for time served
18 of 1,251 days.

19 MS. KOLLINS: Your Honor, Count 14 to run?

20 THE COURT: I'm sorry, consecutive to the
21 other counts.

22 MS. KOLLINS: Thank you, Judge.

23 MS. RADOSTA: Actually, Judge, I don't think
24 that that -- actually, let me double-check. No, that's
25 not -- I don't even understand --

1 MS. KOLLINS: That's what I show 1,251. If
2 you want to put it back on.

3 MS. RADOSTA: I'm just looking at it and the
4 numbers don't make any sense, Judge. They're actually
5 saying from March of '05 to July of '05 it's 1100 days.
6 But if I find out that it's wrong, Judge, I will put it
7 back on calendar.

8 THE COURT: Well, certainly, the Court
9 contemplates full credit for time served. If it needs to
10 be adjusted we can do so.

11 THE CLERK: Judge, does Count 12 not have an
12 enhancement? Robbery with use.

13 MS. KOLLINS: It should.

14 THE COURT: Did I not mention that?

15 Count 12, robbery with use of a deadly weapon
16 would contemplate the basis for an enhancement, an
17 identical term of 120 months in prison, eligibility of
18 parole after 72 months to run consecutively would be the
19 proper sentence.

20 MS. KOLLINS: The only other thing I would
21 ask for is the special condition of lifetime supervision
22 and registration as a sex offender.

23 THE COURT: The sentence has been passed in
24 conformity to the law. The condition that you mentioned,
25 Ms. Kollins, certainly applies so that may be

1 incorporated.

2 Now, as to the latter matter on calendar here,
3 C213690, Ms. Trippiedi?

4 MS. TRIPPIEDI: I believe it was the Public
5 Defender's motion to withdraw, Judge.

6 MS. RADOSTA: And the State was to find out
7 by today's date whether or not they could locate one of
8 the -- Robin Poole, who was the former client of the
9 Public Defender's office that we have a conflict with.

10 MS. TRIPPIEDI: And we have not ever been
11 able to serve her or locate her at this time. So there's
12 no conflict because we're not going to be using her.

13 THE COURT: Well, are you announcing at this
14 time regardless of what may develop you're not going to
15 use her?

16 MS. TRIPPIEDI: No. We will not be using
17 her, that's correct.

18 THE COURT: The Public Defender will remain.
19 We have a jury trial scheduled here going forward the 8th
20 of September. We have that decision to make.

21 MS. TRIPPIEDI: I don't believe so, Judge.
22 This is Amos Stege's case.

23 MS. RADOSTA: Judge, I believe we have
24 calendar call on Tuesday on that.

25 THE COURT: We'll just wait until the 3rd

1 and see what the status is. That will be entertained the
2 3rd. Thank you very much.

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5 ATTEST: Full, true and accurate transcript of
6 proceedings.

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MAUREEN SCHORN, CCR NO. 496, RPR

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DISTRICT COURT

2008 NOV 25 A 8:25

CLARK COUNTY, NEVADA

E. J. [Signature]
CLERK OF THE COURT

THE STATE OF NEVADA,

Plaintiff,

vs.

JOSEPH ALEXANDER HENDERSON,

Defendant.

No. C212968
Dept. XIV

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DONALD M. MOSLEY

June 24, 2008
1:30 p.m.
Department XIV

APPEARANCES:

For the State:

MS. STACY KOLLINS

MR. BRAD TURNER

Deputy District Attorneys

For the Defendant:

MS. VALERIE RADOSTA

MR. NORMAN REED

Deputy Public Defenders

Reported by:
Joseph A. D'Amato
Nevada CCR #17

RECEIVED

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CLERK OF THE COURT

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COURT SERVICES: No green uniforms today.

MS. RADOSTA: We have SERT officers still in Court. The officers are still here, but dressed as corrections officers.

THE COURT: All right.

COURT SERVICES: We're Court Services now, but we were SERT.

MS. KOLLINS: You're not here in a SERT capacity today?

COURT SERVICES: Yes.

MS. KOLLINS: Regular corrections officers.

MR. REED: We want to describe the uniform they are wearing. Maybe we can have the corrections officer describe it so if the record is reviewed they aren't going to have seen a photograph of them in their SERT outfits.

It's a green military fatigue uniform that says SERT across the label.

Other than that, are there any significant differences between that uniform and uniforms you're wearing?

COURT SERVICES: That was accurate.

THE COURT: That's a matter of record.

THE COURT: The continuation of C212968, State versus Joseph Alexander Henderson. Record reflects the presence of the Defendant and his counsel, Mr. Reed and Ms. Radosta, Ms. Kollins and Mr. Turner present for the state.

The absence of the jury is noted.

Ms. Radosta, do you have something?

MS. RADOSTA: Yesterday when we were doing the initial pick of the jury there were two SERT officers in the courtroom dressed out a bit differently than our regular CO's.

They were in sort of military fatigues, definitely looking different from the corrections officers.

We were having questions as to why there were approximately four officers in the room with our client. Um, we did discuss that in chambers.

Apparently, there's allegedly some security risk. We requested that some accommodations be made.

The Court suggested that they be dressed like the other corrections officers. I'm not sure if those -- are there SERT officers here today?

Am I to understand we won't have any more of the fatigues during the duration of the trial?

COURT SERVICES: That's correct.

THE COURT: We're fine with that. What else?

COURT SERVICES: Unless there becomes another security issue, then that's something we would have to take up with our supervisors and let them make that decision.

THE COURT: Certainly if there's an emergency -- we aren't going to have people change their clothes to respond to the emergency.

If you have a serious elevated threat I need to talk to you about it as well.

MR. REED: In addition to that -- and the court room is the only way I can observe Mr. Henderson -- he's been a gentleman, cooperative and hasn't exhibited, in my opinion, any behavior in any way that could be considered violent.

THE COURT: Let's move along.

What's the next issue?

MS. RADOSTA: Also pursuant to the Foster Decision, we were requesting that we not be required to voice the peremptory challenges in open

1 court, since the Nevada Supreme Court strongly
2 recommends it's not done in that fashion.

3 THE COURT: What is the strong
4 recommendation in review of that?

5 MR. REED: The language is found in 121
6 Nevada 165. As counsel said, it's Foster versus
7 State.

8 They are cited to the ABA standards
9 for criminal justice which talks about all
10 challenges should be addressed to the Court outside
11 the presence of the jury and in that headnote the
12 Supreme Court says "We emphasize, however, our
13 strong preference that, in accordance with the
14 American Bar Association standards, the trial courts
15 of the State should assure that all peremptory
16 challenges during jury selection are exercised and
17 considered outside the presence of a jury venue."

18 THE COURT: What is suggested?

19 We let the jury leave the court room
20 every time we exercise a peremptory?

21 MR. REED: No.

22 There is a number of different ways
23 that can be done. We can do them at the bench, at
24 sidebar.

25 Some departments actually pass a piece

1 of paper back and forth with the jurors' name on
2 that to strike five jurors. Number of ways of doing
3 it on the record without removing the jury from the
4 court room every time we make --

5 THE COURT: You hand me a slip of
6 paper. You come up here and whisper in my ear.

7 I look up and I say Mrs. Jones, you're
8 excused.

9 Is that supposed to be a mystery that
10 they don't know what's going on?

11 MR. REED: If they don't know who is
12 doing the excusal -- if it comes from the bench it's
13 not going to be pointing out that the juror was
14 excused by either the defense or by the prosecution.

15 That's where the ABA has their
16 concern, so does the Supreme Court. The obvious
17 implication is as we go through the process the jury
18 will be concerned about why would the defense strike
19 me or that juror or why would the State have struck
20 me?

21 For example, there's been two young
22 male jurors that have been struck by the State so
23 far. If I'm a young male juror I might be thinking
24 why is the State striking young male jurors?

25 It causes the potential for prejudice

1 and as the questions continue a juror might be more
2 inclined to change their answer because they are
3 afraid that I might say something that where the
4 defense lawyers are going to challenge me or that
5 they might take it personally or that they are
6 overly concerned about why they are selected,
7 whereas the court has instructed them they are to
8 take no -- take nothing from the fact they are
9 stricken by either side.

10 The problem with doing that in front
11 of them is they have the implication of who has
12 actually decided they are not proper to sit on this
13 jury.

14 THE COURT: I take it that the
15 alternative order of peremptory challenge has to be
16 kept a secret as well?

17 MR. REED: That would be true, too,
18 judge.

19 THE COURT: Much ado about nothing, in
20 my view. I appreciate the input from all concerned.

21 I'm not inclined to change my method
22 of doing this for the last 27 years.

23 Next, please.

24 MR. REED: That's it. I understand and
25 appreciate that.

1 What's happened is if we don't make
2 this record the Supreme Court says that it's not
3 preserved for appellate purposes.

4 Thank you for your time.

5 THE COURT: I understand.

6 Bring the jury in, please.

7 [Whereupon, the prospective jury panel
8 entered the court room.]

9 THE COURT: Have a seat.

10 Ms. Clerk, will you call the roll of
11 our prospective jury panel, please?

12 [Whereupon, the court clerk called
13 the roll of the prospective panel.]

14 THE COURT: With the exception of
15 Ms. Doris and Ms. Gilliard, all are present; is that
16 correct?

17 COURT CLERK: Correct.

18 THE COURT: We'll hold off any action
19 in that regard.

20 MS. RADOSTA: Mrs. Gilliard was one of
21 the people that you excused and she said she wanted
22 to stay.

23 She may have changed her mind yet
24 again.

25 THE COURT: I don't know if I gave that

1 option.

2 MR. REED: She's walking in right now.

3 THE COURT: Call a single name to

4 replace the juror who was excused yesterday.

5 COURT CLERK: 0809, Taylor Gardner.

6

7

8

9 VOIR DIRE EXAMINATION

10 BY THE COURT:

11 Q. Is it Miss or Mrs. Gardner?

12 A. Miss.

13 Q. Ms. Gardner, do you know of any reason
14 why you could not serve as a fair juror?

15 A. No.

16 Q. Have you served as a juror before?

17 A. No.

18 Q. Are you or any close friends or
19 relatives involved in law enforcement or have you
20 been in the past?

21 A. No.

22 Q. Have you or close friends or family
23 members ever been the victim of crime?

24 A. **My car has been broken into this year.**

25 Q. In Las Vegas?

1 not have to take the the stand and testify or offer
2 any evidence if he chooses not to and you can still
3 find him not guilty and that's because the burden is
4 on the state to prove the defendant's guilt beyond a
5 reasonable doubt?

6 A. Yes.

7 Q. Have you or close friends or family
8 members ever been involved in the criminal justice
9 process either in prosecuting a case or as a witness
10 or a defendant?

11 A. No.

12 Q. Have you, close friends or family
13 members ever been the victim or accused of sexual
14 assault?

15 A. No.

16 Q. Do you have any particular interest or
17 understanding of the DNA science or evidence?

18 A. No.

19 Q. Have you ever consulted with an expert
20 other than a medical doctor?

21 A. No.

22 Q. Have you any specialized training in
23 medicine, science or biology?

24 A. No.

25 Q. Will the nature of these charges

1 A. **Actually in Reno, Nevada. I go to**
2 **school to UNR.**

3 Q. Was it reported?

4 A. Yes.

5 Q. Was anyone caught?

6 A. No.

7 Q. Did the authorities treat the matter
8 appropriately, in your judgement?

9 A. Yes.

10 Q. Is there anything about the event that
11 would affect your view of this case?

12 A. No.

13 Q. Will you follow all of the
14 instructions of the Court on the law even though
15 they may differ from your personal conceptions of
16 what the law ought to be?

17 A. Yes.

18 Q. A person accused of committing a crime
19 is presumed to be innocent in a criminal trial. Do
20 you understand and agree?

21 A. Yes.

22 Q. Speak up just a bit.

23 A. Yes.

24 Q. He has to hear this.

25 Are you aware that the Defendant does

1 create a situation where you cannot be fair and
2 impartial?

3 A. No.

4 Q. Tell us of your current employment,
5 the number of children you may have and how long
6 you've lived in Clark County.

7 A. **I've lived in Clark County all my**
8 **life, besides going to school in Reno, Nevada. I'm**
9 **not married.**

10 **I don't have any kids.**

11 Q. Are you working?

12 A. **Currently, since I'm home for the**
13 **summer from school I'm caring for my handicapped**
14 **little sister and part-time working at the Red Rock**
15 **at the spa.**

16 Q. So you are in school at this point.
17 You're going back in the fall?

18 A. Yes.

19 Q. Do you have any prejudice as to the
20 nature of the charges in this case?

21 A. No.

22 Q. Do you know any of the other
23 prospective jurors?

24 A. No.

25 Q. Do you have any racial prejudice?

1 A. No.

2 Q. You understand that an Information is
3 a mere accusation and not evidence, that the
4 Defendant is presumed innocent until proven guilty
5 beyond a reasonable doubt?

6 A. Yes.

7 Q. If you were charged with offenses
8 similar to the ones alleged in this case or if were
9 prosecuting this case would you want 12 individuals
10 such as yourself to be on your jury?

11 A. Yes.

12 Q. Do you know of any reason at all why
13 you can't be completely fair and impartial in
14 hearing this case?

15 A. No.

16 THE COURT: Questions from the State?
17 MR. TURNER: Briefly, judge.

20 VOIR DIRE EXAMINATION

21 BY MR. TURNER:

22 Q. What are you studying in college?

23 A. **Communications minor and major in**
24 **journalism.**

25 Q. No classes in criminal justice?

1 A. No.

2 **I've taken one of the standard biology**
3 **and science courses.**

4 Q. Certainly no specialized knowledge of
5 DNA or anything like that?

6 A. No.

7 **MR. TURNER: Pass for cause.**

8 THE COURT: Defense counsel?

9 MR. REED: No questions. Pass for
10 cause.

11 THE COURT: Very well.

12 The state may exercise its third
13 peremptory challenge.

14 MS. KOLLINS: The State will waive its
15 third.

16 THE COURT: Defense counsel's third.

17 MS. RADOSTA: Thank you.

18 Defense would thank and excuse juror
19 768, Mr. Hernandez.

20 THE COURT: Mr. Hernandez, thank you,
21 sir.

22 COURT CLERK: 0917, Claudette
23 Candelaro-Garcia.

24
25

VOIR DIRE EXAMINATION

2 BY THE COURT:

3 Q. Is it Miss or Mrs.?

4 A. **Mrs.**

5 Q. Mrs. Candelaro-Garcia, do you know of
6 any reason why you couldn't serve as a fair juror in
7 this case?

8 A. **No.**

9 Q. Have you served as a juror before?

10 A. **No.**

11 Q. Are you or any close friends or
12 relatives involved in law enforcement or have you
13 been in the past?

14 A. **My sister, she's majoring in criminal**
15 **justice. She's graduating this fall.**

16 Q. At UNLV?

17 A. **Yeah.**

18 Q. Do you discuss her studies with her?

19 A. **No.**

20 Q. Her chosen area of study, would that
21 have any effect on your view of this case?

22 A. **No.**

23 Q. Have you or close friends or family
24 members ever been the victim of crime?

25 A. **No.**

1 Q. Will you follow all of the
2 instructions of the Court on the law even though
3 they may differ from your personal conceptions of
4 what the law ought to be?

5 A. **Yes.**

6 Q. A person accused of committing a crime
7 is presumed to be innocent in a criminal trial.

8 Do you understand and agree with that?

9 A. **Yes.**

10 Q. Are you aware that the Defendant does
11 not have to take the stand and testify or offer any
12 evidence if he chooses not to and you can still find
13 him not guilty and that's because the burden is on
14 the state to prove the defendant's guilt beyond a
15 reasonable doubt?

16 A. **Yes.**

17 Q. Have you or close friends or family
18 member ever been involved in the criminal justice
19 process either in prosecuting a case or as a witness
20 or a defendant?

21 A. **No.**

22 Q. Have you or close friends or family
23 ever been the victim or accused of sexual assault?

24 A. **No.**

25 Q. Do you have any particular interest or

1 knowledge in DNA, the science or evidence?

2 A. No.

3 Q. Have you ever consulted with an expert
4 other than a medical doctor?

5 A. No.

6 Q. Do you have any specialized training
7 in medicine, science or biology?

8 A. No.

9 Q. Will nature of these charges create a
10 situation where you cannot be fair and impartial?

11 A. No.

12 Q. Tell us please of your current
13 employment, number of children you may have and how
14 long you've lived in Clark County.

15 A. **I lived here for 15 years. I work at
16 Kohls for about 10 months and I'm single, no kids.**

17 Q. You're single?

18 A. Yes.

19 Q. Are you currently working at Kohls?

20 A. Yes.

21 Q. What do you do?

22 A. Cashier.

23 Q. Any other employment as an adult?

24 A. No, none.

25 Q. When you came here 15 years ago you

1 were just a little girl?

2 A. **I have lived here 15 years. I was in
3 San Diego for four years and half and I'm originally
4 from Mexico. I came when I was a year and a half.**

5 Q. Do you have any prejudice as to the
6 charges in this case?

7 A. No.

8 Q. Do you know any of the other
9 prospective jurors?

10 A. No.

11 Q. Do you have any racial prejudice?

12 A. No.

13 Q. You understand that an Information is
14 a mere accusation and not evidence, that Defendant
15 is presumed to be innocent and that the burden is on
16 the state to prove the defendant's guilt beyond a
17 reasonable doubt?

18 A. Yes.

19 Q. If you were charged with offenses
20 similar to the ones alleged in this case or if you
21 were prosecuting this case would you want 12
22 individuals such as yourself to be on your jury?

23 A. Yes.

24 Q. Do you know of any reason at all why
25 you can't be completely fair and impartial in

1 hearing this case?

2 A. No.

3 THE COURT: Questions from the State?
4 MS. KOLLINS: Briefly.

5

6

7

8 VOIR DIRE EXAMINATION

9 BY MS. KOLLINS:

10 Q. What did do you before you worked at
11 Kohls?

12 A. **I studied at the art institute for
13 interior design.**

14 Q. Did you ever work in that capacity as
15 an interior designer?

16 A. **No, just graduated about two weeks
17 ago.**

18 Q. Where did you work?
19 Did you work anyplace else before

20 Kohls?

21 A. **No. I graduated from Desert Pines
22 high school and worked on an ice cream truck.**

23 MS. KOLLINS: Pass for cause.

24 THE COURT: Defense counsel?

25 MS. RADOSTA: Thank you.

1 VOIR DIRE EXAMINATION

2 BY MS. RADOSTA:

3 Q. Ms. Candelaro-Garcia, your sister, is
4 at UNLV?

5 A. Yes.

6 Q. What year is she in?

7 A. **She's graduating this fall.**

8 Q. Do you know what she plans to do with
9 her degree when she's done?

10 A. No.

11 Q. Don't know if she plans to go into law
12 enforcement or maybe on to another degree?

13 A. **I don't know.**

14 **She's currently going to Chile. She's
15 going to study long distance and she's getting
16 married.**

17 Q. She's finishing her studies long
18 distance?

19 A. Yes.

20 MS. RADOSTA: Thank you. Pass for
21 cause.

22 THE COURT: Very good. Prosecution's
23 fourth peremptory challenge.

24 MS. KOLLINS: State will waive, Your
25 Honor.

1 THE COURT: Defense counsel's fourth.
 2 MR. REED: Court's indulgence.
 3 MS. RADOSTA: Thank you.
 4 Defense would thank and excuse juror
 5 889, Ms. Houston.
 6 THE COURT: Thank you very much.
 7 MR. REED: 0841, Robert Gergory.

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 11 VOIR DIRE EXAMINATION

12 BY THE COURT:

13 Q. Mr. Gregory, do you know of any reason
 14 why you couldn't serve as a fair juror in this case?
 15 A. **No, sir.**
 16 Q. Have you served as a juror before?
 17 A. **No, sir.**
 18 Q. Are you or any close friends or
 19 relatives involved in law-enforcement or have you
 20 been in the past?
 21 A. **No, sir.**
 22 Q. Have you or close friends or family
 23 ever been the victim of crime?
 24 A. **Yes, sir.**
 25 Q. Tell me about that.

1 A. **My brother, his van was broken into**
 2 **when we were at Circus Circus about 10 years ago.**
 3 Q. His van was broken into?
 4 A. **Yes.**
 5 Q. Was it reported?
 6 A. **Yes.**
 7 Q. Anyone caught?
 8 A. **No.**
 9 Q. Do you think the authorities treated
 10 the matter appropriately?
 11 A. **Yes.**
 12 Q. Is there anything about the event that
 13 would affect your view of this case?
 14 A. **No.**
 15 Q. Will you follow all of the
 16 instructions of the court on the law even though
 17 they may differ from your personal conceptions of
 18 what the law ought to be?
 19 A. **Yes.**
 20 Q. A person accused of committing a crime
 21 is presumed to be innocent in a criminal trial.
 22 Do you understand and agree with that?
 23 A. **Yes.**
 24 Q. Are you aware that the Defendant does
 25 not have to take the stand or testify if he chooses

1 not to and you can still find him not guilty and
 2 that's because the burden is on the state to prove
 3 the defendant's guilt beyond a reasonable doubt?
 4 A. **Yes.**
 5 Q. Have you or close friends or family
 6 members ever been involved in the criminal justice
 7 process either in prosecuting a case or as a witness
 8 or a defendant?
 9 A. **Yes.**
 10 Q. Tell me about that.
 11 A. **I was a witness for Albertsons on**
 12 **several occasions in California. I was an assistant**
 13 **manager and we caught shoplifters.**
 14 **One of the incidences was assault and**
 15 **battery on another customer and I was called as a**
 16 **witnesses for that.**
 17 Q. Would these events, again, affect your
 18 view of this case in any way?
 19 A. **No, sir.**
 20 Q. Do you believe you can be a fair
 21 juror?
 22 A. **Yes.**
 23 Q. Have you or close friends or family
 24 members ever been a victim or accused of sexual
 25 assault?

1 A. **No, sir.**
 2 Q. Do you have any particular interest or
 3 knowledge as to DNA science or evidence?
 4 A. **No, sir.**
 5 Q. Have you ever consulted with an expert
 6 other than a medical doctor?
 7 A. **Other than my brother on my computer,**
 8 **no.**
 9 Q. Do you have any specialized training
 10 in medicine, science or biology?
 11 A. **No, sir.**
 12 Q. Will the nature of these charges
 13 create a situation where you cannot be fair or
 14 impartial?
 15 A. **No, sir.**
 16 Q. Tell us of your current employment,
 17 marital status, the number of children you may have
 18 and how long you've been in Clark County.
 19 A. **My current employment is with**
 20 **Albertsons, been with them since 1968. I've been**
 21 **manager for about 10 of those years.**
 22 **I'm married. I have one son, nine**
 23 **years old. Currently my two nieces and my**
 24 **sister-in-law have moved up with us.**
 25 **They have lived with us for about a**

1 : year.

2 **They are going through a divorce.**

3 Q. How long have you lived in Clark
4 County?

5 A. **Over seven years.**

6 Q. You've worked for Albertsons the
7 entire period?

8 A. **Is your wife employed outside the
9 home?**

10 A. **Yes.**

11 Q. What does she do?

12 A. **She works for E5. It's a group that
13 deals with Southwest Medical group and Pacific Care.**

14 Q. Does she have medical training?

15 A. **She has a degree in psychology. She
16 doesn't practice here.**

17 Q. Does her work require medical
18 training?

19 A. **No.**

20 Q. Were you ever in the military?

21 A. **No, sir.**

22 Q. You moved from where when you came
23 here?

24 A. **From Hisperia, California.**

25 Q. Lived there how long?

1 A. **I lived there for about three years.**

2 Q. Before that?

3 A. **Before that, Ridgecrest, California.**

4 Q. How long there?

5 A. **The second time we lived there for
6 about another four years. I was a military child so
7 I was moved around a lot with my father.**

8 Q. Where are you from originally?

9 A. **Born in the Phillipines. We left
10 there at age six and came to the United States.**

11 Q. Do you have any prejudice as to the
12 charges in this case?

13 A. **No, sir.**

14 Q. Do you know any of the other
15 prospective jurors?

16 A. **No, sir.**

17 Q. Do you have any racial prejudice?

18 A. **No, sir.**

19 Q. Do you understand an Information is a
20 mere accusation and not evidence, that the Defendant
21 is presumed innocent until proven guilty and that
22 the state has the burden of proving the defendant's
23 guilt beyond a reasonable doubt?

24 A. **Yes.**

25 Q. If you were charged with offenses

1 similar to the ones alleged in this case or if you

2 were prosecuting this case would you want 12

3 individuals such as yourself to be on your jury?

4 A. **Yes.**

5 Q. Do you know of any reason at all why
6 you can't be completely fair and impartial in
7 hearing this case?

8 A. **No, sir.**

9 THE COURT: Questions from the State?

10 MR. TURNER: Pass for cause.

11 THE COURT: Defense counsel?

12 MR. REED: Yes.

13 VOIR DIRE EXAMINATION

14 BY MR. REED:

15 Q. Mr. Gregory, I assume you must have
16 started with Albertsons at a very young age?

17 A. **Yes.**

18 Q. Did you work your way up from stock
19 boy all the way to manager?

20 A. **Yes, I started in 1986. I was working
21 originally for Burger King. I was the shift manager
22 there.**

23 **By the time I turned 18 the Albertsons**

1 **manager at that store frequented the establishment
2 several times with his children, thought I took good
3 care of his kids and the other customers and invited
4 me to come over to his team.**

5 THE COURT: Next question.

6 MR. REED: Yes.

7 BY MR. REED:

8 Q. As a manager do you get involved in
9 any of the criminal prosecution that goes on in the
10 Albertsons stores?

11 A. **Only if I'm called to it. If I catch
12 a shoplifter or if I am notified of a shoplifter or
13 any incidences on the property I'm responsible.**

14 **I have to contact the police
15 accordingly.**

16 **I ask for police reports and that way
17 I can give it to my loss prevention people and human
18 resources or my manager above me.**

19 Q. You had mentioned you were involved as
20 a witness in, -- two parts. First you said there
21 were some thefts that took place?

22 A. **Yes.**

23 **Most of them were shoplifting. Couple
24 of them were about assault and battery on other
25 customers, property damage to our property or to**

1 other customers property.

2 Q. Were you ever called upon in any of
3 these matters to be a witness, go to Court and
4 testify?

5 A. I was called to go up and we sat there
6 and then they dismissed us because they settled or
7 we actually had to go to the witness stand, yes.

8 Q. As a manager it's probably a different
9 situation, but back when you were working in the
10 floor area would you follow the cases, other than
11 being a witness, like find out what happened to
12 them?

13 A. No, sir.

14 Q. Were there ever any weapons involved
15 in any of the incidences in which you were a
16 witness?

17 A. Other than maybe someone using a tea
18 bottle to smash someone else in the head, that's
19 about it. Whatever happened to be there.

20 Q. What the judge is driving at and what
21 I'm getting to is it sounds like you've been
22 frequently involved in some potentially violent
23 crimes.

24 Is there anything about these
25 experiences that would cause you to possibly be

1 prejudiced in this case?

2 A. No, sir.

3 MR. REED: Thank you. Pass for cause.

4 THE COURT: Very good.

5 Prosecution's fifth peremptory
6 challenge.

7 MS. KOLLINS: State will waive, Your
8 Honor.

9 THE COURT: Thank you.

10 Defense counsel's fifth.

11 Counsel, do you have a peremptory
12 challenge?

13 MR. REED: We're discussing it --

14 THE COURT: I can see.

15 MR. REED: -- in tandem. We appreciate
16 that.

17 THE COURT: Let's move along.

18 MS. RADOSTA: Judge, the defense would
19 waive their fifth.

20 THE COURT: Very well. Prosecution's

21 sixth.

22 MR. TURNER: Yes.

23 The State would challenge and excuse
24 juror number 814, Mr. George Madden.

25 THE COURT: Mr. Madden, thank you very

1 much.

2 COURT CLERK: 827, Deborah Doris --
3 she's missing.

4 THE COURT: Did Ms. Doris arrive?

5 UNIDENTIFIED VOICE: No, sir.

6 THE COURT: Call another name.

7 COURT CLERK: 076, Terry Draper.

10 VOIR DIRE EXAMINATION

11 BY THE COURT:

12 Q. Is it Miss or Mrs. Draper?

13 A. Mrs.

14 Q. Mrs. Draper, do you know of any reason
15 why you could not serve is a fair juror in this
16 case?

17 A. No.

18 Q. Have you served as a juror before?

19 A. No.

20 Q. Are you or any close friends or
21 relatives involved in law-enforcement or have you
22 been in the past?

23 A. No.

24 Q. Have you or close friends or family
25 members ever been the victim of crime?

1 A. No.

2 Q. Will you follow all the instructions
3 of the Court on the law even though they may differ
4 from your personal conceptions of what the law
5 ought to be?

6 A. Yes.

7 Q. A person accused of committing a crime
8 is presumed to be innocent. Do you understand and
9 agree with that?

10 A. Yes.

11 Q. Are you aware that the Defendant does
12 not have to take the the stand and testify or offer
13 any evidence if he chooses not to and you can still
14 find him not guilty and that's because the burden is
15 on the state to prove the defendant's guilt beyond a
16 reasonable doubt?

17 A. Yes.

18 Q. Have you or close friends or family
19 members ever been involved in the criminal justice
20 system?

21 A. No.

22 Q. Have you or close friends or family
23 members ever been the victim or accused of sexual
24 assault?

25 A. No.

- 1 Q. Do you have any particular interest or
2 understanding in DNA science or evidence?
3 A. **No.**
4 Q. Have you ever consulted with an expert
5 other than a medical doctor?
6 A. **No.**
7 Q. Do you have any specialized training
8 in medicine, science or biology?
9 A. **No.**
10 Q. Will the nature of the charges in this
11 case create a situation where you cannot be fair and
12 impartial?
13 A. **No.**
14 Q. Tell us please of your current
15 employment, the number of children you may have and
16 how long you've lived in Clark County.
17 A. **I was raised here. I was three months**
18 **old when we came. I'm a bus driver for BellTrans.**
19 **I used to drive school bus for the**
20 **district for 15 years.**
21 Q. You are driving a private bus?
22 A. **Yes.**
23 Q. You said you were married?
24 A. **I am.**
25 Q. Do you have any children?

- 1 A. **No.**
2 Q. What's your husband's occupation?
3 A. **We own a water truck. He drives it.**
4 Q. On construction sites, wet things
5 down?
6 A. **Yes, road construction.**
7 Q. You indicated you had driven a school
8 bus for many years?
9 A. **Um-hum.**
10 Q. Any other employment on the part of
11 your husband during the time he's lived here?
12 A. **He's a mechanic.**
13 Q. Automobile?
14 A. **Um-hum, and motorcycles.**
15 Q. He doesn't have an um-hum key. You
16 have to say yes or no.
17 You've lived here all your life?
18 A. **Yes.**
19 Q. But your husband hasn't necessarily,
20 has he?
21 A. **Yeah. No, he was -- he got here in**
22 **'76.**
23 Q. To your knowledge, he's worked as an
24 automobile mechanic and you have this truck?
25 A. **Um-hum.**

- 1 Q. Is that right?
2 A. **Yes.**
3 Q. Do you have any prejudice as to the
4 charges in this case?
5 A. **No.**
6 Q. Do you know any of the other
7 prospective jurors?
8 A. **No.**
9 Q. Do you have any racial prejudice?
10 A. **No.**
11 Q. Do you understand an Information is a
12 mere accusation and not evidence, that the Defendant
13 is presumed innocent until proven guilty and it's
14 the state's burden to prove his guilt beyond a
15 reasonable doubt?
16 A. **Yes.**
17 Q. If you were charged with offenses
18 similar to the ones alleged in this case would you
19 want 12 individuals such as yourself to be on your
20 jury?
21 A. **Yes.**
22 Q. Do you know of any reason at all why
23 you can't be completely fair and impartial in
24 hearing this case?
25 A. **No.**

- 1 THE COURT: Questions from the State?
2 MS. KOLLINS: Pass for cause.
3 THE COURT: Defense counsel?
4 MS. RADOSTA: Couple questions.
5
6
7
8 VOIR DIRE EXAMINATION
9 BY MS. RADOSTA:
10 Q. In your capacity as a school bus
11 driver was it younger kids or high school kids?
12 A. **All of them.**
13 Q. Were there ever any incidents on the
14 school bus that you had to write up incident reports
15 or anything like that?
16 A. **Citations, yes.**
17 Q. So you had the authority to write
18 citations to the kids?
19 A. **Um-hum.**
20 Q. What type of violations?
21 A. **Throwing things, throwing stuff out**
22 **the window.**
23 Q. What's the result of the citations
24 that you issued?
25 A. **They get kicked off the bus.**

1 Q. Are there ever any hearings or
2 anything like that?

3 A. **There is, but I never --**

4 Q. You never had anybody challenge your
5 citation?

6 A. **No.**

7 MS. RADOSTA: Thank you.

8 BY MS. RADOSTA:

9 Q. After you would issue a citation did
10 you ever have to fill out any other additional
11 paperwork?

12 A. **No.**

13 Q. Just the citation?

14 A. **Just the citation.**

15 MS. RADOSTA: Nothing further. Pass
16 for cause.

17 THE COURT: Very good.

18 The defense's sixth, I believe.

19 MS. RADOSTA: We would thank and excuse
20 juror seven 53, Mr. Ferguson.

21 THE COURT: Thank you very much, sir.

22 COURT CLERK: 877, April Karlis.

23
24
25

1 VOIR DIRE EXAMINATION

2 BY THE COURT:

3 Q. Is it Miss or Mrs.?

4 A. **Mrs.**

5 Q. Mrs. Karlis, do you know of any reason
6 why you could not be a fair and impartial juror?

7 A. **No.**

8 Q. Have you served as juror before?

9 A. **No.**

10 Q. Are you or any close friends or
11 relatives involved in law enforcement or have you
12 been in the past?

13 A. **My late uncle used to administer to**
14 **polygraph tests for state, an uncle who is a retired**
15 **FBI agent and a cousin who is a current FBI agent**
16 **and one of my long time clients is a gaming control**
17 **agent.**

18 Q. Clients in what regard?

19 A. **I'm a nurse.**

20 Q. So perhaps two of these individuals
21 you see somewhat regularly; is that correct?

22 A. **Actually, yeah, actually three.**

23 Q. Do you think you would feel a
24 compunction to explain or justify your verdict to
25 them when you'd next see them?

1 A. **No.**

2 Q. Do you think that their occupation and
3 your relationship to them would affect in any way
4 your view of this case?

5 A. **No.**

6 Q. Do you think you can be fair and
7 objective?

8 A. **Yes.**

9 Q. Have you or close friends or family
10 ever been the victim of crime?

11 A. **Yes.**

12 **I myself was a victim of physical**
13 **assault when I was a child and my car was stolen**
14 **last year.**

15 Q. The assault, was that in Clark County?

16 A. **Yes.**

17 Q. Was it reported?

18 A. **Yes.**

19 Q. Anyone caught?

20 A. **No.**

21 Q. The car, again in Clark County?

22 A. **Yes.**

23 Q. Reported?

24 A. **Yes.**

25 Q. Anyone caught?

1 A. **No.**

2 Q. Do you think the authorities treated
3 these matters appropriately?

4 A. **Yeah.**

5 **The second one they were a bit**
6 **overwhelmed. They weren't able to come out and take**
7 **the report.**

8 **I had to go in and give it for the**
9 **car.**

10 Q. On the assault, how old were would you
11 say you were?

12 A. **About 10 or 11.**

13 Q. Were you injured?

14 A. **Yes.**

15 Q. Did you know the assailant?

16 A. **No.**

17 Q. Was there anything sexual in the
18 assault?

19 A. **No. It was physical.**

20 Q. Just a random stranger situation?

21 A. **I was with a bunch of friends at the**
22 **North Las Vegas City Hall. We lived there when we**
23 **were younger an two older boys were trying to steal**
24 **our friends bike and they were unable to get him to**
25 **leave it so they thought if they assaulted me he**

1 **might Friday to help and they could take it, but it**
2 **didn't work that way.**

3 Q. Will you follow all of the

4 instructions of the Court on the law even though
5 they may differ from your personal conceptions of
6 what the law ought to be?

7 A. Yes.

8 Q. A person accused of committing a crime
9 is presumed to be innocent. Do you understand and
10 agree with that?

11 A. Yes.

12 Q. Are you aware that the Defendant does
13 not have to take the stand and testify or offer any
14 evidence if he chooses not to and you can still find
15 him not guilty?

16 That's because the burden is on the
17 state to prove his guilt beyond a reasonable doubt.

18 A. Yes.

19 Q. Have you or close friends or family
20 ever been the victim of crime involved in the
21 criminal justice process either in prosecuting a
22 case or as a witness or a defendant?

23 A. Not that I'm aware of.

24 Q. Have you or close friends or family
25 ever been accused of sexual assault?

1 A. No.

2 Q. Do you have any particular interest or
3 knowledge in DNA, the science or evidence?

4 A. No.

5 Q. Have you ever consulted an expert
6 other than a medical doctor?

7 A. No.

8 Q. Do you have any specialized training
9 in medicine, science or biology?

10 A. No.

11 Q. Will the nature of the charges in this
12 case create a situation where you cannot be fair and
13 impartial?

14 A. No.

15 Q. Tell us please of your current
16 employment, the number of children you may have and
17 how long you've lived in Clark County.

18 A. I was born in Clark County. I have
19 one child and I'm a hairdresser.

20 Q. How old is your child?

21 A. Fifteen.

22 Q. You're currently married?

23 A. Yes.

24 Q. What is your husband's occupation?

25 A. He's a professional sports

1 handicapper.

2 Q. What other kinds of work has he had
3 over the years?

4 A. He was a real estate agent for a
5 while. He's done the sports handicapping thing but
6 for a while he was a real estate agent and
7 bartender.

8 Q. What other work if any have you had
9 over the years?

10 A. I've been a hair dresser mostly,
11 before that some waitressing, cocktails.

12 Q. Do you have any prejudice as to the
13 charges in this case?

14 A. No.

15 Q. Do you know any of the other
16 prospective jurors?

17 A. No.

18 Q. Do you have any racial prejudice?.

19 A. No.

20 Q. You understand that an Information is
21 a mere accusation and not evidence, that the
22 Defendant is presumed until proven guilty and that
23 the burden is on the state to prove the defendant's
24 guilt beyond a reasonable doubt?

25 A. Yes.

1 Q. If you were charged with offenses
2 similar to the ones alleg in this case would you
3 want 12 individuals such as yourself to be on your
4 jury?

5 A. Yes.

6 Q. Do you know of any reason at all why
7 you can't be completely fair and impartial in
8 hearing this case?

9 A. No.

10 THE COURT: Questions from the State?
11 MR. TURNER: Yes, judge.

12

13

14

15

VOIR DIRE EXAMINATION

16 BY MR. TURNER:

17 Q. You indicated you had an uncle who
18 performed polygraph tests for the State?

19 A. Yes.

20 Q. Was that for state employees or was
21 that part of some kind of criminal investigation?

22 A. He worked for the State of Nevada. I
23 don't know exactly which part.

24 Q. You certainly didn't discuss what he
25 did with him in terms of the polygraphs?

1 A. Not really, no.
 2 After that he worked for drug advocacy
 3 and liaison for the court.
 4 Q. That's your late uncle, as well?
 5 A. Yeah, Ray Slaughter.
 6 I don't know if you know him or
 7 anything about his career.
 8 Q. He's your late uncle?
 9 A. He passed away three weeks ago.
 10 MR. TURNER: Pass for cause.

VOIR DIRE EXAMINATION

BY MR. REED:

14 Q. You pronounce your last name Kralis?
 15 A. Um-hum.
 16 Q. Yes?
 17 A. Yes.
 18 Q. You said that you have had contact
 19 over the years with about three different people,
 20 relatives.
 21 Would you ever talk in detail about
 22 their investigations?
 23 A. Um, my gaming control client tells me

1 some stuff. My cousin told me a few of his, but
 2 he's with child Internet predators.
 3 That's what he does.
 4 Q. The area -- why we ask this line of
 5 questioning is we're concerned that maybe you
 6 think -- do you subscribe to the idea sometimes the
 7 police the arrest the wrong person?
 8 A. Um --
 9 Q. They may not always get it right?
 10 A. Not because of that.
 11 Q. But do you believe that's true?
 12 A. I guess from watching television, yes,
 13 but not personally, not with my personal first-hand
 14 knowledge, no.
 15 Q. The concern that we have is that based
 16 on information like you obtained from law
 17 enforcement you must think they always get it right.
 18 You don't think that's true, right?
 19 A. Do I think law enforcement always gets
 20 it right?
 21 Q. Yes.
 22 A. I'd say majority of the time.
 23 Q. That's reasonable, but not all the
 24 time?
 25 A. No, I don't think anybody does

1 anything all the time correctly.
 2 MR. REED: Pass for cause.
 3 THE COURT: Very good.
 4 State's seventh peremptory challenge.
 5 1234 state waives, Your Honor.
 6 THE COURT: Defense counsel's seventh.
 7 MS. RADOSTA: The defense would waive.
 8 THE COURT: Seventh is waived.
 9 State's eighth and last.
 10 MS. KOLLINS: State will waive its
 11 last, Your Honor.
 12 THE COURT: Defense counsel's eighth
 13 and last.
 14 MS. RADOSTA: Defense would waive.
 15 THE COURT: Ms. Clerk, swear our jury.
 16 [Whereupon, the court clerk swore in
 17 the jury panel.]
 18 COURT CLERK: Please be seated.
 19 THE COURT: Call a single name to serve
 20 as an alternate.
 21 MS. KOLLINS: Court's indulgence. May
 22 we approach?
 23 THE COURT: No, you may not.
 24 COURT CLERK: 799 Tom Duran.
 25 THE COURT: Come forward, please.

VOIR DIRE EXAMINATION

2 BY THE COURT:
 3 Q. Mr. Duran, do you know know of reason
 4 why you could not serve as a fair and impartial
 5 juror?
 6 A. Not -- as I stated yesterday other
 7 than being a financial burden, no.
 8 Q. Have you served as juror before?
 9 A. Yes.
 10 Q. How long ago would you say?
 11 A. Approximately 10 years ago.
 12 Q. Here in Clark County?
 13 A. Yes.
 14 Q. Do you recall if it was a civil or
 15 criminal case?
 16 A. Civil.
 17 Q. Did you reach a verdict?
 18 A. Yes, we did.
 19 Q. Were you the foreman of the jury?
 20 A. No, I wasn't.
 21 Q. Do you think your prior jury service
 22 would in any way inhibit your ability to be fair and
 23 impartial on this jury?
 24 A. No.
 25 Q. Are you or any close friends or

1 relatives involved in law enforcement or have you
2 been in the past?

3 **A. I was, in the past. I was a police**
4 **officer for the Albuquerque police department.**

5 **Q. What police department?**

6 **A. Albuquerque police department.**

7 **Q. How long did you serve?**

8 **A. Three months.**

9 **Q. Didn't care for it or what was the**
10 **situation?**

11 **A. That was not my line of work.**

12 **Q. Do you think that experience would in**
13 **any way affect your ability to serve as a juror**
14 **here?**

15 **A. No.**

16 **Q. Do you think you can be a fair juror?**

17 **A. Yes.**

18 **Q. Have you or close friends or family**
19 **members ever been the victim of crime?**

20 **A. No.**

21 **Q. Will you follow all of the**
22 **instructions of the Court on the law even though**
23 **they may differ from your personal conceptions of**
24 **what the law ought to be?**

25 **A. Yes.**

1 **Q. A person accused of committing a crime**
2 **is presumed to be innocent.**

3 **Do you understand and agree with that?**

4 **A. I do.**

5 **Q. Are you aware that the Defendant does**
6 **not have to take the stand and testify if he chooses**
7 **not to and you can still find him not guilty?**

8 **That's because the burden is on the**
9 **state to prove his guilt beyond a reasonable doubt.**

10 **A. I do.**

11 **Q. Have you or close friends or family**
12 **members ever been involved in the criminal justice**
13 **process?**

14 **A. No.**

15 **Q. Have you you or close friends or**
16 **family ever been the victim or accused of sexual**
17 **assault?**

18 **A. No.**

19 **Q. Do you have any particular interest or**
20 **understanding of the DNA the science or evidence?**

21 **A. No.**

22 **Q. Have you ever consulted with an expert**
23 **other than a medical doctor?**

24 **A. No.**

25 **Q. Do you have any specialized training**

1 in medicine, science or biology?

2 **A. CPR.**

3 **Q. Nothing beyond that?**

4 **A. That's it.**

5 **Q. Will the nature of the charges in this**
6 **situation create a situation where you cannot be**
7 **fair or impartial?**

8 **A. No.**

9 **Q. Tell us of your current employment,**
10 **your marital status, the number of children you may**
11 **have and how long you've lived in Clark County.**

12 **A. I am married. I've lived in Clark**
13 **County 20 years.**

14 **I have two children and one stepchild.**

15 **Q. Their ages, roughly?**

16 **A. Let's see, 36, 32 and 33, I believe.**

17 **Q. Are any of those children or their**
18 **spouses involved in law enforcement?**

19 **A. No.**

20 **Q. You indicated you worked as a security**
21 **guard, I believe?**

22 **A. Yes.**

23 **Q. Also a second job?**

24 **A. Yes.**

25 **Q. What's the second job?**

1 **A. I am a construction worker.**

2 **Q. Do you work for a particular firm or**
3 **are you on your own?**

4 **A. No. I work for a general contractor.**

5 **Q. Who is that?**

6 **A. His name is Steven Jones.**

7 **Q. You work the evenings as a security**
8 **guard?**

9 **A. Yes. I work swing shift, from three**
10 **to 12.**

11 **Q. How long have you been involved with**
12 **this kind of work?**

13 **A. In security?**

14 **Q. Yes.**

15 **A. Approximately since February.**

16 **Q. Just several months, then?**

17 **A. Yes.**

18 **Q. Any particular training?**

19 **A. No.**

20 **Q. What do you do in construction?**

21 **A. I'm a drywall finisher, painter.**

22 **Q. Any other kinds of work as an adult?**

23 **A. No.**

24 **Q. Were you ever in the the military?**

25 **A. No.**

1 Q. You moved here some 20 years ago?
 2 A. **Yes.**
 3 Q. Has your wife been employed outside
 4 the home in the last 20 years?
 5 A. **Yes.**
 6 Q. What capacity?
 7 A. **She was an AP supervisor for one of**
 8 **the casinos here in town.**
 9 Q. Which casino would that be?
 10 A. **The Bellagio.**
 11 Q. Any other work on her part?
 12 A. **She did some clerical work outside**
 13 **Nevada in Washington.**
 14 Q. She worked kind of a long distance
 15 thing with some company?
 16 A. **I believe it was a law firm.**
 17 **THE COURT: Are you the wife?**
 18 **MRS. DURAN: Yes.**
 19 **THE COURT: Did you work for a law**
 20 **firm?**
 21 **MRS. DURAN: No, an accounting firm**
 22 **and I was in the service.**
 23 **THE COURT: This is a first. You're**
 24 **welcome, certainly.**
 25 **Where did you move from when you came**

1 here 20 years ago?
 2 A. **Albuquerque, New Mexico.**
 3 Q. You said you worked as a police
 4 officer for three months. How long did you live in
 5 Albuquerque?
 6 A. **All my life basically /KHREU.**
 7 Q. Any other work in Albuquerque?
 8 A. **Construction.**
 9 Q. That's been pretty much the entire --
 10 A. **The same field.**
 11 Q. Do you have any prejudice as to the
 12 charges in this case?
 13 A. **Pardon me?**
 14 Q. Do you have any prejudice as to the
 15 charges?
 16 A. **No.**
 17 Q. Do you know any of the other now
 18 jurors or prospective jurors?
 19 A. **Other than Mr. Randall, watching him**
 20 **on tv for being the weather man.**
 21 Q. You don't know him personally?
 22 A. **No.**
 23 Q. Have you any racial prejudice?
 24 A. **No.**
 25 Q. Do you understand that an Information

1 is a mere accusation and not evidence, that the
 2 Defendant is presumed innocent until proven guilty
 3 and it's the state's burden to prove his guilt
 4 beyond a reasonable doubt?
 5 A. **I do.**
 6 Q. If you were charged with offenses
 7 similar to the ones alleged in this case or would
 8 you want 12 individuals such as yourself to be on
 9 your jury?
 10 A. **Yes.**
 11 Q. Do you know of any reason at all why
 12 you can't be completely fair and impartial in
 13 hearing this case?
 14 A. **No.**
 15 **THE COURT: Questions from the State?**
 16 **MS. KOLLINS: State would pass for**
 17 **cause.**
 18 **THE COURT: Defense counsel?**
 19 **MR. REED: Court's indulgence.**
 20 **Pass for cause.**
 21 **THE COURT: Very good. Does the State**
 22 **wish to exercise a peremptory challenge?**
 23 **MS. KOLLINS: State would. State would**
 24 **thank and excuse Mr. Duran.**
 25 **THE COURT: Thank you very much. You**

1 can go.
 2 **COUR CLERK: 0766, John George.**
 3
 4
 5
 6 **VOIR DIRE EXAMINATION**
 7 **BY THE COURT:**
 8 Q. Mr. George, do you know of any reason
 9 why you could not serve as a fair and impartial
 10 juror?
 11 A. **I do have a concern.**
 12 Q. What's that?
 13 A. **A woman I dated for about three years**
 14 **was the victim of very, very similar crimes to**
 15 **what's in front of the Court.**
 16 **You know, I saw the long term**
 17 **consequences as a result of that crime. It was**
 18 **pretty devastating and still is.**
 19 Q. Let me ask you this: By virtue of
 20 what you've explained do you think you could not be
 21 a fair juror?
 22 A. **I don't know.**
 23 **I feel I'm fair and impartial, but the**
 24 **crimes are so similar. There was no sexual assault**
 25 **involved.**

1 Q. Do you still see this lady?
2 A. **I do talk to her from time to time. I**
3 **do not see her.**

4 Q. You do have contact with her?
5 A. **Yes. She lives in another state.**
6 Q. Of course you're the one that really
7 has to evaluate whether you can be fair or not.
8 None of the rest of us can tell you whether you can.

9 As I pointed out yesterday to someone,
10 you would not be involved in sentencing anyone,
11 regardless of what the outcome would be here.

12 Your determination would be to decide
13 the guilt or innocence of the Defendant.

14 Do you think you cannot do that fairly
15 and objectively or do you think you can?

16 A. **I do have some concerns that I can be**
17 **fair and impartial, only because the crimes are so**
18 **similar.**

19 As I said, I've lived with the results
20 of those crimes and the psychological devastation as
21 a result.

22 Q. I'll simply conclude by saying this
23 and ask you the to think about this.

24 Regardless of your experience which
25 evidently was rather horrendous -- and I'll give you

1 that. I won't quarrel with that evaluation on your
2 part, but notwithstanding your experience your
3 function as a juror would be to determine if the
4 State has proffered sufficient evidence to show
5 guilt and if not, the Defendant would be not guilty.

6 You wouldn't want to make an error in
7 that process because of the experience you've had
8 previously, would you?

9 A. **I would not.**

10 Q. Do you think your experience
11 previously would have any bearing on this particular
12 case?

13 A. **Yes.**

14 Q. So in your mind you could have this
15 lingering flashback or whatever you want to call it
16 that that would affect you?

17 A. **Yes, understanding that I was not the**
18 **victim of the crime.**

19 Q. On balance do you think you might not
20 be fair?

21 A. **Yes.**

22 THE COURT: Additional questions from
23 either side?

24 MR. REED: No. We challenge.

25 MS. KOLLINS: No.

1 THE COURT: I'll excuse you, thank you.
2 MS. CLERK: 0893, Jonathan Henderson.

3
4
5
6 VOIR DIRE EXAMINATION

7 BY THE COURT:

8 Q. Mr. Henderson, do you know of any
9 reason why you could not be fair or serve as a fair
10 juror in this case?

11 A. **No.**

12 Q. Have you served as a juror before?

13 A. **No.**

14 Q. Are you or any close friends or
15 relatives involved in law enforcement or have you
16 been in the past?

17 A. **No. My brother tried but he didn't**
18 **pass.**

19 Q. He tried to do what?

20 A. **He wanted to be a police officer. He**
21 **didn't get hired.**

22 Q. Did he apply to the school?

23 A. **In California.**

24 He went to some basic interviewing and
25 training and so forth but for some reason he didn't

1 get hired on.

2 Q. Have you or close friends or family
3 member ever been the victim of crime?

4 A. **Yeah.**

5 Q. Tell me, please.

6 A. **I've been shot at. My cousin has been**
7 **shot at. My niece was held at gunpoint, my brother**
8 **was stabbed by a hitchhiker.**

9 Typical California upbringing.

10 Q. Where in California was this?

11 A. **Southern California, Rancho Cucamonga.**
12 **Inland empire area.**

13 Q. Were these instances reported to the
14 authorities?

15 A. **My brother's, yeah. His was reported.**

16 The other two, I guess they were
17 reported because they were involved at their place
18 of work.

19 Mine, I didn't report mine. Didn't
20 really get the information to report it. It was a
21 drive-by shooting.

22 Shot my car up and left.

23 Q. Was anyone ever caught?

24 A. **No. I didn't call the police on that**
25 **one.**

- 1 Q. I'm talking about any of these
2 cousins, anyone caught?
- 3 A. **No. I don't recall. I don't think --**
4 **the bank robber -- I don't think any of them were**
5 **caught.**
- 6 Q. Did the authorities treat the matters
7 appropriately, in your judgement?
- 8 A. **Not.**
- 9 Q. You don't have an opinion as to
10 whether they treated it properly?
- 11 A. **No.**
- 12 Q. Is there anything about these events
13 that would affect your view of this case?
- 14 A. **No.**
- 15 Q. Do you think you can be a fair juror?
- 16 A. **Yes.**
- 17 Q. Will you follow all of the
18 instructions of the Court on the law even though
19 they may differ from your personal conceptions of
20 what the law ought to be?
- 21 A. **Yes.**
- 22 Q. A person accused of committing a crime
23 ups presumed to be innocent.
- 24 Do you understand and agree?
- 25 A. **Yes.**

- 1 Q. Are you aware that the Defendant does
2 not have to take the stand and testify or offer any
3 evidence if he chooses not to and you can still find
4 him not guilty?
- 5 That's because the burden is on the
6 state to prove the defendant's guilt beyond a
7 reasonable doubt.
- 8 A. **Yes.**
- 9 Q. Have you or close friends or family
10 members ever been involved in the criminal justice
11 process either in prosecuting a case or as a witness
12 or a defendant?
- 13 A. **No.**
- 14 Q. Have you or close friends or family
15 ever been accused of sexual assault?
- 16 A. **Yeah.**
- 17 Q. Tell me about that.
- 18 A. **I had an uncle that was -- had some --**
19 **can't think of the term, but it was like a sexual**
20 **assault of some kind, but more like sexual assault**
21 **towards a minor.**
- 22 Q. Was he accused of such?
- 23 A. **Yeah.**
- 24 **He went to jail and recently he was**
25 **released from jail for time served during a process**

- 1 **of his hearing and he's on five years probation.**
- 2 Q. Is this in California?
- 3 A. **Yeah.**
- 4 Q. How much time did he serve in custody,
5 roughly?
- 6 A. **Little over a year.**
- 7 Q. Was he convicted of something?
- 8 A. **Yeah.**
- 9 **He was convicted of it and he pled**
10 **guilty and he went and served his term immediately**
11 **and due to good behavior and time served he was**
12 **released and now he's serving his probation in a**
13 **home.**
- 14 Q. Do you know the specifics as to what
15 he was accused of?
- 16 A. **No, I don't know. I know it was some**
17 **sort of sexual misconduct towards a minor.**
- 18 Q. This is your uncle?
- 19 A. **Yes.**
- 20 Q. Do you have a sense as to whether or
21 not he was treated fairly?
- 22 A. **Yeah, probably was treated fairly. He**
23 **pled guilty. He served time.**
- 24 **He could have got a lot worse penalty.**
- 25 Q. Anything about the situation that

- 1 would affect your view of this case?
- 2 A. **No.**
- 3 Q. Do you have any particular interest or
4 knowledge in DNA, the science or evidence?
- 5 A. **No.**
- 6 Q. Have you ever consulted with an expert
7 other than a medical doctor?
- 8 A. **No.**
- 9 Q. Do you have any specialized training
10 in medicine, science or biology?
- 11 A. **No.**
- 12 Q. Will the nature of the charges in this
13 case create a situation where you cannot be fair and
14 impartial?
- 15 A. **No.**
- 16 Q. Tell us please of your current
17 employment, your marital status, the number of
18 children you may have and how long you've lived in
19 Clark County.
- 20 A. **I'm currently employed with Humana**
21 **which is a health and life insurance company. I am**
22 **married, three kids, been married around nine years.**
- 23 Q. How old are your children, roughly?
- 24 A. **Six, four and two.**
- 25 Q. How long have you lived in Clark

1 : County?
 2 A. **Four years, roughly.**
 3 Q. Worked for Humana the entire time?
 4 A. **No, I was an independent agent.**
 5 **Self-employed for most of the time.**
 6 Q. Selling insurance?
 7 A. **Yes.**
 8 Q. Is your wife employed outside the
 9 home?
 10 A. **No.**
 11 Q. Has she been at all in Las Vegas?
 12 A. **No.**
 13 Q. Where did you move from?
 14 A. **From Salt Lake City, Utah area.**
 15 Q. Were you working there?
 16 A. **Yes.**
 17 Q. What were you doing?
 18 A. **I was a business account executive for**
 19 **Verizon wireless.**
 20 Q. How long did you work for that
 21 company?
 22 A. **Five years.**
 23 Q. Was your wife employed at that time?
 24 A. **Yeah, through part of it she was a rep**
 25 **for American Express financial supervisors. She did**

1 **trades and so forth in terms of stocks.**
 2 Q. Where did you live prior to Salt Lake?
 3 A. **Southern California. Actually Idaho**
 4 **and Texas and Southern California.**
 5 Q. Prior to Salt Lake City was that
 6 Idaho?
 7 A. **Just prior, yeah.**
 8 Q. What city?
 9 A. **Rexburg.**
 10 Q. Were you working there?
 11 A. **No, student.**
 12 Q. Were you with your wife during that
 13 time?
 14 A. **We were dating, but no, I was single**
 15 **at the time.**
 16 Q. Before that you lived in Texas?
 17 A. **Yeah. Lived in Texas.**
 18 Q. What city?
 19 A. **Little town called Euclise, Texas in**
 20 **between Dallas and Fort Worth.**
 21 Q. You say you were working there?
 22 A. **Yeah. I was doing a sales job.**
 23 Q. Sales?
 24 A. **Yes.**
 25 Q. Prior to that Southern California?

1 A. **Yes.**
 2 Q. That's where you grew up?
 3 A. **Prior to that I went -- lived in the**
 4 **West Virginia, Virginia area for a while and prior**
 5 **to that grew up in Southern California.**
 6 Q. In the military?
 7 A. **No.**
 8 Q. Do you have any prejudice as to the
 9 charges in this case?
 10 A. **No.**
 11 Q. Do you know any of other now jurors,
 12 other prospective jurors?
 13 A. **No.**
 14 Q. Do you have any racial prejudice?
 15 A. **No.**
 16 Q. Do you understand an Information is a
 17 mere accusation and not evidence, that the Defendant
 18 is presumed innocent until proven guilty and that
 19 is's the state's burden to prove the defendant's
 20 guilt beyond a reasonable doubt?
 21 A. **Yes.**
 22 Q. If you were charged with offenses
 23 similar to the ones alleged in this case or if you
 24 were prosecuting this case would you want 12
 25 individuals such as yourself to be on your jury?

1 A. **Yes.**
 2 Q. Do you know of any reason at all why
 3 you can't be completely fair and impartial in
 4 hearing this case?
 5 A. **No.**
 6 THE COURT: Questions from the State?
 7 MS. KOLLINS: Pass for cause.
 8 THE COURT: Defense counsel?
 9 MR. REED: Court's indulgence.
 10 Yes, few questions.
 11
 12
 13
 14 VOIR DIRE EXAMINATION
 15 BY MR. REED:
 16 Q. Mr. Henderson, no relation to the city
 17 of Henderson?
 18 A. **No.**
 19 Q. You have been associated with four
 20 straight violent crimes, all of which are unsolved.
 21 Is that basically a correct statement?
 22 A. **Yeah, pretty much.**
 23 Q. Obviously these are allegations of
 24 serious crimes of violence.
 25 Are you in a position where you feel

1 : you might have to do some individual justice so
 2 maybe if they caught a bad guy this time, so I'll go
 3 out of my way to convict this individual, just
 4 because of what may have happened or what you may
 5 have seen in the past and these people are at large?
 6 **A. No. I mean, you don't know either way**
 7 **what the facts are unless you see them for yourself.**

8 **Q.** You don't feel that any of those
 9 crimes would affect you at all in any way in your
 10 deliberation process?

11 **A. No, not in the deliberation process,**
 12 **no.**

13 MR. REED: Pass for cause.

14 THE COURT: Defense wish information
 15 exercise a peremptory challenge?

16 MR. REED: Waive our last.

17 THE COURT: Ms. Clerk, swear in our
 18 alternate.

19 [Whereupon clerk of the court swore in
 20 the alternate juror.]

21 THE COURT: Ladies and Gentlemen, you
 22 have, who have not been called, let me thank you
 23 very sincerely for your willingness to be here and
 24 go through the process.

25 If you were not willing to be here we

1 wouldn't have jury trials. We don't know how many
 2 people we need.

3 You come and wait and you're escorted
 4 up one staircase and down the elevator. It's not a
 5 pleasant experience. We do appreciate your being
 6 here.

7 You are at liberty to go down and
 8 check out at this time.

9 We'll take a brief break.

10 [Whereupon, the Court admonished the
 11 jury.]

12 [Recess taken.]

13 THE COURT: The continuation of
 14 C212968, State versus Joseph Alexander Henderson.
 15 Record reflects the presence of the Defendant and
 16 his counsel, Mr. Reed and Ms. Radosta. Ms. Kollins
 17 and Mr. Turner present for the state.

18 Do counsel stipulate all members of
 19 the jury are present and properly seated?

20 MS. KOLLINS: The State will.

21 MS. RADOSTA: Yes, the defense will.

22 THE COURT: Ms. Clerk, read aloud the
 23 charging document.

24 Does counsel waive the reading of the
 25 list of witnesses that may be attached thereto?

1 MS. RADOSTA: Yes.

2 MS. KOLLINS: Yes, judge.

3 [Whereupon, the clerk of the court
 4 read the Amended Information.]

5 MS. CLERK: To which the Defendant has
 6 entered pleas of not guilty.

7 THE COURT: Thank you, Ms. Clerk.

8 Ladies and Gentlemen, what I will now
 9 read is intended to serve as an introduction to the
 10 trial of this case.

11 It is not a substitute for the
 12 detailed instructions on the law which I will give
 13 to you at the close of the case and before you
 14 retire to consider your verdict.

15 This is a criminal matter commenced by
 16 the State of Nevada which I may sometimes refer to
 17 as the State against Joseph Alexander Henderson.
 18 This is based upon the information which has been
 19 read to you by my clerk.

20 You should distinctly understand that
 21 the Information is simply a charge and it is not in
 22 any sense evidence of the allegations it contains.

23 The defendant has pled not guilty to
 24 the information. The State therefore has the burden
 25 of proving each of the essential elements of the

1 information, beyond a reasonable doubt.

2 The purpose of this trial is to
 3 determine whether the State will meet that burden.

4 It is your primary responsibility as
 5 jurors to find and determine the facts. Under our
 6 system of criminal procedure you're the sole judge
 7 of the facts.

8 You are to determine the facts from
 9 the testimony you hear and other evidence including
 10 exhibits introduced in Court.

11 It is up to you to determine the
 12 inferences which you feel may be properly drawn from
 13 the evidence.

14 The parties may sometimes present
 15 objections to some of the money or other evidence.
 16 At times, I may sustain such objections or direct
 17 that you disregard certain testimony or exhibits.

18 You must not consider any evidence
 19 which, to which an objection has been sustained or
 20 which I've instructed you to disregard.

21 If you cannot hear a witness please
 22 raise your hand as an indication.

23 You are informed that you may if you
 24 wish take notes during the trial. You are
 25 admonished that no juror may declare to a fellow

1 juror any fact relating to this case which is within
2 his or her own knowledge.

3 If any juror discovers during the
4 trial or after the jury has retired to consider
5 their verdict that he or she or any other juror has
6 personal knowledge of any fact in controversy in
7 this case he shall disclose such situation to me in
8 the absence of the other jurors.

9 This means if you learn during the
10 course of the trial that you were acquainted with
11 the facts of the case or one of the witnesses and
12 you've not previously told me of this relationship
13 you must then disclose that facts to me.

14 You communicate to the Court through
15 the bailiff.

16 You will be given the opportunity to
17 ask written questions of any of the witnesses who
18 are called to testify in this case.

19 You are not encouraged to ask large
20 numbers of questions because that is the primary
21 responsibility of counsel.

22 Questions may be asked only in the
23 following manner: After both lawyers have finished
24 questioning the witness and only at this time, if
25 there are additional questions you would like to ask

1 the witness you should write your questions down
2 with your juror badge number and signature below it
3 on a sheet of plain paper and raise your hand.

4 The bailiff will pick up your question
5 and give it to the court.

6 All questions must be directed to the
7 witness and not to the lawyers or to myself. After
8 consulting with counsel I will determine if your
9 question would result in an unfair trial or would be
10 legally improper.

11 If I determine that your your question
12 may properly be asked I will ask it. No emphasis
13 should be placed on the answer to the question
14 simply because the question came from a juror.

15 You are admonished that you may not
16 visit the scene of any of the acts or occurrences
17 made mention of concerning the trial unless
18 specifically directed to do so.

19 Does counsel wish to invoke the
20 exclusionary rule?

21 MS. RADOSTA: Yes.

22 MS. KOLLINS: Yes, Your Honor.

23 THE COURT: Proceed on that basis.

24 Opening remarks, please.

25 MS. KOLLINS: Thank you, judge.

1 Good afternoon, ladies and gentlemen.

2 First and foremost, on behalf of the Clark County
3 District Attorney's Office, more particularly the
4 Special Victim's Unit, I'd like to take this
5 opportunity to thank you in advance for setting your
6 time aside for us over next couple days.

7 We know that you have other
8 obligations and so for that we thank you in advance.

9 This case starts in the early morning
10 hours of September 3, 2004, in a northwest gated
11 community at the home of Eric Bernzweig and Julie
12 Kim. They are engaged.

13 It's a single family residence at 7833
14 Lonesome Harbor Drive.

15 At about 9:00 o'clock that evening the
16 couple arrives home from dinner. They have just
17 gotten home from vacation. They are tired. They go
18 to bed. Eric is restless.

19 At 12:30 past midnite the doorbell
20 rings. Eric is already awake. As I said he was
21 restless.

22 Eric goes to the door and there is a
23 gentleman at the front door.

24 He will describe him as olive skinned,
25 perhaps Hispanic, perhaps middle Eastern. This

1 gentleman comes to the door and he says "My kid
2 through my keys over your back wall. Can you go
3 look for them?"

4 Eric says sure, closes the door behind
5 him, locks it, leaves the gentleman on the front
6 porch. Eric goes out into his back yard, looks
7 around for a couple minutes.

8 He goes back to the front door, tells
9 the man he can't find the keys.

10 The gentleman says maybe we need a
11 flashlight. Let me go to my car and see if I can
12 find a be flashlight, says the gentleman.

13 Eric says let me see if I can go to
14 the garage and find a flashlight.

15 They eventually -- let me back up --
16 go back into the back yard together. He let's the
17 olive skinned man go back in the back yard with him.
18 They come back out into the residence, after not
19 finding the keys.

20 Julie is downstairs by now. When he
21 comes back inside there are two black male adults
22 inside the front door, with firearms, with masks.

23 They know Eric by name, saying "Eric,
24 be cool."

25 Eric and Julie will tell you they have

1 never seen these people before, nor do they know
2 them.

3 Eric is taken upstairs. They used his
4 robe he's wearing to constrain his arms behind his
5 back and they take him up to the second floor of
6 that two story residence.

7 They are asking for the money. Where
8 is the safe, where is the safe?

9 Eric is repeatedly telling them I
10 don't have a safe. The olive-skinned man is
11 downstairs taking the phone from the hands of Julie
12 Kim who is in her nightgown and a robe. They were
13 in bed.

14 Julie is taken to the living room by
15 the olive-skinned man, put on a couch, tied up with
16 a zip tie, those little elastic ties. Her arms are
17 tied and bound with a pair of swim trunks placed
18 over her head.

19 One of the black males from upstairs
20 enters that sitting room, the one in the previous
21 picture, takes Julie to this second living room area
22 and places her on that white couch.

23 He shoves a cat toy, a little burlap
24 cat toy in her mouth, and she's moved to this second
25 couch that's a leather couch that's off of their

1 greatroom.

2 He tells her "Shut the fuck-up. Don't
3 look at me. I'll kill you. Spit this cat toy out
4 and I'll kill you. Shut the fuck-up. Don't let my
5 partners know what I'm doing down here."

6 He touches her vagina with his hand.
7 She hears him unbuckling his pants. He sticks his
8 fingers in her vagina on that couch against her
9 will, still while in possession of that firearm.

10 That is the first sexual assault of
11 Julie Kim in those early morning hours. On that
12 same couch he places his penis in her vagina, has
13 intercourse without her consent, against her will.

14 Her husband is upstairs. She has no
15 phone access. While he's on top of her -- this is
16 one of the black male adults from upstairs -- and
17 this will become important later -- he kisses her on
18 the breast.

19 There is the third sexual assault of
20 Julie Kim in the early morning hours of September 3,
21 2004.

22 The same black male adult takes her to
23 her own master bedroom where her and her fiancé
24 reside, ties her ankles, puts her face down, tells
25 her to get doggie-style and he puts his penis in

1 her, again, against her will, without her consent.

2 Simultaneously, the olive-skinned male
3 and the other black male adult are upstairs
4 ransacking the house.

5 They are asking Eric "Where is the
6 money, where is the safe, where is the money."

7 They have moved Eric to a landing area
8 upstairs after they have taken a thousand dollars
9 out of what Eric and Julie described as just an
10 extra room upstairs.

11 They had a thousand dollars in cash in
12 there and Eric is -- has relinquished that to them
13 telling them "There is no safe here. There is no
14 safe. I don't have any money. Take whatever you
15 want", but they keep ransacking. They keep
16 ransacking.

17 At this point Eric is bound with zip
18 ties and a pair of fake handcuffs that don't demand
19 a key for release.

20 They just have a button on them so
21 that if you hit the button you can release the cuff.

22 Eric watches the olive-skinned male
23 and the black male go back and forth across the
24 hallway and he knows he can get out of these cuffs.
25 He pops the button and he waits for his opportunity

1 to get free and he does.

2 He tries to make a run for the stairs.
3 He has not heard his wife. He does not know what is
4 going on with Julie.

5 Eric breaks free and he's pistol
6 whipped. Those are the resulting injuries on the
7 top of his head that are eventually medically taken
8 care of.

9 After he's pistol whipped he's tied up
10 again with tape and accord from a Dell MP3 player.

11 The three -- the sexual assailant and
12 the two that were upstairs fighting with Eric
13 eventually leave. And actually if you let me back
14 up for a moment. I think I missed something.

15 Julie is walked upstairs to her
16 bedroom and Eric is attacked by both of the black
17 male adults. I misspoke.

18 The perpetrators leave together. The
19 olive-skinned one gets on the phone, is talking to
20 someone about a ride or a car, something like that.
21 It's a very chaotic situation.

22 Eric is bleeding profusely from the
23 head and lip. You didn't see that injury in these
24 pictures.

25 Julie is hysterical. She's crying,

1 she's frantic. They call 911.

2 Metro police officers arrive. Patrol
3 arrives as is customary in an emergency situation.
4 A scene like this is sealed for crime scene
5 analysis. That means nobody comes in or out.

6 It is such that the scene is not
7 contaminated. Julie Kim is transported to the
8 hospital.

9 Eric Bernzweig follows her in his car
10 and eventually seeks medical treatment from a
11 specialty surgeon he knows in the community.

12 Detectives from robbery and sexual
13 assault detail are assigned because it is crossover
14 crime, if you will, the robbery of the individuals
15 at the house and the sexual assault of Julie Kim.

16 The investigation begins. This is
17 Julie Kim at the inception of her sexual assault
18 examination. She's seen by SANE examiner Linda
19 Ebbert.

20 She completes a rape kit. She's
21 photographed. Swabbings are taken and this becomes
22 critical California for this reason: Her ligature
23 injuries are documented.

24 When an individual goes through a
25 sexual assault examination, anyplace the perpetrator

1 was known to have touched or exchanged bodily fluid
2 is swabbed for physical evidence just to see if
3 anything remains.

4 Julie was instructed by the 911 caller
5 not to shower. She did not do so before she went to
6 get her examination.

7 Linda Ebbert documents the trauma.
8 There is redness at 6:00 o'clock in her vaginal
9 area. She preserves all those swabbings, including
10 swabbing from the vagina and swabbing from the
11 breast area where Julie Kim reports the perpetrator
12 had put his mouth on her.

13 The investigation continues. Robbie
14 Dahn goes out, she's a CSR in Las Vegas. She
15 doesn't work like CSI.

16 They document and collect. They do
17 not come to analytical conclusions, if you will.

18 She recovers a bed sheet from the
19 master bedroom upstairs in that residence on
20 Lonesome Harbor.

21 The interview process of everyone
22 begins. Michael Jeffries is the assigned robbery
23 detective. He interviews Julie and Eric in the late
24 evening hours.

25 This happened at 12:30 a.m. We're

1 talking like six, seven o'clock the next day.

2 He sends them to a sketch artist to
3 discuss the olive-skinned male who was not wearing a
4 face cover. The other two they couldn't give a
5 sketch description because their faces were masked.

6 Michael Jeffries makes -- the
7 detectives submit the sexual assault kit for
8 forensic examination.

9 By forensic examination I mean to look
10 for any DNA evidence DNA evidence that may be
11 present in the sexual assault kit either from the
12 breast swabbings or the vaginal canal.

13 When the kit is submitted analyst
14 David Welch conducts an analysis of that rape kit.
15 What he obtains -- you probably can't see the
16 numbers here.

17 We don't have it up on that screen,
18 but we'll show it to you later -- he obtains a
19 profile from the epithelial cells contained within
20 the saliva found on the breast of Julie Kim.

21 You'll learn from these analysts that
22 almost any type of bodily fluid will contain a DNA
23 profile unless it is semen without sperm.

24 He obtains that profile.

25 On November 15, 2004 he concludes that

1 profile -- and it's been reviewed by the
2 Metropolitan Police Department DNA lab and gone
3 through the peer review process.

4 At this time they know it's a male and
5 the suspect is unknown.

6 In February 2005 analyst Kathy
7 Guenther develops Mr. Joseph Henderson as a suspect
8 in this crime and after she develops him as a
9 suspect a buccal swab is taken of Mr. Henderson's
10 mouth cheek by Detectives Melissa Wilds and Michael
11 Jeffries.

12 That sample is matched against the
13 sample that was taken from Julie Kim's breast.

14 That profile was matched to the
15 Defendant, Joseph Henderson, in that one in six
16 hundred billion people, save identical twins, have
17 that DNA profile.

18 Six hundred billion is more than 10
19 times the earth's population.

20 These are the results, the buccal swab
21 from Julie Kim which is a standard for Julie Kim
22 taken at the sexual assault examination.

23 They also do her DNA profile in case
24 you have a mixture of bodily fluids so they can
25 ferret that out.

1 This is the breast swab from Julie Kim
2 that was the previously unknown male and the first
3 match for Mr. Henderson is concluded in early 2005,
4 matching that breast swab from Julie Kim.

5 At the request of the prosecution in
6 April 2005, it was asked that everyone go back and
7 look at the sexual assault kit that was obtained
8 from Julie Kim, including the swabbings and the bed
9 sheet that was in the master bedroom.

10 When Dave Welch initially loaded the
11 first profile of the breast swab he looked at the
12 vaginal swab and concluded there was the presence of
13 semen without sperm heads.

14 He could not see a sperm head on the
15 portion of the swab that he cut.

16 If you do not have a sperm head you
17 cannot get a DNA profile.

18 At the request of the prosecution,
19 that evidence was re-examined. Kathy Gunther
20 looking at a different area on the vaginal swab was
21 able to find a sperm head sufficient to get a DNA
22 profile from the vaginal swab.

23 She also found sperm with -- semen
24 with sperm on the bed sheet that was collected by
25 Crime Scene Analyst Robbie Dahn and those were also

1 matched to the profile of Joseph Henderson, one in
2 six hundred billion, 10 times the earth's
3 population.

4 This is the second DNA analysis
5 review. And I'll make this bigger for you.

6 Again, Julie Kim's standard DNA
7 profile, her own DNA from the kit. The vaginal swab
8 of the male contributor, the bed sheet and the
9 swabbings of Joseph Henderson.

10 Again, they match one in six hundred
11 billion. 10 times the earth's population.

12 At the conclusion of the trial, Ladies
13 and Gentlemen, after you've heard compelling
14 testimony of Julie Kim, the testimony of her
15 husband, the testimony of our Metro Police officers,
16 our forensic analysts, we are going to ask that you
17 find the defendant guilty of conspiracy to commit
18 burglary, burglary while in possession of a firearm,
19 conspiracy to commit degree kidnapping, First Degree
20 kidnapping with use of deadly weapon, sexual assault
21 with use of deadly weapon, conspiracy to commit that
22 crime, conspiracy to commit robbery, conspiracy to
23 commit robbery with use of deadly weapon, open and
24 gross lewdness and battery with use of deadly weapon
25 with substantial bodily harm.

1 I thank you for your time.

2 THE COURT: Thank you.

3 Does defense counsel wish to make an
4 opening statement at this time or reserve your
5 right?

6 MR. REED: I will.

7 THE COURT: Go ahead.

8 MR. REED: Dioxynucleic acid.

9 That's what this case is all about.

10 That acid also known as DNA. At the
11 end of the case I will tell you do not assume.

12 Do not assume that Joseph Henderson
13 was the person who left the DNA at that scene.

14 What the evidence will show you,
15 Ladies and Gentlemen, is that the examiners in this
16 case rushed to judgment.

17 They did not do a proper blind
18 comparison of the samples in this matter.

19 As a result, they came to the wrong
20 conclusion and erroneously they accused
21 Mr. Henderson of leaving the DNA at that scene.

22 All of you, when you were hearing
23 about this case expressed little or no knowledge
24 about DNA. You'll hear a lot of terminology.

25 You'll hear about STR's, short tandem

1 repeats, and peaks and stutters and all kinds of
2 different terminology.

3 I want to take for you a few minutes
4 if I can just to walk you through the testimony that
5 you'll hear from the experts that are going to be
6 presented in this case concerning DNA.

7 As we start off, I think even Judge
8 Mosley mentioned it early on, DNA is basically
9 the -- contains inside molecules and is a basic
10 construct of what makes us up. It's what makes us
11 unique for each individual.

12 The FBI has identified there are 23
13 separate loci. Loci are a particular identifier
14 that can separate us as individuals, besides the
15 chromosomes, which determines whether we're male or
16 female.

17 In DNA testing, at least in the DNA
18 testing that is done in this case, they will narrow
19 it down to 13 loci to do the comparison. We saw a
20 chart of those basic loci.

21 The loci are each individual
22 presentations of part of our DNA.

23 What is critical in this case, when
24 you hear the testimony, is that if there's one
25 particular comparison out of the 13 that is

1 erroneous, then the one in six hundred billion

2 possibility becomes --

3 MS. KOLLINS: I'm going to object.

4 This is argument.

5 THE COURT: It is.

6 MR. REED: These are all things that
7 the evidence is going to show, judge.

8 THE COURT: You don't want to -- this
9 is going to be supplied. The jury will make the
10 determination of what the import of it is.

11 MR. REED: The evidence is going to
12 show that the testing was not done in a complete and
13 accurate manner.

14 What it's also going to show is -- and
15 they had the chart up there -- STR is Short Tandem
16 Repeat. That is the method they use to do the
17 testing.

18 What happens is they put all the
19 information basically into a computer, not like on
20 CSI where they put it all in a computer and it spits
21 out a picture of the person.

22 It doesn't work that way in DNA
23 analysis.

24 The way it works is that there is
25 actual judgment and discretion on the part of the

1 different people.

2 Do a mathematical comparison. It's
3 not that complicated.

4 Based on this number the first peak
5 and the second peak, they will tell you they do a
6 mathematical percentage.

7 The experts will also tell you any
8 time there is a 60 percent or higher, in other
9 words, there is a 60 percent difference in the peak,
10 between the first peak and the second peak, they
11 will then have to analyze it to determine whether or
12 not this second part is another individual and, if
13 so, what conclusions they can make from that.

14 They will also tell you -- when you
15 saw on counsel's chart, as for example, let's
16 take -- and you'll hear about D13. D13 is one of
17 those 13 loci.

18 You will see in the charts that there
19 will be an A15. There is not going to be just one
20 person.

21 What you'll hear the examiner say is
22 that she will make a conclusion based on her
23 analysis that in the end it was a 13/15.

24 What she didn't do, objectively -- she
25 did not eliminate a possibility of a 13, 13, a 15,

1 examiner in making these determinations.

2 Counsel showed you a chart that has
3 the actual numbers. When we go through the actual
4 testimony the experts will be showing you the data,
5 the raw data which will be comprised of something
6 that will look like this.

7 What will happen is you'll see peaks
8 on a chart and you'll see numbers across here.
9 These numbers are called RFU's.

10 The higher the number the experts will
11 tell you the better presentation of that particular
12 person's sample of that loci, that one little
13 indicator with the bigger the spike, the bigger the
14 point the more there is a representation of DNA
15 being present in that.

16 What happened in this case, as an
17 example, the vaginal swab which counsel mentioned in
18 her opening statement, it is a mixture of DNA. It
19 is not one, individual DNA.

20 In doing so the expert then has to
21 determine the mixture.

22 How do you separate out the two?

23 What they will do in the testimony is
24 they will show you they will have these two
25 different peaks which could be potentially two

1 13 -- sorry, I'm scribbling down there -- or a
2 15/15.

3 This happens not just once, not just
4 twice, but in at least five separate loci. So as
5 you're hearing the testimony from the experts keep
6 this in mind.

7 Again, I promise that -- I said it's
8 all not that complicated. If I have complicated
9 it -- let me back up for second and tell you
10 basically the procedure that they go through in the
11 collection. This is more of the science of the
12 analysis.

13 In every case -- excuse me -- get some
14 water -- in every case there is and there was
15 mentioned already there are going to be a number of
16 factors that you have to watch out for in how we get
17 to the final result.

18 Factor number one, collection.

19 Was the sample collected properly and
20 stored properly?

21 Step number two, does the person who
22 is testifying have the proper qualifications to do
23 the testing and analysis?

24 Step number three, was the DNA
25 extracted properly?

1 MS. KOLLINS: Judge, I'm going to
2 object -- objection. Argument.

3 Are we talking about --

4 MR. REED: These are things that are
5 going to get testified to.

6 THE COURT: I know. You're not to
7 testify at this time.

8 Say what you're going to say, but
9 don't draw any conclusion.

10 When you say it was improperly done,
11 that's a conclusion.

12 MR. REED: I don't think I said that.

13 THE COURT: Explain what you're going
14 to present.

15 MR. REED: What will be presented is
16 they -- first it will be collected. Look at the
17 manner and method which it was collected.

18 Was it preserved properly?

19 Secondly, does the individual have the
20 proper qualifications in order to do the analysis?

21 Third, which you will hear them testify
22 about -- you'll hear evidence of the extraction and
23 the extraction method. You'll hear there are a
24 couple of different extraction methods that they
25 place.

1 Did the DNA get extracted, that is
2 taken from the crime scene, brought to the lab and
3 then removed from the sample itself and put on the
4 little swab?

5 Was that process done correctly?

6 Next, was the analysis done right?

7 What happens is, like I said, they are
8 going to spit out a whole bunch of data. They will
9 tell you that the computer gave them these loci,
10 these numbers.

11 There is judgment that has to be made
12 by the experts in this regard.

13 There will be evidence presented to
14 show to you that when they did this they had to make
15 judgment calls.

16 There will be evidence presented to
17 you that will show you that they are supposed to be
18 objective and not make improper judgment calls.

19 They are supposed to be fair and
20 impartial. And they didn't do that when they made
21 these judgment calls.

22 Keep in in mind as you hear the
23 evidence what they will tell you is that it is not
24 the type of science in which you can automatically
25 make assumptions from statistical data.

1 There is some analysis, some
2 discretion that has to take place in that.

3 Then the final step, the actual final
4 step would then be the mathematical calculations
5 that they will tell you about, assuming that they
6 have done all the first four steps correctly, then
7 they will indicate that there is a one in six
8 hundred billion chance that Mr. Henderson is the
9 person who left the DNA at the scene.

10 No one disputes that this was not a
11 violent, serious offense. No one disputes what
12 happened out in that house. That is not what's at
13 issue.

14 What is at issue is do not assume.

15 The DNA analysis -- did the DNA
16 analysis get the proper person?

17 We will show you at the conclusion of
18 this case -- and you should also not assume that
19 they have it right.

20 We'll ask you to find Joseph Henderson
21 not guilty of these serious charges.

22 Thank you.

23 THE COURT: Thank you.

24 State's first witness, please.

25 MR. TURNER: Julie Kim.

1 JULIE KIM,
2 called as a witness herein, was sworn by the court's
3 clerk, was examined and testified as follows:

4

5

6 EXAMINATION

7 BY MR. TURNER:

8 Q. Ms. Kim, will you please state and
9 spell your last name for the record, please?

10 A. **Stand up?**

11 Q. Just state and spell your last name
12 for the record.

13 A. **Julie Bernzweig, B-e-r-n-z-w-e-i-g**

14 Q. Ms. Bernzweig, I'm going to draw your
15 attention back to September 3, 2004, at around 12 am
16 on that date and time.

17 Do you recall that particular date and
18 time?

19 A. **Yes.**

20 Q. Was your last name --

21 THE COURT: Excuse me. I want you to
22 move up. You'll have to speak louder, please.

23 What was your answer to that last
24 question?

25 THE WITNESS: Yes.

1 THE COURT: Proceed.

2 BY MS. KOLLINS:

3 Q. Was your name Bernzweig on that
4 particular date?

5 A. No.

6 Q. What was it?

7 A. Kim.

8 Q. Where were you living on that date and
9 time?

10 A. **7833 Lonesome Harbor Drive.**

11 Q. Is that a residence?

12 A. Yes.

13 Q. Is that in a gated community?

14 A. Yes.

15 Q. Is that in Clark County?

16 A. Yes.

17 Q. Who were you living there with?

18 A. **My boyfriend who is now my husband, at
19 that time, Eric Bernzweig.**

20 Q. Were living with any one else in that
21 residence?

22 A. No.

23 Q. What were you doing at that time?

24 A. **Trying to go to sleep.**

25 Q. Where were you?

1 A. **Upstairs in bed.**

2 Q. Where was Eric?

3 A. **Upstairs with me.**

4 Q. Were you actually asleep at that time?

5 A. **We were kind of dozing off. We
6 couldn't really sleep.**

7 Q. What happened that, at around 12 am?

8 A. **The doorbell rang.**

9 Q. What did you do in response to the
10 doorbell ringing?

11 A. **I had Eric go and answer the door.**

12 Q. Did he in fact do that?

13 A. Yes.

14 Q. What did you do?

15 A. **I stayed in bed.**

16 Q. At some point did you leave the bed?

17 A. Yes.

18 Q. Why did you leave the bed?

19 A. **I saw a light go on in the back yard
20 and I put my robe on and went downstairs to see what
21 was going on.**

22 Q. You said you had your robe on. What
23 else were you wearing?

24 A. **My night gown.**

25 Q. Did you have any underwear on?

1 A. No.

2 Q. A bra?

3 A. No.

4 Q. You went downstairs to see what
5 happened and what did you see when you went
6 downstairs?

7 A. **There was a guy in the back yard with
8 Eric.**

9 Q. Could see what they were doing?

10 A. No.

11 Q. What did you do?

12 A. **I talked to Eric and he told me that
13 the guy said a kid threw his -- his kid threw his
14 keys in our back yard and they were looking for the
15 keys.**

16 Q. Where were you and Eric when you spoke
17 with him?

18 A. **In the kitchen.**

19 Q. Is the kitchen next to where the back
20 yard is?

21 A. Yes.

22 Q. Did you have an opportunity to look at
23 the gentleman that Eric was helping?

24 A. Yes.

25 Q. Could you describe that person for the

1 jury?

2 A. **Thin, olive-skinned, about five eight;
3 young.**

4 Q. Do you recall what the person was
5 wearing?

6 A. **Beige pants and olive green striped
7 shirt.**

8 Q. Did you have occasion to speak with
9 him at all at that time?

10 A. **I don't recall.**

11 Q. And what happened after Eric told you
12 that they were looking for the keys?

13 A. **Eric told me he was going in the
14 garage to look for a flashlight.**

15 Q. Did he do that?

16 A. **Yes, he did.**

17 Q. What did the other gentleman do?

18 A. **He went back out the front door and
19 told me he was going to look for a flashlight in his
20 car.**

21 Q. Did the gentleman actually go out the
22 front door?

23 A. **Yes, he did.**

24 Q. Was the door left unlocked behind him?

25 A. Yes.

1 Q. What happened next?
 2 A. **All of a sudden he came storming in,**
 3 **the three of them.**
 4 Q. You said he came storming back in.
 5 Who came through the door first?
 6 A. **The guy that was in our house that was**
 7 **looking for the keys. He came in and other two guys**
 8 **came storming back in the house with guns.**
 9 Q. The gentleman who had been at least
 10 saying he was looking for the keys in the back, he
 11 came through the door first?
 12 A. **Yes.**
 13 Q. That's the front door?
 14 A. **Yes.**
 15 Q. When they first came through the door
 16 where was Eric?
 17 A. **He was still in the garage.**
 18 Q. You said two individuals came in
 19 behind that first individual; is that correct?
 20 A. **Yes.**
 21 Q. Can you describe these two individuals
 22 for the jury?
 23 A. **They were wearing all black, their**
 24 **faces were covered up.**
 25 Q. Could you tell what was covering their

1 faces?
 2 A. **Some sort of a mask.**
 3 Q. Was any portion of their faces
 4 visible?
 5 A. **I could see little bit below their**
 6 **eyes. I did see their lips and a little portion of**
 7 **their mouth.**
 8 **They were mostly covered up.**
 9 Q. What other clothes were they wearing,
 10 do you recall?
 11 Were they -- both of them were wearing
 12 all black?
 13 A. **Yes.**
 14 Q. Was there any difference between the
 15 two in terms of height, that type of thing?
 16 A. **One was a little bigger than the**
 17 **other.**
 18 Q. By bigger what do you mean?
 19 A. **Little taller.**
 20 Q. Taller.
 21 What about weight?
 22 A. **I don't remember.**
 23 Q. One was taller than the other one?
 24 A. **Yes.**
 25 Q. Did either one of them have anything

1 in their hands?
 2 A. **Guns.**
 3 Q. What kind of guns; do you know?
 4 A. Black guns. One had one of those
 5 lights on it.
 6 THE COURT: You have to speak up,
 7 ma'am.
 8 THE WITNESS: One of them had one of
 9 the red lights on. It pointing towards my husband.
 10 BY MR. TURNER:
 11 Q. So they both had guns?
 12 A. **Yes.**
 13 Q. Do you know the difference between a
 14 revolver and a semi-automatic?
 15 A. **Is the revolver the one with the**
 16 **little round click looking things?**
 17 Q. Did you see like a cylinder --
 18 A. **I didn't see a cylinder.**
 19 Q. -- on either one of the guns?
 20 A. **No.**
 21 Q. Did both these guns have lights on
 22 them or just one?
 23 A. **Just one.**
 24 Q. Which of the two men had -- I don't
 25 know if you testified -- did you -- could you tell

1 the race of the other two individuals that came in
 2 after the man that you had seen earlier?
 3 A. **They were African American.**
 4 Q. Which one of those had the gun with
 5 the light on it?
 6 A. **The one that -- he was pointing**
 7 **towards my husband.**
 8 Q. Was that the taller one?
 9 A. **The taller one.**
 10 Q. Could you see whether they were
 11 wearing any gloves?
 12 A. **Yes.**
 13 Q. Both of them or one of them?
 14 A. **Both of them.**
 15 Q. You say one of them was pointing the
 16 gun at your husband?
 17 A. **Yes.**
 18 Q. When did Eric come back into the room?
 19 A. **Very shortly after he went into the**
 20 **garage. Couldn't have been more than a minute or**
 21 **two.**
 22 Q. Where is the garage door in relation
 23 to the front door?
 24 A. **About 15 steps.**
 25 Q. He came in, the individual with the

1 a gun with the laser went to him -- is that right --
 2 or pointed the gun at him?
 3 A. **They were both pointing at him.**
 4 Q. You said there was a light on it. Do
 5 you know what kind of light it was?
 6 A. **It was a red light.**
 7 Q. Like a flashlight or like a laser?
 8 A. **Like a laser red light.**
 9 Q. Could you see the light on Eric?
 10 A. **Yeah.**
 11 Q. What happened when Eric came in?
 12 What did they do?
 13 A. **They made him get down on his knees.**
 14 Q. You say they.
 15 A. **The gunmen.**
 16 Q. Both of them?
 17 A. **Both of them.**
 18 Q. What was the other gentleman doing?
 19 A. **I don't remember.**
 20 Q. Do you recall whether that person had
 21 a gun in his hand at that time?
 22 A. **No.**
 23 Q. Do you recall whether he was wearing
 24 gloves or not at that time?
 25 A. **No.**

1 Q. **What happened with you when these two**
 2 **gentlemen who were dealing with Eric, what happened**
 3 **to you?**
 4 A. **I was holding a telephone in my hand**
 5 **and the middle eastern guy made me put it down.**
 6 Q. Where was this telephone?
 7 A. **In the kitchen.**
 8 Q. You said he made you put it down.
 9 How did he make you put it down?
 10 A. **He told me to put down the phone.**
 11 Q. What did you do?
 12 A. I put the phone down.
 13 Q. What happen next?
 14 A. **He seated me on the couch in the**
 15 **living room.**
 16 Q. Who is he?
 17 A. **The middle eastern man.**
 18 Q. You say middle Eastern man.
 19 Why do you say he was middle Eastern?
 20 A. **The way he looked, olive-skinned.**
 21 Q. Again this was the olive-skinned
 22 gentleman you saw first come in and went into your
 23 back yard?
 24 A. **Yes.**
 25 Q. Did you go into the living room area

1 and sit down?
 2 A. **Yes.**
 3 Q. Could you see what the other two men
 4 were doing with Eric?
 5 A. **They took him upstairs.**
 6 Q. What happened next?
 7 A. **The middle eastern guy kept asking me**
 8 **where the safe was. Where is your safe?**
 9 Q. Did you have a safe?
 10 A. **No.**
 11 MR. TURNER: Approach the witness?
 12 THE COURT: You may.
 13 BY MR. TURNER:
 14 Q. I'm showing what you has been marked
 15 State's proposed exhibit 11. Ask you to look at
 16 that and see if you recognize it?
 17 A. **Yes.**
 18 Q. What is it?
 19 A. **The kitchen.**
 20 Q. Does it fairly and accurately depict
 21 the condition of your kitchen on the evening this
 22 incident occurred?
 23 A. **Yes.**
 24 Q. Showing you what has been marked as
 25 State's proposed exhibit 12. Ask you if you

1 recognize what's depicted in that exhibit.
 2 A. **Yes.**
 3 Q. What is it?
 4 A. **My little room by the kitchen.**
 5 Q. What specifically is depicted in that?
 6 A. **The couch he raped me on -- no, he**
 7 **didn't rape me on this couch. He felt me up on this**
 8 **couch.**
 9 Q. Is this the couch you're talking about
 10 that the olive-skinned gentleman sat you on?
 11 A. **He tied me up here, yes.**
 12 Q. And that fairly and accurately depicts
 13 how that couch appeared on that particular evening?
 14 A. **Yes.**
 15 MR. TURNER: State moves to admit
 16 state's proposed exhibits 11 and 12.
 17 THE COURT: Any objection?
 18 MS. RADOSTA: Submit it.
 19 THE COURT: Received.
 20 MR. TURNER: May I publish?
 21 THE COURT: You may.
 22 MR. TURNER: I'd move to be able to pass
 23 it around to the jurors.
 24 THE COURT: Hand it to the jury. First
 25 look at one and then pass it on to another.

1 BY MR. TURNER:

2 Q. So the olive-skinned gentleman you
3 described as middle Eastern placed you on the brown
4 couch; is that correct?

5 A. Yes.

6 Q. And you described that as a living
7 room area?

8 A. Yes.

9 Q. Is that also kind of an attached part
10 to the overall kitchen area?

11 A. Yes.

12 Q. What did he have you do when he put
13 you on that couch or what did he do to you?

14 A. He tied me up.

15 Q. What part of your body did he tie up?

16 A. He tied my hands up behind my back.

17 Q. Do you know what he tied your hands
18 with?

19 A. Plastic ties.

20 Q. How tight did he tie your hands?

21 A. They were pretty tight.

22 Q. Were you looking at him in the face
23 when he was tying your hands behind your back?

24 A. No.

25 Q. Why was that?

1 A. Because he was behind my back tying my
2 hands.

3 Q. Did you get a good look at him?

4 A. Yes.

5 Q. And did he do anything else other than
6 tie your hands behind your back?

7 A. He told me to look away from him.

8 Q. Did he tell you why?

9 A. He didn't want me to look at him.

10 Q. Was he asking you anything at that
11 time?

12 A. Where is the safe?

13 Q. What did you tell him?

14 A. We don't have one.

15 Q. What happened next?

16 A. He left the room, went upstairs and
17 the rapist came down.

18 Q. We'll get do that in just a second.

19 Make sure you talk into that

20 microphone, okay?

21 A. Okay.

22 Q. You said another person came down?

23 A. Yes.

24 Q. How long after the olive-skinned man
25 left did this second individual come down?

1 A. Not very long. Less than a minute.

2 Q. You described two black male adults
3 that had come in behind the olive-skinned man.

4 Which of the two was it, the shorter
5 one or taller one?

6 A. The shorter one.

7 Q. When this shorter black male adult
8 came down what did he do?

9 A. He came towards me. He was using
10 profanity to me.

11 Q. What was he saying specifically?

12 A. Something to the effect of "If you
13 scream I'll kill you, bitch."

14 Q. Did you say anything to him?

15 A. No.

16 Q. And what else did he do?

17 A. He started to touch me.

18 Q. Did you have an opportunity to look at
19 him in the face?

20 A. Um, he put some -- put my husband's
21 swimming trunks over my head.

22 Q. Did he tell you anything before he did
23 that?

24 A. I don't remember.

25 Q. Did he do anything else to prevent you

1 from talking?

2 A. Just threatened me.

3 Q. Do you recall talking with the police
4 on the -- later in the evening after this incident

5 had occurred?

6 Do you recall talking to Detective
7 Jeffries about this?

8 A. Yes.

9 Q. Do you recall talking to Detective
10 Jeffries about the person who did this to you
11 putting something in your mouth?

12 A. Yes. I remember.

13 Q. What did this person put in your
14 mouth?

15 A. He put a cat toy in my mouth to
16 prevent me from screaming.

17 Q. Now, when did he do that?

18 Was that before or after he put your
19 husband's swim trunks on your head?

20 A. I don't remember.

21 Q. This cat toy, what was it?

22 A. It was -- it said catnip on it and it
23 said 50 pounds on it.

24 Q. Did he tell you what would happen if
25 you removed that tie from your mouth?

- 1 A. **He would kill me.**
 2 Q. Did you attempt to spit that tie out?
 3 A. **No.**
 4 Q. So you had that tie in your mouth and
 5 you also had swim trunks over your head; is that
 6 correct?
 7 A. **Yes.**
 8 Q. Were you still able to see at all?
 9 A. **Yes, I could see out of it.**
 10 Q. What did he do after he had you put
 11 this tie in your mouth and put the swim trunks on
 12 your head?
 13 A. **He started touching me.**
 14 Q. Where did he touch you?
 15 A. **My breasts, my butt.**
 16 Q. Was that above your clothes or under
 17 your clothes?
 18 A. **Under my clothes.**
 19 Q. At this point what were you wearing?
 20 A. **My night gown and my robe.**
 21 Q. Was he saying anything to you during
 22 this time?
 23 A. **When he started touching my butt he**
 24 **said oh, shit.**
 25 THE COURT: You'll have to speak up,

- 1 little louder.
 2 THE WITNESS: Okay.
 3 BY MS. KOLLINS:
 4 Q. Repeat that again for the jury,
 5 please.
 6 A. **When he started touching my butt he**
 7 **said, oh, shit.**
 8 Q. When he was touching your butt where
 9 were you located?
 10 A. **On the couch in the living room.**
 11 Q. You were seated on the couch?
 12 A. **Yes.**
 13 Q. And your arms were tied behind your
 14 back?
 15 A. **Yes.**
 16 Q. And he was touching your butt with his
 17 hands?
 18 A. **Yes.**
 19 Q. Did you see whether he still had a gun
 20 in his hand?
 21 A. **No.**
 22 Q. Do you know -- you don't know if he
 23 had it or you didn't or he didn't have it, I guess?
 24 I guess that's confusing.
 25 A. **When he came downstairs towards me he**

- 1 **had the gun.**
 2 Q. When you first saw him come down
 3 before he put the cat toy in your mouth, before he
 4 put the swim trunks over your head you saw him with
 5 that handgun; is that correct?
 6 A. **Yes.**
 7 Q. This is the handgun you saw him first
 8 come through the door with?
 9 A. **Yes.**
 10 Q. At the time he's touching you you
 11 don't know whether he had that handgun; is that
 12 correct?
 13 A. **That's correct.**
 14 Q. When he touching you do you know
 15 whether he was wearing gloves or not?
 16 A. **I don't remember.**
 17 Q. How long did he touch you?
 18 A. **Not very long.**
 19 Q. Did something happen to cause him to
 20 stop touching you?
 21 A. **He moved me into the other room.**
 22 Q. Was there a reason why he moved you in
 23 the other room?
 24 A. **I don't know.**
 25 Q. During the time period he was touching

- 1 you did you know what was happening with your
 2 husband, Eric?
 3 A. **I heard noises.**
 4 Q. Where did you hear the noises?
 5 A. **Upstairs.**
 6 Q. At think time that he was touching you
 7 downstairs on the green couch did you see any of the
 8 other two individuals who had come through the door?
 9 A. **No. They were upstairs.**
 10 Q. You said that the shorter of the two
 11 black males then moved you into another room.
 12 What room was that?
 13 A. **That was the room next to the living**
 14 **room.**
 15 Q. Is that right next to the living room?
 16 A. **Right next to it.**
 17 Q. Is there a single door to get in that
 18 room or are there double doors?
 19 A. **Done double doors.**
 20 Q. This individual who moved in there,
 21 how did he move you in there?
 22 A. **Led me in there.**
 23 Q. By the arm?
 24 A. **Yes.**
 25 Q. Did you still have the swim trunks on

1 : your head?

2 A. Yes.

3 Q. Do you recall whether you had a cat
4 toy still in your mouth?

5 A. **I don't remember.**

6 Q. Did you still have your robe on?

7 A. **I don't remember.**

8 Q. Do you recall whether you had your
9 night gown on?

10 A. **Yes, I did.**

11 Q. He led you into this room.

12 Where did he place you inside the
13 room?

14 A. **On one of the couches.**

15 Q. Approach the witness?

16 THE COURT: You may.

17 BY MR. TURNER:

18 Q. Showing you what has been marked as
19 State's proposed exhibits 16, 17, 19 and 21, I'll
20 ask you to look through each of those for me real
21 quick and let me know when you're done.

22 Have you had an opportunity to look at
23 all those?

24 A. Yes.

25 Q. Do you recognize what's depicted in

1 each of those exhibits?

2 A. Yes.

3 Q. What is that?

4 A. **The couch that he raped me on the
5 first time.**

6 Q. Is this the room you just testified
7 to?

8 A. Yes.

9 Q. Does it fairly and accurately depict
10 the condition of that room on the night this
11 incident occurred?

12 A. Yes.

13 MR. TURNER: At this time the State
14 would move to admit state's proposed exhibits 16,
15 17, 19 and 21.

16 THE COURT: Objection?

17 MS. RADOSTA: Submit it.

18 THE COURT: They will be received.

19 BY MR. TURNER:

20 Q. Julie, I'll show you specifically
21 what's been marked State's proposed exhibit 19. You
22 mentioned earlier you recognized the couch that you
23 were placed on.

24 Is that depicted in State's Exhibit

25 19?

1 A. Yes.

2 Q. That is in fact the couch that the
3 shorter of the two black males placed you on; is
4 that correct?

5 A. Yes.

6 MR. TURNER: Move to publish at this
7 time.

8 THE COURT: You may do so.

9 BY MR. TURNER:

10 Q. How were you positioned on it?
11 Were you seated, laying down?

12 A. **I was seated.**

13 Q. What happened when he sat you down on
14 this couch?

15 A. **He started to touch me again.**

16 Q. By he you mean the shorter of the two
17 black males?

18 A. Yes.

19 Q. Same person that had first touched you
20 on the green couch?

21 A. Yes.

22 Q. Where did he touch you?

23 A. **My vagina.**

24 THE COURT: Counsel, let me ask you to
25 cease for just a moment. The man is here for the

1 projector. Take a look at it, if you would.

2 MS. KOLLINS: May we approach, Your
3 Honor?

4 THE COURT: Yes.

5 (DISCUSSION OFF THE RECORD)

6 THE COURT: We'll forego the use of
7 the projector the remainder of the day and take care
8 of it tomorrow.

9 MR. TURNER: Proceed?

10 THE COURT: You may.

11 BY MR. TURNER:

12 Q. You're on the white couch. You said
13 he's touching you.

14 What part of your body is he touching?

15 A. **My vagina.**

16 Q. Is he touching you anywhere else?

17 A. No.

18 Q. What part of his body is he using to
19 touch you?

20 A. **His hands.**

21 Q. Do you recall whether he was wearing
22 gloves at that time?

23 A. No.

24 Q. He was not wearing gloves?

25 A. No.

1 Q. Was he touching your vagina on the
 2 outside of your gown or on the inside?
 3 A. **Outside.**
 4 Q. So his hands -- your gown was between
 5 his hand and your vagina at that time?
 6 A. **Yes.**
 7 Q. What happened next?
 8 A. **He pulled me down on the couch.**
 9 Q. And how is he positioned?
 10 Is he standing, sitting next to you,
 11 when he pulled you down?
 12 A. **He was standing in front of me.**
 13 Q. You said he pulled you down.
 14 At that point how were you positioned
 15 on the couch?
 16 A. **Still on my back.**
 17 Q. Were you laying down on the couch at
 18 that time?
 19 A. **No. I was on my back and he pulled me**
 20 **down.**
 21 Q. He kind of -- you were sitting on the
 22 couch but he pulled your legs forward?
 23 A. **Yes.**
 24 Q. And how was he positioned?
 25 A. **He was standing up.**

1 Q. Was he facing you directly?
 2 A. **Yes.**
 3 Q. And what did he do next?
 4 A. **I heard him unbuckle --**
 5 Q. You heard him unbuckle his pants?
 6 A. -- I heard him unbuckle his pants.
 7 Q. Did you still have your husband's swim
 8 trunks over your head at this time?
 9 A. **Yes.**
 10 Q. You said you heard him do this.
 11 Were you able to see what he was
 12 doing?
 13 A. **Yes, I could see.**
 14 Q. What happened after he unbuckled his
 15 pants?
 16 A. **He raped me.**
 17 Q. You say he raped you. I need you to
 18 be real specific with me exactly what he did.
 19 What did he do?
 20 A. He put his penis inside of me.
 21 Q. Before he put his penis inside of you
 22 did he do anything to you before he did that?
 23 A. **I don't remember.**
 24 Q. Do you recall talking with Detective
 25 Jeffries and having an interview with him later that

1 same evening of September 3, 2004?
 2 A. **Yes.**
 3 Q. Do you recall telling Detective
 4 Jeffries --
 5 MS. RADOSTA: Objection. This is
 6 improper.
 7 THE COURT: Response?
 8 MR. TURNER: On this point she says she
 9 doesn't recall. I'm trying to put in a prior in
 10 consistent statement.
 11 MS. RADOSTA: There is a proper way to
 12 do it. He's providing testimony.
 13 He's providing her the testimony.
 14 THE COURT: He can assist her in
 15 recalling, but cannot suggest the answer.
 16 Is there a way to accomplish that, Mr.
 17 Turner?
 18 MR. TURNER: Court's indulgence.
 19 BY MR. TURNER:
 20 Q. You said he placed his penis in your
 21 vagina; is that correct?
 22 A. **Yes.**
 23 Q. How long did that go on?
 24 A. **Not very long.**
 25 Q. Were you in the same position down on

1 the couch?
 2 A. **Yes.**
 3 Q. How was he positioned at the time he
 4 put his penis in your vagina?
 5 A. **On top of me.**
 6 Q. With the weight of him on top of you?
 7 A. **Not the whole entire weight, but he**
 8 **was on top of me.**
 9 Q. How long did that go on?
 10 A. **Not very long.**
 11 Q. Why was that?
 12 A. **There was a noise upstairs, loud**
 13 **noises upstairs.**
 14 Q. Could you tell exactly where upstairs?
 15 A. **Above the stairs.**
 16 Q. What area is above the stairs in that
 17 house, do you know?
 18 A. Our bedroom.
 19 Q. You heard loud noises. Did you hear
 20 anyone talking?
 21 Could you tell who was making those
 22 noises?
 23 A. **It was Eric and the middle eastern guy**
 24 **and the other guy that was up there with him with**
 25 **the taser gun, laser gun.**

1 Q. So you could tell all three
 2 individuals were involved in whatever was going on
 3 up there?
 4 A. **Yes.**
 5 Q. What did it sound like to you?
 6 A. **Lot of commotion, lots of loud noises.**
 7 Q. Noises.
 8 You said that stopped this individual
 9 from continuing to sexually assault you?
 10 A. **Yes.**
 11 Q. What did he do?
 12 A. **He went soft.**
 13 Q. Now, you previously testified you
 14 don't recall him doing anything else prior to
 15 placing his penis in your vagina; is that correct?
 16 A. **He threatened me and told me not to**
 17 **scream, because he didn't want his two partners to**
 18 **know what he was doing.**
 19 MR. TURNER: Approach the witness?
 20 THE COURT: You may.
 21 BY MR. TURNER:
 22 Q. Have you had an opportunity to look at
 23 the statement you gave Detective Jeffries might that
 24 refresh your recollection as to what he did before
 25 he sexually assaulted you by placing his penis in

1 your vagina?
 2 A. **Sure, oh, yes, yes, yes. He placed**
 3 **his mouth on my breast.**
 4 Q. Okay. Let's back up a little bit.
 5 A. **Okay.**
 6 Q. When exactly did that occur?
 7 A. **It was on the green couch, I think.**
 8 Q. **As you sit here today do you recall**
 9 **which couch it was?**
 10 A. **I don't recall which couch it was.**
 11 Q. What do you remember him doing with
 12 his mouth?
 13 A. **He placed his mouth on my breast.**
 14 Q. What did he do once he did that?
 15 A. **I don't remember.**
 16 Q. Do you recall if it was one or both?
 17 A. **I don't remember.**
 18 Q. As you sit here today do you recall
 19 him doing anything to you prior to placing his penis
 20 in your vagina, immediately prior to that?
 21 A. **No, I don't know.**
 22 MR. TURNER: Approach the witness?
 23 THE COURT: You may.
 24 MR. TURNER: Page 47, counsel,
 25 voluntary statement.

1 BY MR. TURNER:
 2 Q. Julie, I'm going to ask you to read
 3 through that and let me know when you're done.
 4 A. **Okay.**
 5 Q. Have you had an opportunity to read
 6 that?
 7 A. **Yes.**
 8 Q. Does that refresh your recollection
 9 anything he may have done prior to putting his penis
 10 in your vagina?
 11 A. **I don't remember.**
 12 Q. Okay. You said there was a noise
 13 upstairs and that caused this individual to stop
 14 what he was doing.
 15 A. **Yes.**
 16 Q. Do you know whether he ejaculated?
 17 A. **No.**
 18 Q. He didn't or you don't?
 19 A. **He didn't.**
 20 Q. What did he do?
 21 A. **He stopped.**
 22 Q. What did he do after he stopped?
 23 A. **The middle eastern guy came**
 24 **downstairs.**
 25 Q. And what happened with the -- when the

1 middle eastern guy came downstairs?
 2 A. **I heard him say what are you doing?**
 3 Q. And what did -- who said that?
 4 A. **The middle eastern guy said to him**
 5 **what are you doing?**
 6 Q. What did the black male say?
 7 A. **He responded by saying, telling him**
 8 **that I was tight.**
 9 Q. He told the individual you described
 10 as the middle Eastern that you were tight?
 11 A. **Yes.**
 12 Q. And did the middle Eastern gentleman
 13 respond?
 14 A. **No, he did not.**
 15 Q. The individual who sexually assaulted
 16 you, when he told this to the person you described
 17 as middle Eastern do you know whether he had his
 18 pants on or off?
 19 A. **I don't remember.**
 20 Q. Where was he when he told that to the
 21 middle eastern gentleman?
 22 A. **He was in front of me.**
 23 Q. How close to you?
 24 A. **Two feet away.**
 25 Q. Were you still on the couch?

- 1 A. **Yes.**
 2 Q. What happened after he told the middle
 3 eastern guy that?
 4 A. **They both went upstairs.**
 5 Q. Both of them did?
 6 A. **Yes.**
 7 Q. So you were left down there alone?
 8 A. **Yes.**
 9 Q. Was there any phone or anything else
 10 around there that was available to you?
 11 A. **No.**
 12 Q. Do you know if there was a phone in
 13 where the kitchen area was?
 14 A. **No.**
 15 Q. Do you know if it was available or do
 16 you know whether they had done something to the
 17 phone?
 18 A. **I saw the middle eastern guy tear it**
 19 **up. He pulled it out.**
 20 Q. That was done way back when they first
 21 came in?
 22 A. **Before he tied me up.**
 23 Q. So when those two went upstairs what
 24 did you do?
 25 A. **I was left on the couch.**

- 1 Q. Did they go upstairs at around the
 2 time you heard this commotion take place upstairs or
 3 was that after?
 4 A. **The commotion was right after the**
 5 **middle eastern guy came downstairs.**
 6 Q. The middle eastern guy came
 7 downstairs, you heard a commotion and then you went
 8 up or then they went up?
 9 A. **Then both of them went up.**
 10 Q. What happened when they went up?
 11 A. **I just heard noises.**
 12 Q. What kind of noises?
 13 A. **Loud noises.**
 14 Q. Sound like things banging around,
 15 people yelling?
 16 A. **Banging around.**
 17 Q. What happened next?
 18 A. **The shorter African American came back**
 19 **downstairs for me.**
 20 Q. This is the same individual who
 21 sexually assaulted you; is that correct?
 22 A. **Yes.**
 23 Q. Did anybody else come back down with
 24 him?
 25 A. **No.**

- 1 Q. How long was he gone?
 2 A. Not very long.
 3 Q. At this point during this whole time
 4 period had you had an opportunity to see what was
 5 happening with Eric?
 6 A. **No.**
 7 Q. What about the second black male, the
 8 taller of the two?
 9 A. **No.**
 10 Q. When the shorter of the two black
 11 males, the first who sexually assaulted you came
 12 back down, what happened next?
 13 A. **He took me upstairs.**
 14 Q. And how did he do that?
 15 A. **Led me upstairs. He told me he wasn't**
 16 **going to let me bump into anything. He took me**
 17 **upstairs.**
 18 Q. Did you still have the swim trunks on
 19 your head?
 20 A. **Yes.**
 21 Q. Do you recall what you were wearing at
 22 that time?
 23 A. **My night gown.**
 24 Q. An where did he lead you to?
 25 A. **The bathroom in the master bedroom.**

- 1 Q. When you're going through there were
 2 you able to see where he was leading you to, through
 3 your swim trunks -- his swim trunks?
 4 A. **Yes.**
 5 Q. Did you see Eric or the other black
 6 male or the middle eastern gentleman?
 7 A. **Yes.**
 8 Q. Who did you see?
 9 A. **I saw Eric, the middle eastern**
 10 **gentleman and the taller African American.**
 11 Q. Where were they?
 12 A. **Right on the side of the stairs before**
 13 **the entrance to the bedroom.**
 14 Q. Right by where the stairwell -- at the
 15 top of the stairwell?
 16 A. **Yes, to the right of it.**
 17 Q. Did you see what condition Eric was in
 18 at the time?
 19 A. **No, I didn't see.**
 20 Q. Did you have an opportunity to say
 21 anything to him or did he have an opportunity to say
 22 anything to you?
 23 A. **No.**
 24 Q. Could you see if Eric was bound or
 25 not?

1 A. **I just got a brief glimpse of him. I**
2 **didn't see.**

3 MR. TURNER: Approach the witness?

4 THE COURT: You may.

5 BY MR. TURNER:

6 Q. Showing you what has been marked
7 State's proposed exhibit 34, I'll ask you to take a
8 look at that and tell me if you recognize it.

9 A. **Yes.**

10 Q. What's depicted in that exhibit?

11 A. **That's where they had Eric.**

12 Q. Where is this located inside your
13 house?

14 A. **Directly upstairs.**

15 Q. Right at the top of the stairs?

16 A. **Yes.**

17 Q. There's an open door that's right next
18 to where the stair -- I guess the railing of the
19 stairwell is; is that correct?

20 A. **Yes.**

21 Q. What leads -- what room is that?

22 A. **That's my bedroom.**

23 Q. Does this fairly and accurately
24 depicts that particular location as it appeared on
25 the evening that this occurred?

1 A. **Yes.**

2 MR. TURNER: State moves to admit
3 state's proposed Exhibit 34.

4 THE COURT: Is there an objection?

5 MS. RADOSTA: No objection.

6 THE COURT: Received.

7 MR. TURNER: Move to publish?

8 THE COURT: You may.

9 BY MR. TURNER:

10 Q. You were led into the bathroom?

11 A. **Yes.**

12 Q. This is a bathroom connected to the
13 master bedroom?

14 A. **Yes.**

15 Q. Do you have to go through those double
16 doors or those doors into the bedroom, master
17 bedroom in order to get to the bathroom?

18 A. **Yes.**

19 Q. He led you through there into the
20 master bedroom?

21 A. **Yes.**

22 Q. And what happened when he took you
23 into the bathroom?

24 A. **He took me right out of it towards the**
25 **bed.**

1 Q. What did he do?

2 What did he have you do when you got
3 to the bed?

4 A. **He put me on the bed and he told me to**
5 **get into the doggie-style position.**

6 Q. Did you in fact do that?

7 A. **Yes.**

8 Q. How were you positioned on the bed?
9 Were you facing the --

10 A. **I was facing the window so it was --**
11 **um --**

12 Q. Were you facing towards the headboard
13 or facing towards the kind of the opposite angle?

14 A. **The opposite towards the -- opposite**
15 **of the headboard.**

16 Q. He told you to get in the doggie
17 position?

18 A. **Yes.**

19 Q. Was that the words he used?

20 A. **Yes.**

21 Q. And did you do that?

22 A. **Yes.**

23 Q. At this point do you know whether he
24 still had a weapon?

25 A. **I don't remember.**

1 Q. What did he do after he told you to
2 get into that position?

3 A. **He sexually assaulted me again.**

4 Q. How did he do that?

5 A. **He put his penis inside of me.**

6 Q. Did he do anything to you before he
7 did that?

8 A. **I think he placed his fingers in my**
9 **vagina again before --**

10 Q. You said again.

11 A. **-- before he penetrated.**

12 Q. You say he placed his fingers in your
13 vagina, again.

14 Is that what you just testified to?

15 A. **Yes.**

16 Q. Do you recall an incident prior to
17 that where he did that?

18 A. **Downstairs.**

19 Q. Let's back up a little bit then.

20 A. **Okay.**

21 Q. When do you recall the first time that
22 this black male put his fingers inside your vagina?

23 A. **The first time?**

24 Q. Yes.

25 A. **Downstairs on the leather couch.**

**PLEADING
CONTINUES
IN NEXT
VOLUME**

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ALEXANDER HENDERSON,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: 05C212968

Docket No: 85367

RECORD ON APPEAL VOLUME 1

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INFO

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9:00 A.M.
PD

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JOSEPH ALEXANDER HENDERSON,
#1502730

Defendant.

Case No: C212968
Dept No: XIV

I N F O R M A T I O N

STATE OF NEVADA)
COUNTY OF CLARK) ss.

DAVID ROGER, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That JOSEPH ALEXANDER HENDERSON, the Defendant above named, having committed the crimes of **CONSPIRACY TO COMMIT BURGLARY (Gross Misdemeanor - NRS 199.480. 205.060); BURGLARY WHILE IN POSSESSION OF A FIREARM (Felony - NRS 205.060); CONSPIRACY TO COMMIT FIRST DEGREE KIDNAPPING (Felony - NRS 199.480, 200.310, 200.320); FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Felony - NRS 200.310, 200.320, 193.165); CONSPIRACY TO COMMIT SEXUAL ASSAULT (Felony - NRS 199.480, 200.364, 200.366); SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Felony - NRS 200.364, 200.366, 193.165); CONSPIRACY TO COMMIT**

ROBBERY (Felony - NRS 199.480, 200.380); ROBBERY WITH USE OF A DEADLY WEAPON (Felony - NRS 200.380, 193.165); OPEN OR GROSS LEWDNESS (Gross Misdemeanor - NRS 201.210); and BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Felony - NRS 200.481.2e), on or about the 3rd day of September, 2004, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT 1 - CONSPIRACY TO COMMIT BURGLARY

did then and there meet with Unknown Individuals and between themselves, and each of them with the other, wilfully and unlawfully conspire and agree to commit the crime of burglary, and in furtherance of said conspiracy, Defendant did commit the acts as set forth in Count 2, said acts being incorporated by this reference as though fully set forth herein.

COUNT 2 - BURGLARY WHILE IN POSSESSION OF A FIREARM

did then and there wilfully, unlawfully, and feloniously enter, while in possession of a firearm, and with intent to commit larceny and/or robbery and/or sexual assault, that certain building occupied by JULIE KIM and/or ERIC BERNZWEIG, located at 7833 Lonesome Harbor, Las Vegas, Clark County, Nevada.

COUNT 3 - CONSPIRACY TO COMMIT FIRST DEGREE KIDNAPPING

did then and there meet with unknown individuals and between themselves, and each of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit the crime of first degree kidnapping, and in furtherance of said conspiracy, Defendant did commit the acts as set forth in Counts 4 and 5, said acts being incorporated by this reference as though fully set forth herein.

COUNT 4 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

did wilfully, unlawfully, feloniously, and without authority of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away JULIE KIM, a human being, with the intent to hold or detain the said JULIE KIM against her will, and without her consent, for the purpose of committing sexual assault and/or robbery, said Defendant using a

1 deadly weapon, to-wit: a firearm, during the commission of said crime, the Defendant being
2 responsible under one or more of the following principles of criminal liability; to-wit: (1) by
3 the Defendant directly committing the acts set forth; and/or (2) the Defendant and Unknown
4 Individuals conspiring with each other to commit the offense of First Degree Kidnapping
5 with Use of a Deadly Weapon whereby the defendant and Unknown Individuals are each
6 vicariously liable for the foreseeable acts of the other conspirators when the acts were in
7 furtherance of the conspiracy; and/or (2) the Defendant and Unknown Individuals aiding
8 or abetting in the commission of the crime by accompanying each other to the crime scene
9 where (they bound Julie Kim at gunpoint and separated her from Eric Bernzweig whereupon
10 she was sexually assaulted and/or robbed, the Defendant and Unknown Individuals
11 encouraging one another throughout by actions and words; acting in concert throughout and
12 fleeing the scene together.

13 COUNT 5 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

14 did wilfully, unlawfully, feloniously, and without authority of law, seize, confine,
15 inveigle, entice, decoy, abduct, conceal, kidnap, or carry away ERIC BERNZWEIG, a
16 human being, with the intent to hold or detain the said ERIC BERNZWEIG against his will,
17 and without his consent, for the purpose of committing robbery, said Defendant using a
18 deadly weapon, to-wit: a firearm, during the commission of said crime, the Defendant being
19 responsible under one or more of the following principles of criminal liability; to-wit: (1) by
20 the Defendant directly committing the acts set forth; and/or (2) the Defendant and Unknown
21 Individuals conspiring with each other to commit the offense of First Degree Kidnapping
22 with Use of a Deadly Weapon whereby the defendant and Unknown Individuals are each
23 vicariously liable for the foreseeable acts of the other conspirators when the acts were in
24 furtherance of the conspiracy; and/or (2) the Defendant and Unknown Individuals aiding
25 or abetting in the commission of the crime by accompanying each other to the crime scene
26 where they bound Eric Bernzweig at gunpoint and separated him from Julie Kim whereupon
27 he was robbed, the Defendant and Unknown Individual encouraging one another throughout
28 by actions and words; acting in concert throughout and fleeing the scene together.

1 COUNT 6 - CONSPIRACY TO COMMIT SEXUAL ASSAULT

2 did then and there meet with unknown individuals and between themselves, and each
3 of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit
4 the crime of sexual assault, and in furtherance of said conspiracy, Defendant did commit the
5 acts as set forth in Counts 7, and 8, said acts being incorporated by this reference as though
6 fully set forth herein.

7 COUNT 7 - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

8 did then and there wilfully, unlawfully, and feloniously sexually assault and subject
9 JULIE KIM, a female person, to sexual penetration, to-wit: sexual intercourse, by placing
10 his penis into the genital opening of the said JULIE KIM, against her will, said Defendant
11 using a deadly weapon, to-wit: a firearm, during the commission of said crime.

12 COUNT 8 - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

13 did then and there wilfully, unlawfully, and feloniously sexually assault and subject
14 JULIE KIM, a female person, to sexual penetration, to-wit: sexual intercourse, by placing
15 his penis into the genital opening of the said JULIE KIM, against her will, said Defendant
16 using a deadly weapon, to-wit: a firearm, during the commission of said crime.

17 COUNT 9 - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

18 did then and there wilfully, unlawfully, and feloniously sexually assault and subject
19 JULIE KIM, a female person, to sexual penetration, to-wit: digital penetration, by placing
20 his finger(s) into the genital opening of the said JULIE KIM, against her will, said Defendant
21 using a deadly weapon, to-wit: a firearm, during the commission of said crime.

22 COUNT 10 - CONSPIRACY TO COMMIT ROBBERY

23 did then and there meet with unknown individuals and between themselves, and each
24 of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit
25 the crime of robbery, and in furtherance of said conspiracy, Defendant did commit the acts
26 as set forth in Counts 10, and 11, said acts being incorporated by this reference as though
27 fully set forth herein.

28 . . .

1 COUNT 11 - ROBBERY WITH USE OF A DEADLY WEAPON

2 did then and there wilfully, unlawfully, and feloniously take personal property, to-wit:
3 lawful money of the United States, from the person of JULIE KIM, or in her presence, by
4 means of force or violence or fear of injury to, and without the consent and against the will
5 of the said JULIE KIM, said Defendant using a deadly weapon, to-wit: a firearm, during the
6 commission of said crime, the Defendant being responsible under one or more of the
7 following principles of criminal liability; to-wit: (1) by the Defendant directly committing
8 the acts set forth; and/or (2) the Defendant and Unknown Individuals conspiring with each
9 other to commit the offense of Robbery with Use of a Deadly Weapon whereby the
10 defendant and Unknown Individuals are each vicariously liable for the foreseeable acts of
11 the other conspirators when the acts were in furtherance of the conspiracy; and/or (2) the
12 Defendant and Unknown Individuals aiding or abetting in the commission of the crime by
13 accompanying each other to the crime scene where they bound Julie Kim at gunpoint and
14 separated him from Eric Bernzweig whereupon she was robbed, encouraging one another
15 throughout by actions and words; acting in concert throughout and fleeing the scene
16 together.

17 COUNT 12- ROBBERY WITH USE OF A DEADLY WEAPON

18 did then and there wilfully, unlawfully, and feloniously take personal property, to-wit:
19 lawful money of the United States, from the person of ERIC BERNZWEIG, or in his
20 presence, by means of force or violence or fear of injury to, and without the consent and
21 against the will of the said ERIC BERNZWEIG, said Defendant using a deadly weapon, to-
22 wit: a firearm, during the commission of said crime, the Defendant being responsible under
23 one or more of the following principles of criminal liability; to-wit: (1) by the Defendant
24 directly committing the acts set forth; and/or (2) the Defendant and Unknown Individuals
25 conspiring with each other to commit the offense of Robbery with Use of a Deadly Weapon
26 whereby the defendant and Unknown Individuals are each vicariously liable for the
27 foreseeable acts of the other conspirators when the acts were in furtherance of the
28 conspiracy; and/or (2) the Defendant and Unknown Individuals aiding or abetting in the

1 commission of the crime by accompanying each other to the crime scene where they bound
2 Eric Bernzweig at gunpoint and separated him from Julie Kim whereupon he was robbed,
3 encouraging one another throughout by actions and words; acting in concert throughout and
4 fleeing the scene together.

5 COUNT 13 - OPEN OR GROSS LEWDNESS

6 did then and there wilfully and unlawfully commit an act of open or gross lewdness
7 by placing his mouth and/or tongue on the breast(s) of JULIE KIM.

8 COUNT 14 - BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN
9 SUBSTANTIAL BODILY HARM

10 did then and there wilfully, unlawfully and feloniously use force or violence upon the
11 person of another, to-wit: ERIC BERNZWEIG, with use of a deadly weapon, to-wit: a
12 firearm, by striking the said ERIC BERNZWEIG on the head with said firearm, resulting in
13 substantial bodily harm to the said ERIC BERNZWEIG.

14 DAVID ROGER
15 DISTRICT ATTORNEY
16 Nevada Bar #002781

17 BY /s//R. BRAD TURNER
18 R. BRAD TURNER
19 Chief Deputy District Attorney
20 Nevada Bar #006526
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Names of witnesses known to the District Attorney's Office at the time of filing this
Information are as follows:

NAME

ADDRESS

BERCH, HENRY – LVMPD

BERNZWEIG, ERIC – 3886 BILTMORE BAY, LVN 89147

CUSTODIAN OF RECORDS – LVMPD RECORDS

EBBERT, LINDA – UNIVERSITY MEDICAL CENTER

GUENTHER, KATHY – LVMPD P#6109

JEFFRIES, MICHAEL – LVMPD P#5302

KIM, JULIE – 3886 BILTMORE BAY, LVN 89147

WELCH, DAVID – LVMPD P#1418

DA#05F05146X/mmww/SVU
LVMPD EV#0409030152
CONSP;BURG W/WPN;1ST
DEG KIDNAP W/WPN;SEX
ASSLT W/WPN; ROBB W/WPN;
OG LEWD;BWDW W/SBH - GM/F
(TK5)

● ORIGINAL ●

FILE

JUL 19 3 37 PM '05

Shirley B. Kingma
CLERK

0205
PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

JOSEPH ALEXANDER HENDERSON,

Defendant.

CASE NO. C212968X

DEPT. NO. XIV

DATE: July 21, 2005

TIME: 9:00 A.M.

NOTICE OF MOTION AND MOTION FOR SETTING OF REASONABLE BAIL

COMES NOW, the Defendant, JOSEPH ALEXANDER HENDERSON, by and through his attorney, JAMES J RUGGEROLI, Deputy Public Defender, and moves this Honorable Court for an order releasing the Defendant from custody on his own recognizance or, in the alternative, for the setting of bail in a reasonable amount.

This Motion is based upon the attached Declaration of Counsel, any documents attached hereto, argument of Counsel and any information provided to the Court at the time set for hearing this motion.

DATED this 19 of July, 2005.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By

[Signature]
JAMES J RUGGEROLI, #7891
Deputy Public Defender

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JUL 19 2005
COUNTY CLERK

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DECLARATION

JAMES J RUGGEROLI makes the following declaration:

1. That I am an attorney duly licensed to practice law in the State of Nevada; that I am the Deputy Public Defender assigned to represent the Defendant in the instant matter, and that I am familiar with the facts and circumstances of this case.

2. That Mr. Henderson has lived in the Las Vegas community since 1993.

3. That Mr. Henderson's close friends and family reside in Las Vegas, including: his girlfriend, Elizabeth Ama, his grandmother and grandfather, his aunts, and several cousins.

4. That Mr. Henderson's friends and family would vouch for his continued presence before this court.

5. That Mr. Henderson has a local residence where he will stay if released: 5900 W. Tropicana, Las Vegas, NV.

6. That Mr. Henderson has been steadily employed during his time in Las Vegas, and that he has been employed at the Aladdin Hotel Casino for the last years, prior to his arrest in this matter.

7. That Mr. Henderson presently has no bail in this case.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 19 day of July, 2005.



JAMES J RUGGEROLI

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NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the foregoing Motion For Own
Recognizance Release, Or, In The Alternative, For Setting Of Reasonable Bail will be heard on 21st
day of July, 2005, at 9:00 a.m. in Department No. XIV District Court.

DATED this 19 day of July, 2005.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By 
JAMES J RUGGEROLI, #7891
Deputy Public Defender

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Motion For Own Recognizance
Release, Or, In The Alternative, For Setting Of Reasonable Bail is hereby acknowledged this
19 day of July, 2005.

CLARK COUNTY DISTRICT ATTORNEY

By 


CLERK

OPPS

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
R. BRAD TURNER
Chief Deputy District Attorney
Nevada Bar #006526
200 South Third Street
Las Vegas, Nevada 89155-2212
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,	)	CASE NO: C212968
)	
-vs-	)	DEPT NO: XIV
)	
JOSEPH ALEXANDER HENDERSON,)	
#1502730)	
)	
Defendant.)	

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR SETTING OF
REASONABLE BAIL

DATE OF HEARING: 07/21/05
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through R. BRAD TURNER, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion For Setting Of Reasonable Bail.

This Opposition 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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1 **STATEMENT OF THE CASE**

2 Defendant is charged by way of Information with:

- 3 1. Conspiracy to Commit Burglary
- 4 2. Burglary While in Possession of a Firearm.
- 5 3. Conspiracy to Commit First Degree Kidnapping.
- 6 4. First Degree Kidnapping with use of a Deadly Weapon.
- 7 5. Conspiracy to Commit Sexual Assault.
- 8 6. Sexual Assault with use of a Deadly Weapon.
- 9 7. Conspiracy to Commit Robbery.
- 10 8. Robbery with use of a Deadly Weapon
- 11 9. Open or Gross Lewdness.
- 12 10. Battery with use of a Deadly Weapon Resulting in Substantial Bodily Harm.

13 The above crimes being committed against Julie Kim and/or Eric Bernzweig in their
14 residence located at 7833 Lonesome Harbor.

15 On July 19, 2005, Defendant filed the instant Motion for Setting of Reasonable Bail.

16 **ARGUMENT**

17 Nevada Revised Statute 178.498 provides:

18 If the Defendant is admitted to bail, the bail must be set at an
19 amount which in the judgment of the magistrate will reasonably
20 ensure the appearance of the defendant and the safety of other
persons and of the community, having regard to:

- 21 1. The nature and circumstances of the offense charged;
- 22 2. The financial ability of the defendant to give bail;
- 23 3. The character of the defendant; and
4. The factors listed in NRS 178.4835.

24 Nevada Revised Statute 178.4853 provides as follows:

25 In deciding whether there is good cause to release a person
26 without bail, the court as a minimum shall consider the following
factors concerning the person:

- 27 1. The length of his residence in the community;
- 28 2. The status and history of his employment;
3. His relationships with his spouse and children, parents or

1 other members of his family and with his close friends;
2 4. His reputation, character and mental conditions;
3 5. His prior criminal record, including any record of his
4 appearing or failing to appear after release on bail or without
5 bail;
6 6. The identity of responsible members of the community who
7 would vouch for the defendant's responsibility;
8 7. The nature of the offense with which he is charged, the
9 apparent probability of conviction and the likely sentence,
10 insofar as these facts relate to the risk of his not appearing;
11 8. The nature and seriousness of the danger to any person or the
12 community that would be posed by the person's release;
13 9. The likelihood of more criminal activity by the person after he
14 is released; and
15 10. Any other factors concerning his ties to the community or
16 bearing on the risk that he may willfully fail to appear.

17 Defendant begins by asserting that he has lived in the Las Vegas Community since
18 1993. Actually, between 1986 and 1998, Defendant was off and on a resident of the
19 California Department of Corrections prison system. A reading of his NCIC criminal history
20 printout indicates that he was convicted and incarcerated during that time for the crimes of:
21 Transport/Sell Narcotic/Controlled Substance 1986, Assault with a Firearm on a Person
22 1991, Felon in Possession of a Firearm 1995 for which he was paroled and subsequently
23 revoked in 1998 to finish his prison term.

24 Defendant next speaks of his close ties to this community, his close friends and
25 relatives, and how they vouch for his continued presence before this court. Considering this
26 defendant's history of violent crime, it is unclear how anyone could or would influence this
27 particular defendant to remain in this jurisdiction should he be granted liberty. On March
28 12, 2005, Defendant was arrested in California on outstanding warrants from this
jurisdiction, as he attempted to flee and subsequently had to be extradited.

The defendant has been linked to the instant crimes through DNA evidence left by
him at the scene. Probability of conviction and extended prison time is high, thereby making
him a serious flight risk.

//

Considering the nature and seriousness of the charges against the defendant, it is readily apparent why he is in custody without bail. Any expectation that this defendant would appear for trial if granted liberty, under any circumstance, is misplaced. Considering his demonstrated moral turpitude and his previous attempt to flee this jurisdiction, there is little doubt that he would flee again if given the opportunity to do so, regardless of the amount of bail.

CONCLUSION

Based on the foregoing, the State respectfully requests that Defendant's Motion for Setting of Reasonable Bail be denied.

DATED this 21st day of July, 2005.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s//R. BRAD TURNER

R. BRAD TURNER
Chief Deputy District Attorney
Nevada Bar #006526

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Opposition, was made this 20th day of July, 2005, by facsimile transmission to:

JAMES J. RUGGEROLI, Deputy Public Defender
455-5112

BY M. Warner
Employee of the District Attorney's Office

mmw/SVU

CA 5956

BAIL BOND

FILED

In the Eighth Judicial District Court, County of Clark, State of Nevada. **AUG 2 9 40 AM '05**

STATE OF NEVADA

Bail Bond No. S50 / 00958302

(Power of attorney with this number must be attached)

vs.

CLERK

Defendant: HENDERSON, JOSEPH ALEXANDER Case No. C-212968

Know all men by these presents:

That we, BOB'S BAIL BONDS as principal and SENECA INSURANCE COMPANY as the surety, heretofore authorized to transact bail bonds in the State of Nevada, are held and bound, to the above court, for payment in the sum of 46,000.00 dollars, whereof, we bind ourselves, our heirs, executors, administrators, and successors, and assigns, jointly, severally, and firmly, by these presents. The condition of this obligation is such that the said defendant shall appear from day-to-day and term-to-term of said court to answer the charges(s) of

CONSP ROBB W/DW, ROBB W/DW, OPEN AND GROSS LEWD, BATT W/SBH, CONSP BURG, ASSAULT W/DW

and not depart the same without leave, then this obligation to be void, else to remain in full force and effect.

This bond shall be in full force and effect until any of the following events:

- 1) Exoneration by court order, 2) Termination of this case by dismissal or conviction

Signed and sealed this 30 day of JULY, 2005.

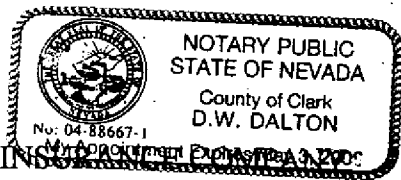
Robert E. McElroy
Attorney in fact (signature)

Subscribed and sworn before me, a notary for the State of Nevada,
This 30 day of JULY, 2005.

D.W. Dalton

Place Notary seal here.

Notary Public
Approved this _____ day of _____, 2005.



By **BOB'S BAIL BONDS**
812 E. OGDEN AVE.
LAS VEGAS, NV 89101
(702) 385-8989

SENECA INSURANCE COMPANY
MANAGING AGENT BAIL USA, INC.
P.O. BOX 806, GREENVILLE, PA 16125
1-800-245-0366

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COUNTY CLERK

COUNTY CLERK 145

WARNING! DO NOT ACCEPT THIS DOCUMENT UNLESS YOU CAN SEE A TRUE WATERMARK AND VISIBLE FIBERS FROM BOTH SIDES.



POWER OF ATTORNEY

VALID IF POSTED BY:

November 15, 2005

POWER AMOUNT \$

51,000

POWER NO.

\$50

00958302

KNOW ALL MEN BY THESE PRESENTS that Seneca Insurance Company, Inc., a corporation duly organized and existing under the laws of the State of New York, has constituted and appointed, and does hereby constitute and appoint the named Executing Agent its true and lawful Attorney-in-Fact, with full power and authority to sign the company's name and affix its corporate seal to, and deliver on its behalf as surety, any and all obligations as herein provided, and the execution of such obligations in pursuance of these presents shall be as binding upon the company as fully and to all intents and purposes as if done by the regularly elected officers of said company at its home office in their own proper person; and the said company hereby ratifies and confirms all and whatsoever its said attorney-in-fact may lawfully do and perform in the premises by virtue of these presents.

The obligation of the company shall not exceed the sum of

FIFTY ONE THOUSAND DOLLARS

Authority of such Attorney-in-Fact is limited to appearance bonds and cannot be construed to guarantee defendant's future lawful conduct, adherence to travel limitation, fines, restitution, payments or penalties, or any other condition imposed by a court not specifically related to court appearance. This Power of Attorney is for use with Bail Bonds only and is void if altered, erased, or used with other powers of this company. It is not valid if used in connection with Federal Immigration Bonds or Civil Bonds. A separate Power of Attorney must be attached to each bond executed. STACKING OF POWERS IS STRICTLY PROHIBITED! No more than one power from this Surety may be used to execute any one bond. Powers of Attorney must not be returned to Attorney-in-Fact, but should remain a permanent part of the court records.

IF BOND FORFEITS, attach a copy of this Power of Attorney to the forfeiture notice and mail to SENECA INSURANCE COMPANY, INC., ATTN: BAIL BOND DEPT, 160 WATER ST., 16TH FL., NEW YORK, NY 10038 AND the Executing Agent named below at: **BOB'S BAIL BONDS**

IN WITNESS WHEREOF, Seneca Insurance Company, Inc. has caused these presents to be signed by its duly authorized attorney-in-fact, proper for the purpose and its corporate seal to be hereunto affixed this 30 day of JULY 2005

Bond Amount \$ 46,000.00

Appearance Date _____ Time _____

Defendant HENDERSON, JOSEPH ALEXANDER

D.O.B. _____ SS # _____

Court LAS VEGAS DISTRICT

City LAS VEGAS State NV

Charge CONSP ROB W/DW, ROBB W/DW, OPEN AND GROSS

Charge SEX ASSAULT W/DW

Case No. C-212968

If rewrite, Original No. _____ Amount \$ _____

Executing Agent ROBERT E. MURRAY

SENPOA121-0198

Attorney-in-Fact

Cheryl L Burns
CHERYL BURNS

Secretary

Marc T.A. Wolin
MARC T.A. WOLIN

President

Douglas M. Libby
DOUGLAS M. LIBBY



BATT W/SEN CONSP BURG
FOR STATE USE ONLY
NOT VALID IF USED IN FEDERAL COURT

IT IS UNLAWFUL TO PRINT OR REPRODUCE THIS FORM.

DESIGNED BY: CORNERSTONE GRAPHICS INC.

COURT COPY



POWER OF ATTORNEY

VALID IF POSTED BY:

November 15, 2005

POWER AMOUNT \$

51,000

POWER NO. S50

00958302

KNOW ALL MEN BY THESE PRESENTS that Seneca Insurance Company, Inc., a corporation duly organized and existing under the laws of the State of New York, has constituted and appointed, and does hereby constitute and appoint the named Executing Agent its true and lawful Attorney-in-Fact, with full power and authority to sign the company's name and affix its corporate seal to, and deliver on its behalf as surety, any and all obligations as herein provided, and the execution of such obligations in pursuance of these presents shall be as binding upon the company as fully and to all intents and purposes as if done by the regularly elected officers of said company at its home office in their own proper person; and the said company hereby ratifies and confirms all and whatsoever its said attorney-in-fact may lawfully do and perform in the premises by virtue of these presents.

The obligation of the company shall not exceed the sum of

FIFTY ONE THOUSAND DOLLARS

Authority of such Attorney-in-Fact is limited to appearance bonds and cannot be construed to guarantee defendant's future lawful conduct, adherence to travel limitation, fines, restitution, payments or penalties, or any other condition imposed by a court not specifically related to court appearance. This Power of Attorney is for use with Bail Bonds only and is void if altered, erased, or used with other powers of this company. It is not valid if used in connection with Federal Immigration Bonds or Civil Bonds. A separate Power of Attorney must be attached to each bond executed. **STACKING OF POWERS IS STRICTLY PROHIBITED!** No more than one power from this Surety may be used to execute any one bond. Powers of Attorney must not be returned to Attorney-in-Fact, but should remain a permanent part of the court records.

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IN WITNESS WHEREOF, Seneca Insurance Company, Inc. has caused these presents to be signed by its duly authorized attorney-in-fact, proper for the purpose and its corporate seal to be hereunto affixed this 30 day of JULY 2005

Bond Amount \$ 46,000.00

Attorney-in-Fact

Cheryl L Burns
CHERYL BURNS

Appearance Date _____ Time _____

Defendant HENDERSON, JOSEPH ALEXANDER

Secretary

Marc T.A. Wolin
MARC T.A. WOLIN

D.O.B. _____ SS # _____

Court LAS VEGAS DISTRICT

President

Douglas M. Libby
DOUGLAS M. LIBBY

City LAS VEGAS State NV

Charge SEX ASSAULT W/DW Case No. C-212968



BATT W/SEX CONSP BURG

NOT VALID IF USED IN FEDERAL COURT

If rewrite, Original No. _____ Amount \$ _____

Executing Agent ROBERT E. MURRAY

SENPOA121-0199

DESIGNED BY: CORNERSTONE GRAPHICS INC.

COLLATERAL RECORD

Please indicate the types and amounts of collateral taken.

☐ Indemnity Agreement \$ _____
☐ Promissory Note \$ _____

☐ Cash \$ _____
☐ CD Assignment \$ _____

☐ Real Property \$ _____
☐ Personal Property \$ _____

☐ None

INDEMNITOR COPY

BAIL BOND

CA
5936

In the Eighth Judicial District Court, County of Clark, State of Nevada

FILED

STATE OF NEVADA

Bail Bond No. 5501-00968 D640 AM '05

(Power of attorney with this number must be attached)

vs.

Defendant HENDERSON, JOSEPH ALEXANDER

Case No. C-21296 *Shirley B. Longoria*
CLERK

Know all men by these presents:

That we, BOB'S BAIL BONDS as principal and SENECA INSURANCE COMPANY as the surety, heretofore authorized to transact bail bonds in the State of Nevada, are held and bound to the above court, for payment in the sum of: 40,000.00 Dollars, whereof, we bind ourselves, our heirs, executors, administrators, and successors, and assigns, jointly, severally, and firmly, by these presents. The condition of this obligation is such that the said defendant shall appear from day-to-day and term-to-term of said court to answer to the charge(s) of
BURG WHILE IN POSS OF D/W, KIDNAP 1ST W/DW, SEX ASSAULT W/DW 2CTS

and not depart the same without leave, then this obligation to be void, else to remain in full force and effect.

This bond shall be in full force and effect until any of the following events:

1) Exoneration by court order, 2) Termination of this case by dismissal or conviction.

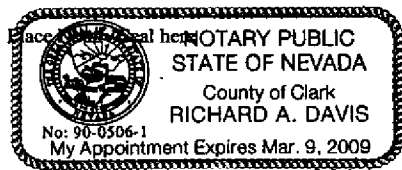
Signed and sealed this 30 day of JULY, 2005.

Robert E. Murray
Attorney in Fact (Signature)

Subscribed and sworn before me, a Notary for the State of Nevada.

This 30 day of JULY, 2005.

[Signature]
Notary Public



Approved this _____ day of _____, 2005.

By: _____

BOB'S BAIL BONDS OF LAS VEGAS
812 EAST OGDEN AVENUE
LAS VEGAS, NEVADA 89101
(702) 385-8989

SENECA INSURANCE COMPANY
MANAGING AGENT BAIL USA, INC.
P.O. BOX 806, GREENVILLE, PA
1-800-245-0366

COUNTY CLERK

AUG 02 2005

RECEIVED

RECEIVED

AUG -1 2005

COUNTY CLERK

WARNING! DO NOT ACCEPT THIS DOCUMENT UNLESS YOU CAN SEE A TRUE WATERMARK AND VISIBLE FIBERS FROM BOTH SIDES.



POWER OF ATTORNEY

VALID IF POSTED BY:

December 15, 2005

POWER AMOUNT \$

51,000

POWER NO. S50

00968164

KNOW ALL MEN BY THESE PRESENTS that Seneca Insurance Company, Inc., a corporation duly organized and existing under the laws of the State of New York, has constituted and appointed, and does hereby constitute and appoint the named Executing Agent its true and lawful Attorney-in-Fact, with full power and authority to sign the company's name and affix its corporate seal to, and deliver on its behalf as surety, any and all obligations as herein provided, and the execution of such obligations in pursuance of these presents shall be as binding upon the company as fully and to all intents and purposes as if done by the regularly elected officers of said company at its home office in their own proper person; and the said company hereby ratifies and confirms all and whatsoever its said attorney-in-fact may lawfully do and perform in the premises by virtue of these presents.

The obligation of the company shall not exceed the sum of

FIFTY ONE THOUSAND DOLLARS

Authority of such Attorney-in-Fact is limited to appearance bonds and cannot be construed to guarantee defendant's future lawful conduct, adherence to travel limitation, fines, restitution, payments or penalties, or any other condition imposed by a court not specifically related to court appearance. This Power of Attorney is for use with Bail Bonds only and is void if altered, erased, or used with other powers of this company. It is not valid if used in connection with Federal Immigration Bonds or Civil Bonds. A separate Power of Attorney must be attached to each bond executed. STACKING OF POWERS IS STRICTLY PROHIBITED! No more than one power from this Surety may be used to execute any one bond. Powers of Attorney must not be returned to Attorney-in-Fact, but should remain a permanent part of the court records.

IF BOND FORFEITS, attach a copy of this Power of Attorney to the forfeiture notice and mail to SENECA INSURANCE COMPANY, INC., ATTN: BAIL BOND DEPT., 160 WATER ST., 16TH FL., NEW YORK, NY 10038 AND the Executing Agent named below at: **BOB'S BAIL BONDS**

IN WITNESS WHEREOF, Seneca Insurance Company, Inc. has caused these presents to be signed by its duly authorized attorney-in-fact, proper for the purpose and its corporate seal to be hereunto affixed this 30 day of JULY 2005

Bond Amount \$ 40,000.00

Appearance Date _____ Time _____

Defendant HENDERSON, JOSEPH ALEXANDER

D.O.B. _____ SS # _____

Court LAS VEGAS DISTRICT

City LAS VEGAS State NV

Charge BURG WHILE IN POSS OF D/W, KIDNAP 1ST W/DW, SEX ASSAULT W/DW 2CTS

Case No. C-212968

If rewrite, Original No. _____ Amount \$ _____

Executing Agent ROBERT E. MURRAY

SENPOA121-0198

Attorney-in-Fact

Cheryl L. Burns
CHERYL BURNS

Secretary

Marc T.A. Wolin
MARC T.A. WOLIN

President

Douglas M. Libby
DOUGLAS M. LIBBY



**FOR STATE USE ONLY
NOT VALID IF USED IN FEDERAL COURT**

DESIGNED BY: CORNERSTONE GRAPHICS INC.

IT IS UNLAWFUL TO PRINT OR REPRODUCE THIS FORM.

COURT COPY



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VALID IF POSTED BY:

December 15, 2005

POWER AMOUNT \$

51,000

POWER NO. S50

00968164

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The obligation of the company shall not exceed the sum of

FIFTY ONE THOUSAND DOLLARS

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IN WITNESS WHEREOF, Seneca Insurance Company, Inc. has caused these presents to be signed by its duly authorized attorney-in-fact, proper for the purpose and its corporate seal to be hereunto affixed this **30** day of **JULY** **2005**

Bond Amount \$ **40,000.00**

Attorney-in-Fact

Cheryl Burns
CHERYL BURNS

Appearance Date **30** Time

Defendant **HENDERSON, JOSEPH ALEXANDER**

Secretary

Marc T.A. Wolin
MARC T.A. WOLIN

D.O.B. SS #

Court **LAS VEGAS DISTRICT**

President

Douglas M. Libby
DOUGLAS M. LIBBY

City **LAS VEGAS** State **NV**

**BURG WHILE IN POSS OF D/W, KIDNAP 1ST W/DW
SEX ASSAULT W/DW 2CTS**

Charge Case No. **C-212968**

If rewrite, Original No. Amount \$

Executing Agent **ROBERT E. MURRAY**



**FOR STATE USE ONLY
NOT VALID IF USED IN FEDERAL COURT**

SENPOA121-0198

DESIGNED BY: CORNERSTONE GRAPHICS INC.

COLLATERAL RECORD

Please indicate the types and amounts of collateral taken.

<input type="checkbox"/> Indemnity Agreement	\$	<input type="checkbox"/> Cash	\$	<input type="checkbox"/> Real Property	\$	<input type="checkbox"/> None
<input type="checkbox"/> Promissory Note	\$	<input type="checkbox"/> CD Assignment	\$	<input type="checkbox"/> Personal Property	\$	

**150
INDEMNITOR COPY**

BAIL BOND

CA 3956

FILED

In the Eighth Judicial District Court, County of Clark, State of Nevada

STATE OF NEVADA

Bail Bond No. Aug 23 9 40 AM '05

(Power of attorney with this number must be attached)

vs.

Shelly E. Pangione

Defendant HENDERSON, JOSEPH ALEXANDER

Case No. CLERK 0-210484

Know all men by these presents:

That we, BOB'S BAIL BONDS as principal and SENECA INSURANCE COMPANY as the surety, heretofore authorized to transact bail bonds in the State of Nevada, are held and bound to the above court, for payment in the sum of: 20,000.00 Dollars, whereof, we bind ourselves, our heirs, executors, administrators, and successors, and assigns, jointly, severally, and firmly, by these presents. The condition of this obligation is such that the said defendant shall appear from day-to-day and term-to-term of said court to answer to the charge(s) of

OPEN AND GROSS LEWDNESS

and not depart the same without leave, then this obligation to be void, else to remain in full force and effect.

This bond shall be in full force and effect until any of the following events:

1) Exoneration by court order, 2) Termination of this case by dismissal or conviction.

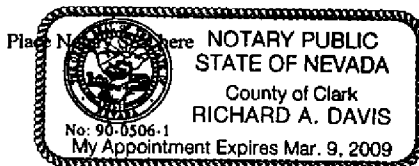
Signed and sealed this 30 day of JULY, 2005.

Shelly E. Pangione
Attorney in Fact (Signature)

Subscribed and sworn before me, a Notary for the State of Nevada.

This 30 day of JULY, 2005.

[Signature]
Notary Public



Approved this _____ day of _____, 2005.

By: _____

BOB'S BAIL BONDS OF LAS VEGAS
812 EAST OGDEN AVENUE
LAS VEGAS, NEVADA 89101
(702) 385-8989

SENECA INSURANCE COMPANY
MANAGING AGENT BAIL USA, INC.
P.O. BOX 806, GREENVILLE, PA
1-800-245-0366

RECEIVED

AUG - 1 2005

COUNTY CLERK

WARNING! DO NOT ACCEPT THIS DOCUMENT UNLESS YOU CAN SEE A TRUE WATERMARK AND VISIBLE FIBERS FROM BOTH SIDES.



POWER OF ATTORNEY

VALID IF POSTED BY:

April 1, 2006

POWER AMOUNT \$

26,000

POWER NO.

S25

01004046

KNOW ALL MEN BY THESE PRESENTS that Seneca Insurance Company, Inc., a corporation duly organized and existing under the laws of the State of New York, has constituted and appointed, and does hereby constitute and appoint the named Executing Agent its true and lawful Attorney-in-Fact, with full power and authority to sign the company's name and affix its corporate seal to, and deliver on its behalf as surety, any and all obligations as herein provided, and the execution of such obligations in pursuance of these presents shall be as binding upon the company as fully and to all intents and purposes as if done by the regularly elected officers of said company at its home office in their own proper person; and the said company hereby ratifies and confirms all and whatsoever its said attorney-in-fact may lawfully do and perform in the premises by virtue of these presents.

The obligation of the company shall not exceed the sum of

TWENTY SIX THOUSAND DOLLARS

Authority of such Attorney-in-Fact is limited to appearance bonds and cannot be construed to guarantee defendant's future lawful conduct, adherence to travel limitation, fines, restitution, payments or penalties, or any other condition imposed by a court not specifically related to court appearance. This Power of Attorney is for use with Bail Bonds only and is void if altered, erased, or used with other powers of this company. It is not valid if used in connection with Federal Immigration Bonds or Civil Bonds. A separate Power of Attorney must be attached to each bond executed. STACKING OF POWERS IS STRICTLY PROHIBITED! No more than one power from this Surety may be used to execute any one bond. Powers of Attorney must not be returned to Attorney-in-Fact, but should remain a permanent part of the court records.

IF BOND FORFEITS, attach a copy of this Power of Attorney to the forfeiture notice and mail to SENECA INSURANCE COMPANY, INC., ATTN: BAIL BOND DEPT., 160 WATER ST., 16TH FL., NEW YORK, NY 10038 AND the Executing Agent named below at: BOB'S BAIL BONDS

IN WITNESS WHEREOF, Seneca Insurance Company, Inc. has caused these presents to be signed by its duly authorized attorney-in-fact, proper for the purpose and its corporate seal to be hereunto affixed this 30 day of JULY 2005

Bond Amount \$ 20,000.00

Attorney-in-Fact

Cheryl L. Burns
CHERYL BURNS

Appearance Date _____ Time _____

Defendant HENDERSON, JOSEPH ALEXANDER

Secretary

Marc T.A. Wolin
MARC T.A. WOLIN

D.O.B. _____ SS # _____

Court LAS VEGAS DISTRICT

President

Douglas M. Libby
DOUGLAS M. LIBBY

City LAS VEGAS State NV

Charge OPEN AND GROSS LEWDNESS

Charge _____ Case No. C-210484

If rewrite, Original No. _____ Amount \$ _____

Executing Agent ROBERT E. MURRAY

SENPOA121-0198



FOR STATE USE ONLY
NOT VALID IF USED IN FEDERAL COURT

DESIGNED BY: CORNERSTONE GRAPHICS INC.

IT IS UNLAWFUL TO PRINT OR REPRODUCE THIS FORM.

COURT COPY



POWER OF ATTORNEY

VALID IF POSTED BY:

April 1, 2006

POWER AMOUNT \$

26,000

POWER NO. S25

01004046

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Bond Amount \$ 20,000.00

Attorney-in-Fact

Cheryl L Burns
CHERYL BURNS

Appearance Date _____ Time _____

Defendant HENDERSON, JOSEPH ALEXANDER

Secretary

Marc T.A. Wolin
MARC T.A. WOLIN

D.O.B. _____ SS # _____

Court LAS VEGAS DISTRICT

President

Douglas M. Libby
DOUGLAS M. LIBBY

City LAS VEGAS

State NV

Charge OPEN AND GROSS LEWDNESS

Case No. C-210484

If rewrite, Original No. _____ *Amount \$ _____

Executing Agent ROBERT E. MURRAY



**FOR STATE USE ONLY
NOT VALID IF USED IN FEDERAL COURT**

SENPOA121-0198

DESIGNED BY: CORNERSTONE GRAPHICS INC.

COLLATERAL RECORD

Please indicate the types and amounts of collateral taken.

☐ Indemnity Agreement \$ _____
☐ Promissory Note \$ _____

☐ Cash \$ _____
☐ CD Assignment \$ _____

☐ Real Property \$ _____
☐ Personal Property \$ _____

☐ None

INDEMNITOR COPY

at 5956

BAIL BOND

FILED

In the Eighth Judicial District Court, County of Clark, State of Nevada **AUG 2 9 40 AM '05**

STATE OF NEVADA

Bail Bond No. 825 01094201
(Power of attorney with this number must be attached)

vs.

Defendant: HENDERSON, JOSEPH ALEXANDER Case No. C-212968

Know all men by these presents:

That we, BOB'S BAIL BONDS as principal and SENECA INSURANCE COMPANY as the surety, heretofore authorized to transact bail bonds in the State of Nevada, are held and bound, to the above court, for payment in the sum of 20,000.00 dollars, whereof, we bind ourselves, our heirs, executors, administrators, and successors, and assigns, jointly, severally, and firmly, by these presents. The condition of this obligation is such that the said defendant shall appear from day-to-day and term-to-term of said court to answer the charges(s) of

KIDNAP 1ST W/DW, CONSP SEX ASSAULT W/DW

and not depart the same without leave, then this obligation to be void, else to remain in full force and effect.

This bond shall be in full force and effect until any of the following events:

1) Exoneration by court order, 2) Termination of this case by dismissal or conviction

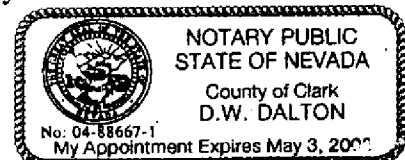
Signed and sealed this 30 day of JULY, 2005.

Robert E. M. M...
Attorney in fact (signature)

Subscribed and sworn before me, a notary for the State of Nevada,
This 30 day of JULY, 2005.

D.W. Dalton
Notary Public
Approved this _____ day of _____, 2005.

Place Notary seal here.



By BOB'S BAIL BONDS
812 E. OGDEN AVE.
LAS VEGAS, NV 89101
(702) 385-8989

SENECA INSURANCE COMPANY
MANAGING AGENT BAIL USA, INC.
P.O. BOX 806, GREENVILLE, PA 16125
1-800-245-0366

RECEIVED

AUG -1 2005

COUNTY CLERK

RECEIVED

AUG 02 2005

COUNTY CLERK

WARNING! DO NOT ACCEPT THIS DOCUMENT UNLESS YOU CAN SEE A TRUE WATERMARK AND VISIBLE FIBERS FROM BOTH SIDES.



POWER OF ATTORNEY

VALID IF POSTED BY:

April 1, 2006

POWER AMOUNT \$ **26,000**

POWER NO. **S25 01004181**

KNOW ALL MEN BY THESE PRESENTS that Seneca Insurance Company, Inc., a corporation duly organized and existing under the laws of the State of New York, has constituted and appointed, and does hereby constitute and appoint the named Executing Agent its true and lawful Attorney-in-Fact, with full power and authority to sign the company's name and affix its corporate seal to, and deliver on its behalf as surety, any and all obligations as herein provided, and the execution of such obligations in pursuance of these presents shall be as binding upon the company as fully and to all intents and purposes as if done by the regularly elected officers of said company at its home office in their own proper person; and the said company hereby ratifies and confirms all and whatsoever its said attorney-in-fact may lawfully do and perform in the premises by virtue of these presents.

The obligation of the company shall not exceed the sum of

TWENTY SIX THOUSAND DOLLARS

Authority of such Attorney-in-Fact is limited to appearance bonds and cannot be construed to guarantee defendant's future lawful conduct, adherence to travel limitation, fines, restitution, payments or penalties, or any other condition imposed by a court not specifically related to court appearance. This Power of Attorney is for use with Bail Bonds only and is void if altered, erased, or used with other powers of this company. It is not valid if used in connection with Federal Immigration Bonds or Civil Bonds. A separate Power of Attorney must be attached to each bond executed. **STACKING OF POWERS IS STRICTLY PROHIBITED!** No more than one power from this Surety may be used to execute any one bond. Powers of Attorney must not be returned to Attorney-in-Fact, but should remain a permanent part of the court records.

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Bond Amount \$ 20,000.00

Appearance Date _____ Time _____

Defendant HENDERSON, JOSEPH ALEXANDER

D.O.B. _____ SS # _____

Court LAS VEGAS DISTRICT

City LAS VEGAS State NV

Charge KIDNAP 1ST W/DW, CONSP SEX ASSAULT W/

Charge _____ Case No. C-212968

If rewrite, Original No. _____ Amount \$ _____

Executing Agent ROBERT E. MURRAY

SENPOA121-0198

Attorney-in-Fact

Cheryl L Burns
CHERYL BURNS

Secretary

Marc T.A. Wolin
MARC T.A. WOLIN

President

Douglas M. Libby
DOUGLAS M. LIBBY



**FOR STATE USE ONLY
NOT VALID IF USED IN FEDERAL COURT**

DESIGNED BY: CORNERSTONE GRAPHICS INC.

IT IS UNLAWFUL TO PRINT OR REPRODUCE THIS FORM.

COURT COPY



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Bond Amount \$ 20,000.00

Attorney-in-Fact

Cheryl L Burns
CHERYL BURNS

Appearance Date _____ Time _____

Defendant HENDERSON, JOSEPH ALEXANDER

Secretary

Marc T.A. Wolin
MARC T.A. WOLIN

D.O.B. _____ SS # _____

Court LAS VEGAS DISTRICT

President

Douglas M. Libby
DOUGLAS M. LIBBY

City LAS VEGAS State NV

Charge KIDNAP 1ST W/DW; CONSP SEX ASSAULT W/DW

Case No. C-212968

If rewrite, Original No. _____ Amount \$ _____

Executing Agent ROBERT E. MURRAY



FOR STATE USE ONLY
NOT VALID IF USED IN FEDERAL COURT

SENPOA121-0198

DESIGNED BY: CORNERSTONE GRAPHICS INC.

COLLATERAL RECORD

Please indicate the types and amounts of collateral taken.

☐ Indemnity Agreement \$ _____

☐ Cash \$ _____

☐ Real Property \$ _____

☐ Promissory Note \$ _____

☐ CD Assignment \$ _____

☐ Personal Property \$ _____

☐ None

INDEMNITOR COPY

BAIL BOND

FILED

In the Eighth Judicial District Court, County of Clark, State of Nevada **Aug 2 9 40 AM '05**

STATE OF NEVADA

Bail Bond No. 825 01004182
(Power of attorney with this number must be attached)
CLERK

vs.

Defendant: HENDERSON, JOSEPH ALEXANDER Case No. C-212968

Know all men by these presents:

That we, BOB'S BAIL BONDS as principal and SENECA INSURANCE COMPANY as the surety, heretofore authorized to transact bail bonds in the State of Nevada, are held and bound, to the above court, for payment in the sum of 20,000.00 dollars, whereof, we bind ourselves, our heirs, executors, administrators, and successors, and assigns, jointly, severally, and firmly, by these presents. The condition of this obligation is such that the said defendant shall appear from day-to-day and term-to-term of said court to answer the charges(s) of
ROBB W/DW, CONSP KIDNAP 1ST W/DW

and not depart the same without leave, then this obligation to be void, else to remain in full force and effect.

This bond shall be in full force and effect until any of the following events:

1) Exoneration by court order, 2) Termination of this case by dismissal or conviction

Signed and sealed this 30 day of JULY, 2005.

Art E. M...
Attorney in fact (signature)

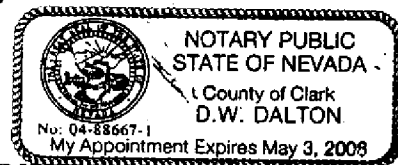
Subscribed and sworn before me, a notary for the State of Nevada,
This 30 day of JULY, 2005.

D.W. Dalton
Notary Public

Approved this _____ day of _____, 2005.

By BOB'S BAIL BONDS
812 E. OGDEN AVE.
LAS VEGAS, NV 89101
(702) 385-8989

Place Notary seal here.



SENECA INSURANCE COMPANY
MANAGING AGENT BAIL USA, INC.
P.O. BOX 806, GREENVILLE, PA 16125
1-800-245-0366

RECEIVED

AUG -1 2005

COUNTY CLERK

AUG 02 2005

COUNTY CLERK
157

WARNING! DO NOT ACCEPT THIS DOCUMENT UNLESS YOU CAN SEE A TRUE WATERMARK AND VISIBLE FIBERS FROM BOTH SIDES.



POWER OF ATTORNEY

VALID IF POSTED BY:

April 1, 2006

POWER AMOUNT \$ **26,000**

POWER NO. **S25 01004182**

KNOW ALL MEN BY THESE PRESENTS that Seneca Insurance Company, Inc., a corporation duly organized and existing under the laws of the State of New York, has constituted and appointed, and does hereby constitute and appoint the named Executing Agent its true and lawful Attorney-in-Fact, with full power and authority to sign the company's name and affix its corporate seal to, and deliver on its behalf as surety, any and all obligations as herein provided, and the execution of such obligations in pursuance of these presents shall be as binding upon the company as fully and to all intents and purposes as if done by the regularly elected officers of said company at its home office in their own proper person; and the said company hereby ratifies and confirms all and whatsoever its said attorney-in-fact may lawfully do and perform in the premises by virtue of these presents.

The obligation of the company shall not exceed the sum of

TWENTY SIX THOUSAND DOLLARS

Authority of such Attorney-in-Fact is limited to appearance bonds and cannot be construed to guarantee defendant's future lawful conduct, adherence to travel limitation, fines, restitution, payments or penalties, or any other condition imposed by a court not specifically related to court appearance. This Power of Attorney is for use with Bail Bonds only and is void if altered, erased, or used with other powers of this company. It is not valid if used in connection with Federal Immigration Bonds or Civil Bonds. A separate Power of Attorney must be attached to each bond executed. STACKING OF POWERS IS STRICTLY PROHIBITED! No more than one power from this Surety may be used to execute any one bond. Powers of Attorney must not be returned to Attorney-in-Fact, but should remain a permanent part of the court records.

IF BOND FORFEITS, attach a copy of this Power of Attorney to the forfeiture notice and mail to SENECA INSURANCE COMPANY, INC., ATTN: BAIL BOND DEPT., 160 WATER ST., 16TH FL., NEW YORK, NY 10038 AND the Executing Agent named below at: **BOB'S BAIL BONDS**

IN WITNESS WHEREOF, Seneca Insurance Company, Inc. has caused these presents to be signed by its duly authorized attorney-in-fact, proper for the purpose and its corporate seal to be hereunto affixed this 30 day of JULY 2005

Bond Amount \$ 20,000.00

Appearance Date Time

Defendant HENDERSON, JOSEPH ALEXANDER

D.O.B. SS #

Court LAS VEGAS DISTRICT

City LAS VEGAS State NV

Charge ROBB W/DW, CONSP KIDNAP 1ST W/DW

Charge Case No. C-212968

If rewrite, Original No. Amount \$

Executing Agent ROBERT E. MURRAY

SENPOA121-0198

Attorney-in-Fact

Cheryl L. Burns
CHERYL BURNS

Secretary

Marc T.A. Wolin
MARC T.A. WOLIN

President

Douglas M. Libby
DOUGLAS M. LIBBY



**FOR STATE USE ONLY
NOT VALID IF USED IN FEDERAL COURT**

DESIGNED BY: CORNERSTONE GRAPHICS INC.

IT IS UNLAWFUL TO PRINT OR REPRODUCE THIS FORM.

COURT COPY



160 WATER ST., NEW YORK, NY 10038

POWER OF ATTORNEY

VALID IF POSTED BY:

April 1, 2006**POWER AMOUNT \$****26,000****POWER NO. S25****01004182**

KNOW ALL MEN BY THESE PRESENTS that Seneca Insurance Company, Inc., a corporation duly organized and existing under the laws of the State of New York, has constituted and appointed, and does hereby constitute and appoint the named Executing Agent its true and lawful Attorney-in-Fact, with full power and authority to sign the company's name and affix its corporate seal to, and deliver on its behalf as surety, any and all obligations as herein provided, and the execution of such obligations in pursuance of these presents shall be as binding upon the company as fully and to all intents and purposes as if done by the regularly elected officers of said company at its home office in their own proper person; and the said company hereby ratifies and confirms all and whatsoever its said attorney-in-fact may lawfully do and perform in the premises by virtue of these presents.

The obligation of the company shall not exceed the sum of

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Authority of such Attorney-in-Fact is limited to appearance bonds and cannot be construed to guarantee defendant's future lawful conduct, adherence to travel limitation, fines, restitution, payments or penalties, or any other condition imposed by a court not specifically related to court appearance. This Power of Attorney is for use with Bail Bonds only and is void if altered, erased, or used with other powers of this company. It is not valid if used in connection with Federal Immigration Bonds or Civil Bonds. A separate Power of Attorney must be attached to each bond executed. **STACKING OF POWERS IS STRICTLY PROHIBITED!** No more than one power from this Surety may be used to execute any one bond. Powers of Attorney must not be returned to Attorney-in-Fact, but should remain a permanent part of the court records.

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IN WITNESS WHEREOF, Seneca Insurance Company, Inc. has caused these presents to be signed by its duly authorized attorney-in-fact, proper for the purpose and its corporate seal to be hereunto affixed this **30** day of **JULY** **2005**

Bond Amount \$ **20,000.00**

Attorney-in-Fact

Cheryl L. Burns
CHERYL BURNS

Appearance Date _____ Time _____

Defendant **HENDERSON, JOSEPH ALEXANDER**

Secretary

Marc T.A. Wolin
MARC T.A. WOLIN

D.O.B. _____ SS # _____

Court **LAS VEGAS DISTRICT**

President

Douglas M. Libby
DOUGLAS M. LIBBY

City **LAS VEGAS** State **NV**Charge **ROBB W/DW, CONSP KIDNAP 1ST W/DW**Charge _____ Case No. **C-212968**

If rewrite, Original No. _____ Amount \$ _____

Executing Agent **ROBERT E. MURRAY**

FOR STATE USE ONLY
NOT VALID IF USED IN FEDERAL COURT

SENPOA121-0198

DESIGNED BY: CORNERSTONE GRAPHICS INC.

COLLATERAL RECORD

Please indicate the types and amounts of collateral taken.

☐ Indemnity Agreement \$ _____ ☐ Cash \$ _____ ☐ Real Property \$ _____
☐ Promissory Note \$ _____ ☐ CD Assignment \$ _____ ☐ Personal Property \$ _____

☐ None**150 INDEMNITOR COPY**

FILED

CASE NO. C 21284

DEPT. NO. 5

ORIGINAL
Aug 5 10 36 AM '05
Shirley B. Ruggieri
CLERK

IN THE JUSTICE'S COURT OF THE LAS VEGAS TOWNSHIP
COUNTY OF CLARK, STATE OF NEVADA

THE STATE OF NEVADA,

Plaintiff,

Vs

JOSEPH ALEXANDER HENDERSON,

Defendant.

)
)
)
)
) Case No. 05F05146X
)
)
)

REPORTER'S TRANSCRIPT
OF
BINDOVER

BEFORE THE HONORABLE WILLIAM D. JANSEN
JUSTICE OF THE PEACE

TAKEN ON WEDNESDAY, JUNE 29, 2005
AT 8:30 A.M.

VOLUME V

APPEARANCES:

For the State:

ROBERT B. TURNER
Deputy District Attorney

For the Defendant:

JAMES J. RUGGEROLI
Deputy Public Defender

REPORTED BY:

PATSY K. SMITH, C.C.R. #190

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 455-4130

RECEIVED

AUG - 5 2005

COUNTY CLERK

1 LAS VEGAS, NEVADA, WEDNESDAY, JUNE 29, 2005

2 * * * * *

3
4 MR. TURNER: Brad Turner on Joseph
5 Henderson.

6 This is a continuation of the argument on
7 the bindover. I believe the Court wanted some case law
8 regarding my argument considering showing binding, in and
9 of itself, constituted kidnapping.

10 THE COURT: Did you get the cases? I
11 think it's fairly clear.

12 MR. RUGGEROLI: Submitted, Judge.

13 THE COURT: In fact, I found another one,
14 a 1994 case. You had '88, '92. I just wanted to let you
15 know I found a '94 case that had the same thing.

16 So, therefore, it is, under Nevada law,
17 when you restrain someone and could cause additional
18 danger or risk, that it can be first degree kidnapping.

19 So, therefore, it appearing to me, from
20 the complaint on file herein, that the crimes have been
21 committed and those are the crimes of conspiracy to commit
22 burglary, burglary while in possession of a firearm,
23 conspiracy to commit first degree kidnapping, first degree
24 kidnapping with use of a deadly weapon, conspiracy to
25 commit sexual assault, sexual assault with a deadly

1 weapon, conspiracy to commit robbery, robbery with use of
2 a deadly weapon, open or gross lewdness with use of a
3 deadly weapon, battery with use of a deadly weapon
4 resulting in substantial bodily harm, and there is
5 reasonable cause to believe the defendant, Joseph
6 Alexander Henderson, committed these crimes, I hereby
7 order said defendant be held to answer said charges in the
8 Eighth Judicial District Court, State of Nevada, in and
9 for the County of Clark.

10 THE CLERK: July 15th, 9 a.m.,
11 Department XIV.

12 MR. RUGGEROLI: Judge, can we address one
13 other matter?

14 THE COURT: Uh-huh.

15 MR. RUGGEROLI: I don't know if he has
16 bail set on the kidnapping charges. I would ask you to
17 consider -- I don't know what it's set at right now.

18
19 (Off the record discussion not reported.)

20
21 THE COURT: Everything is no bail right
22 now.

23 MR. RUGGEROLI: Well, I would like you to
24 set bail.

25 THE COURT: All right, I will set bail.

1 MR. RUGGEROLI: He has a lot of local ties
2 to the community. His girlfriend is present in court
3 today. She's been here all four or five times he's been
4 in court. He's got family in town. He also has a job
5 here, Judge.

6 If you recall the facts of this case,
7 although the charges are very serious, there is no
8 disputing about that, but they are just allegations,
9 Judge, and if you think back to the weight of the
10 evidence, I would suggest that it's very small. Just as a
11 mitigator in what you are going to set the bail at, I
12 would ask you to give him a chance to have a reasonable
13 bail setting.

14 THE COURT: Well, I'm going to set my
15 standard bail that I put on these charges.

16 MR. TURNER: Well, your Honor, I would ask
17 the Court and argue to the Court that this isn't a
18 standard type case.

19 THE COURT: No, no, but let me tell you
20 what I propose and you can argue, all right.

21 Conspiracy to commit burglary is
22 5,000 -- excuse me -- 3,000, burglary while in
23 possession of a firearm 10,000, conspiracy to commit first
24 degree kidnapping 25,000, first degree kidnapping with use
25 of a deadly weapon 50,000, conspiracy to commit sexual

1 assault 10,000, sexual assault with a deadly weapon
2 20,000, conspiracy to commit robbery, 10,000, robbery with
3 use of a deadly weapon 10,000 open or gross lewdness with
4 a deadly weapon 5,000, battery with use of a deadly weapon
5 resulting in substantial bodily harm, 10,000, which is a
6 total of?

7 THE CLERK: Another count they added,
8 Count XIV, sexual assault.

9 THE COURT: Count XIV is at 20,000.

10 THE DEFENDANT: Thank you, your Honor.

11 MR. TURNER: And, Judge --

12 THE COURT: Just a minute, let's see.

13 THE CLERK: Looks like 253,000.

14 THE COURT: 253,000, that's cash or
15 surety.

16 MR. TURNER: Judge, what I would be asking
17 is to double that at 500,000.

18 THE COURT: I will make it 253,000 cash
19 or surety.

20 MR. TURNER: Judge, can I be heard on the
21 record?

22 THE DEFENDANT: Thank you, your Honor.

23 MR. TURNER: Is the Court aware of his
24 record? He is looking at habitual treatment on these
25 counts as well.

1 THE COURT: Let's see what he has here.

2 Yeah, I agree with you. I'll tell you
3 what I'm going to -- hold it. No bail period. That's
4 the way it's going to be.

5 MR. TURNER: And, Judge, I would ask the
6 Court to do that and we can go up to District Court, file
7 a motion, and I can respond in writing.

8 THE COURT: He will be in District Court
9 next week.

10 MR. RUGGEROLI: Is there no way -- we at
11 least agree with the double.

12 MR. TURNER: No, I was asking the Court
13 that in lieu of the Court's finding.

14 THE COURT: I will hold it at no bail.
15 You can argue it by filing a motion in District Court and
16 let him respond in writing. You have got a week.

17 THE DEFENDANT: Damn, your Honor, how can
18 I get a bail, though?

19 MR. RUGGEROLI: I will address it in
20 District Court.

21 THE COURT: Because of your record and
22 the crime you have been bound over on.

23 THE DEFENDANT: But I don't have a
24 murder.

25 THE COURT: Don't argue. They are going

1 to file a motion. They are going to do it properly. They
2 will respond to it and argue it in the District Court.
3 That's the way it should be.

4 MR. TURNER: Thank you, Judge.

5 THE COURT: That's the way it should be,
6 file a formal motion.

7 MR. RUGGEROLI: Okay, Judge.

8

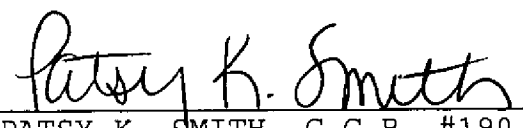
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* * * * *

10 ATTEST: FULL, TRUE, ACCURATE AND CERTIFIED TRANSCRIPT OF
11 PROCEEDINGS.

12

13


PATSY K. SMITH, C.C.R. #190

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ORIGINAL

0001

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
R. BRAD TURNER
Chief Deputy District Attorney
Nevada Bar #006526
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

FILED

2005 AUG 18 P 4: 56

[Handwritten signature]
D. J. [unclear]

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JOSEPH ALEXANDER HENDERSON,
#1502730

Defendant.

Case No. C212968

Dept No. XIV

NOTICE OF MOTION AND MOTION TO REVOKE BAIL

DATE OF HEARING: 08/22/05

TIME OF HEARING: 9:00 A.M.

[Handwritten signature]

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through R. BRAD TURNER, Chief Deputy District Attorney, and files this Notice of Motion and Motion to Revoke Bail.

This Motion 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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AUG 18 2005
REC'D
CLERK

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1 On April 11, 2005, Defendant appeared in custody at time set for Preliminary
2 Hearing. Defense motion to continue granted. Preliminary Hearing was reset for April 28,
3 2005.

4 On April 28, 2005, Defendant appeared in custody at time set for Preliminary
5 Hearing. Hearing continued for congested calendar until May 19, 2005.

6 On May 19, 2005, Defendant appeared in custody at time set for Preliminary Hearing.
7 Defense motion to continue granted. Preliminary Hearing was rest for June 9, 2005.

8 On June 9, 2005, Defendant appeared in custody at time set for Preliminary Hearing.
9 Hearing continued for both counsel to review transcripts. Preliminary Hearing was reset for
10 June 22, 2005.

11 On June 22, 2005, Defendant appeared in custody at time set for Preliminary Hearing.
12 Defense motion to dismiss counts 1-6 denied as to counts 1, 2 and 6. Motion by State to add
13 count of Sexual Assault with use of a Deadly Weapon granted. Hearing continued for
14 argument on counts 3, 4 and 5 until June 29, 2005.

15 On June 29, 2005, Defendant appeared in custody for continuation of Preliminary
16 Hearing and argument on counts 3, 4 and 5 which was submitted without argument. Defense
17 motion to set bail was denied. Initial Arraignment in District Court set for July 14, 2005.

18 On July 14, 2005, Defendant appeared in custody for Initial Arraignment by this
19 Court. Defendant pled not guilty and waived sixty day rule. Defense oral motion for setting
20 of bail denied. Court informed parties that written motion would be required. Calendar Call
21 set for April 4, 2006 and Trial set for April 10, 2006.

22 On July 21, 2004, Defense Motion for Setting of Reasonable Bail heard and granted
23 over States objection in the amount of \$126,000 cash or surety.

24 On July 30, 2005, Defendant posted bail and was released.

25 **STATEMENT OF FACTS**

26 On the night of September 3, 2004, at approximately thirty minutes after midnight, a
27 person described as a "Middle Eastern" man rang the doorbell of Julie Kim and Dr. Eric
28 Bernzweig's residence at 7833 Lonesome Harbor Avenue. Eric answered the door and was

1 told by the Middle Eastern man that he lived in the house adjacent to his and his son had
2 thrown his keys into the backyard. The Middle Eastern man requested to have access to
3 search for the keys. Eric closed and locked the door and in an effort to help, went to the
4 backyard, turned the lights on and attempted to find the keys to no avail. Eric then returned
5 to the front door and told the Middle Eastern man that he could not find the keys. The
6 Middle Eastern man then asked Eric if he could go to the backyard at which time Eric and
7 Julie accompanied him there to search for the keys again, to no avail.

8 At this point they came back to the house and the Middle Eastern man told Eric that
9 he needed to go to his car which was parked in front of the house. While the Middle Eastern
10 man was outside, Eric went to the garage to obtain a flashlight to better aid in looking for the
11 keys. When Eric returned from the garage, the Middle Eastern man was in the house along
12 with Defendant and another masked black male adult. The Middle Eastern man tied Julie's
13 hands behind her back. Defendant remained with her while the Middle Eastern man and the
14 other individual took Eric to the upstairs portion of the house.

15 The Middle Eastern man demanded to know where the safe was. Eric told them he
16 did not have a safe and instead gave them a thousand dollars he had in a bedroom. The
17 perpetrators then handcuffed Eric with a pair of fake (which was unknown to them at the
18 time) handcuffs and laid him on the floor. Eric eventually worked loose from the handcuffs
19 and while scuffling with one of the perpetrators was attacked and pistol whipped in the head
20 causing him to bleed profusely.

21 During this time Defendant was downstairs with Julie. Defendant held her at
22 gunpoint, put a pair of her husband's swim trunks over her head and threatened to "blow her
23 head off" if she screamed. He then began to fondle her and placed his mouth on her breasts
24 and then sexually assaulted her by inserting his fingers into her vagina. He then instructed
25 her to spread her legs. Being in fear for her life, she complied. Defendant then sexually
26 assaulted her by inserting his penis into her vagina.

27 Defendant was distracted by the commotion in the upstairs part of the house.
28 Defendant then took Julie upstairs to the master bedroom, placed her face down on the bed

1 and again sexually assaulted her by inserting his penis into her vagina. After Defendant was
2 done he smoked a cigarette.

3 Defendant and the Middle Eastern man then tied Julie's legs and left the residence.
4 Julie worked her way loose and went to her husband who was lying in a pool of blood and
5 untied him. She then went downstairs and called police.

6 **ARGUMENT**

7 As indicated above, this Court set bail for Defendant in the amount of \$126,000.

8 NRS 178.499(1) provides:

9 At any time after a district or justice court has ordered bail to be
10 set at a specific amount, and before acquittal or conviction, the
11 court may upon it's own motion or upon motion of the District
12 Attorney and after notice to the defendant's attorney of record or,
if none, to the defendant, increase the amount of bail for good
cause shown.

13 Defendant's bail was secured by his girlfriend through Bob's Bail Bonds (hereinafter
14 bail provider). Communication with the bail provider on August 17, 2005 (Exhibit 1),
15 indicated that they were seeking Defendant's return to custody due to the fact that
16 Defendant's girlfriend used what was discovered to be a fraudulent credit card for part of the
17 security for bail. Additionally, Defendant was not checking in with the bail provider as
18 required by the agreement. Coincidentally, Defendant called bail provider on this same day
19 and was asked by the bail provider to come to their offices. Defendant arrived and was taken
20 into custody for failing to adhere to the terms of his bail.

21 Except for the crime of Murder, Defendant is charged with fourteen counts of the
22 most egregious crimes that can be perpetrated by one human being on another. Additionally,
23 when granted bail by this court, he attempted to defraud the bail provider and this Court with
24 a fake credit card and additionally did not check in with the bail provider as required.

25 This is not surprising given the fact this Defendant is a five time convicted felon, two
26 times in Nevada and three times in California. He is therefore eligible for Habitual Criminal
27 treatment, which the State intends to seek.

28 //

1 It is also noteworthy that during his criminal career in the State of Nevada he has:
2 failed to appear and been placed in bench warrant status on ten (10) separate occasions; he
3 has also violated his probation on one Nevada felony conviction and violated his parole on
4 the other Nevada felony conviction. On September 6, 2000 he became a fugitive from
5 California when he left that state and violated his parole from one of his felony convictions
6 there. Additionally, he has accumulated four additional names, three additional social
7 security numbers and two additional dates of birth.

8 It is the State's position that his failure to check in with the bail provider amounts to
9 flight. By his own actions he has demonstrated his complete ethical turpitude; so much so
10 that he cannot be trusted to follow the orders of this Court should he be allowed liberty.

11 In light of his own actions and the seriousness of the crimes he is charged with, the
12 State most earnestly urges this court to remand Defendant without bail to insure his presence
13 at trial and sentencing, should he be convicted. Considering Defendant's eligibility for
14 Habitual Criminal treatment, the high probability for conviction on the instant charges and
15 the lengthy sentence that he could receive, he has become a very real flight risk.

16 However, should this court again rule that bail is appropriate; the State requests an
17 amount of at least \$500,000 be ordered.

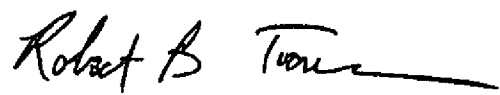
18 CONCLUSION

19 Based on the foregoing, the State requests that this Court grant the instant Motion to
20 Revoke Defendant's Bail.

21 DATED this 18th day of August, 2005.

22 DAVID ROGER
23 Clark County District Attorney
24 Nevada Bar #002781

25 BY


26 R. BRAD TURNER
27 Chief Deputy District Attorney
28 Nevada Bar #006526

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of motion, was made this 18th day of August, 2005, by
facsimile transmission to:

PUBLIC DEFENDER'S OFFICE
455-5112

BY M. Warner
Employee of the District Attorney's Office

mmw/SVU

Exhibit “1”

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STATE OF NEVADA }
COUNTY OF CLARK } ss:

I Leonard Barton, being first duly sworn, depose that I am and have been an employee of the Clark County District Attorney's Office for the past ten years and say:

That on August 17, 2005, in my capacity as the Paralegal for the Special Victims unit I checked on the custody status of the Defendant in case number C212968, Joseph Henderson, as he was recently granted bail by the court. I was informed that he had posted bail and that the bail had been provided by Bob's Bail Bonds (hereinafter Bob's). I called Bob's to inquire how and by whom the bail was paid and was given the following information.

1. Bob's was seeking the Defendant because they suspected that a fake credit card was used to secure \$3000 of his bail. Bob's was contacted by an individual who claimed to be the owner of the card and was inquiring about the charge. When asked for identifying information by Bob's, he gave a social security number that came back with an address in Bristol, Connecticut. Additionally, the billing address attached to the credit card number was an address in Las Vegas that didn't exist. The individual stated his intention to cancel the credit card transaction and when asked for a phone number the individual became evasive and stated that he did not have one.

Bob's was contacted on August 17, 2005, by a person known to them as Mookie, who is believed to be the Defendant's girlfriend; the person who arranged the original transaction with the credit card. While on the phone she related that she and Defendant were to provide the individual who had called about the credit card transaction with rock cocaine in order for them to use the card. They were unable to provide what they promised, and Mookie believes that is why the owner of the card made the call. She told Bob's that she wanted to come in and tell them the story of what had really transpired. She is expected on August 18, 2005.

1
2 2. Defendant signed his bail agreement on August 5, 2005 and was to return in
3 twenty four hours to make a payment. He did not return. When Bob's checked the address
4 Defendant had given them they found it to be a Chevron gas station.

5 Bob's had no contact with the Defendant until he called on August 11, 2005.
6 Defendant was to physically check in with Bob's weekly and make a payment. Defendant
7 was also to contact them by phone at least three times a week to check in. Bob's indicated
8 that Defendant failed to do either.

9 3. Later in the day on August 17, 2005, I was contacted by Bob's and informed
10 that Defendant had called and would appear there that afternoon. Later that same day, I was
11 again informed that Defendant had arrived and was taken into custody by Bob's for the
12 foregoing reasons.

13 4. Defendant's bond was surrendered by Bob's and Defendant was taken to
14 CCDC by them and booked accordingly.

15 I declare under penalty of perjury under the law of the State of Nevada that the
16 foregoing is true and correct.

17
18 Executed on

August 18, 2005
(Date)



LEONARD BARTON, PARALEGAL
CLARK COUNTY DISTRICT
ATTORNEY'S OFFICE

*** TX REPORT ***

TRANSMISSION OK

TX/RX NO 3285
CONNECTION TEL 4555112
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1 0001
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 R. BRAD TURNER
6 Chief Deputy District Attorney
7 Nevada Bar #006526
8 200 South Third Street
9 Las Vegas, Nevada 89155-2211
10 (702) 455-4711
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,)

13 Plaintiff,)

14 -vs-)

15 JOSEPH ALEXANDER HENDERSON,
16 #1502730)

17 Defendant.)

Case No. C212968

Dept No. XIV

NOTICE OF MOTION AND MOTION TO REVOKE BAIL

DATE OF HEARING: 08/22/05

TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through
R. BRAD TURNER, Chief Deputy District Attorney, and files this Notice of Motion and
Motion to Revoke Bail.

ORIGINAL

FILED

0026
PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

2006 JAN 31 A 9:03

DISTRICT COURT

CLERK

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

JOSEPH ALEXANDER HENDERSON,

Defendant.

CASE NO. C212968X

DEPT. NO. XIV

DATE: 01.09, 2006
TIME: 9:00 a.m.

MOTION TO CONTINUE TRIAL DATE

COMES NOW the Defendant, JOSEPH ALEXANDER HENDERSON, by and through his attorney, JAMES J RUGGEROLI, Deputy Public Defender, and respectfully moves this court for an order vacating the April 10, 2006 trial date and requesting a new trial setting on a date convenient to the court.

This Motion is made based upon all the papers and pleadings on file herein, the attached Declaration of Counsel, Memorandum of Points and Authorities in support hereof, and oral argument at the time set for hearing this Motion.

DATED this 30 day of January, 2006.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By

JAMES J RUGGEROLI, #7891
Deputy Public Defender

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JAN 31 2006
COUNTY CLERK

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POINTS AND AUTHORITIES

Pursuant to NRS 174.515, the court may, upon sufficient cause shown by either party by affidavit, direct the trial to be postponed to another day. Therefore, a request for continuance in the ordinary course is respectfully requested. Further, this motion is not made for the purpose of delay.

There is sufficient cause for this Honorable Court to continue the trial date in this matter for the reasons contained within the following declaration.

DECLARATION

JAMES J RUGGEROLI makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am the Deputy Public Defender assigned to represent the Defendant in the instant matter, and I am familiar with the facts and circumstances of this case.
2. JOSEPH ALEXANDER HENDERSON, hereinafter "the Defendant," is presently charged by Information with: sexual assault with use of a deadly weapon; conspiracy to commit sexual assault; first degree kidnapping with use of a deadly weapon; conspiracy to commit first degree kidnapping; burglary while in possession of a firearm; robber with use of a deadly weapon; conspiracy to commit robbery; open or gross lewdness; batter with use of a deadly weapon resulting in substantial bodily harm; conspiracy to commit burglary; burglary while in possession of a firearm.
3. That the preliminary hearing in this matter required approximately 3 days of testimony and argument in justice court.
4. That the Defendant has a trial date presently set for April 10, 2006.'
5. That the upcoming trial could reasonably require more than one to two weeks to complete.
6. That the upcoming trial may deal extensively with experts, as well as lay witnesses.
7. That the present trial setting does not have priority on the court's calendar.
8. That the Defendant did not invoke his right to a speedy trial.

1 9. That counsel, James J. Ruggeroli, has a murder re-trial presently set for the
2 month of April, 2006.

3 10. That the retrial has a priority date in district court department XVIII, that the
4 first trial took approximately 3 weeks to complete, and that there are no negotiations presently
5 available in the Murder trial.

6 11. That counsel has explained the scheduling difficulties with the Defendant,
7 and the Defendant fully concurs with counsel's request to continue the trial in this matter.

8 12. That in order to effectively and fairly defend the Defendant against the very
9 serious charges in this matter, counsel respectfully requests a continuance to adequately prepare for
10 trial and present a competent, diligent and effective defense.

11 13. That the request to continue said trial date is made in good faith and not done
12 for any unnecessary or inappropriate delays.

13
14 I declare under penalty of perjury that the foregoing is true and correct. (NRS
15 53.045).

16 EXECUTED this 30 day of January, 2006.

17
18 
19 JAMES J RUGGEROLI

1
2
3 **NOTICE OF MOTION**

4 TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

5 YOU WILL PLEASE TAKE NOTICE that the foregoing Motion to Continue Trial
6 Date will be heard on 02.09.06, at 9am in Department No. XIV of the District
7 Court.

8 DATED this 30th day of January, 2006.

9 PHILIP J. KOHN
10 CLARK COUNTY PUBLIC DEFENDER

11 By  _____
12 JAMES J. RUGGEROLI, #7891
13 Deputy Public Defender

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20 **RECEIPT OF COPY**

21 RECEIPT OF COPY of the above and foregoing Motion to Continue Trial Date is
22 hereby acknowledged this 31 day of January, 2006.

23 CLARK COUNTY DISTRICT ATTORNEY

24 By  _____
25
26
27
28

1 NOTC

2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 STACY KOLLINS
6 Chief Deputy District Attorney
7 Nevada Bar #005391
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

FILED

AUG 16 4 11 PM '06

Shirley L. Paragiana
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,)

10 Plaintiff,)

11 -vs-)

12 JOSEPH ALEXANDER HENDERSON,
13 #1502730)

14 Defendant.)

CASE NO: C212968

DEPT NO: XIV

NOTICE OF WITNESSES AND/OR EXPERT WITNESSES
[NRS 174.234]

17 TO: JOSEPH ALEXANDER HENDERSON, Defendant; and

18 TO: PUBLIC DEFENDER, Counsel of Record:

19 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF
20 NEVADA intends to call the following witnesses in its case in chief:

21 These witnesses are in addition to those witnesses endorsed on the Information and
22 any other witness for which a separate Notice has been filed.

23 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF
24 NEVADA intends to call expert witnesses in its case in chief as follows:

25 The substance of each expert witness testimony and copy of all reports made by or at
26 the direction of the expert witness has been provided in discovery.

27 A copy of each expert witness curriculum vitae, if available, is attached hereto.

28 //

RECEIVED
AUG 16 2006
COUNTY CLERK

ADDRESS

BERNZWEIG, ERIC - 3886 BILTMORE BAY, LVN 89147

CRANE, I. - LVMPD P#3658

CUSTODIAN OF RECORDS – LVMPD COMMUNICATIONS

CUSTODIAN OF RECORDS – LVMPD RECORDS

CUSTODIAN OF RECORDS – UNIVERSITY MEDICAL CENTER

DAHN, ROBBIE – LVMPD P#5947

EBBERT, LINDA – UNIVERSITY MEDICAL CENTER: Will testify as an expert Sexual Assault Nurse Examiner regarding the treatment of the victim in this case.

GUENTHER, KATHY – LVMPD P#6109: Will testify as an DNA Expert.

JEFFRIES, MICHAEL – LVMPD P#5302

JOGODKA, LVMPD P#7587

KIM, JULIE - 3886 BILTMORE BAY, LVN 89147

KOVAL, K. – LVMPD P#7781

SCLZNICK, DR. J.

STROBECK – LVMPD

TREATING PHYSICAN OF ERIC BRENZWEIG

WELCH, DAVID – LVMPD P#1418: Will testify as an DNA Expert.

WILDS, MELISSA – LVMPD

WOMACK, SHANE - LVMPDP#4953

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY

STACY KOLLINS
Chief Deputy District Attorney
Nevada Bar #005391

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BY M. Warner
Employee of the District Attorney's Office

184

Statement of Qualifications
Name: Kathy M. Guenther
Page: 2

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
FORENSIC LABORATORY
STATEMENT OF QUALIFICATIONS**

Date: 7-1-03

Name: Kathy Molnar Guenther P#: 6109 Classification: Criminalist II

Current Discipline of Assignment: DNA Analysis

EXPERIENCE IN THE FOLLOWING DISCIPLINE(S)			
Controlled Substances	X	Blood Alcohol	X
Toolmarks		Breath Alcohol	
Trace Evidence	X	Arson Analysis	
Toxicology		Firearms	
Latent Prints		Crime Scene Investigations	X
Serology	X	Clandestine Laboratory Response Team	
Document Examination		DNA Analysis	X
Quality Assurance		Technical Support /	

EDUCATION			
Institution	Dates Attended	Major	Degree Completed
Wittenberg University	1968 - 1972	Biology	B.A.
Miami University	1972 - 1974	Botany	M.S.
Miami University	1974	NDBM (non-degree beyond masters)	

ADDITIONAL TRAINING / SEMINARS		
Course / Seminar	Location	Dates
CODIS 5.2W basics given by William Syrtaz, SAIC - CODIS	Las Vegas, NV	06/03

ADDITIONAL TRAINING / SEMINARS		
<i>Course / Seminar</i>	<i>Location</i>	<i>Dates</i>
BioSecurity 2002	Las Vegas, NV	11/02
13 th International Symposium on Human Identification	Phoenix, AZ	10/02
7 th Annual CODIS User's Conference and Statistics Seminar	Washington, D.C.	10/01
Digital Imaging Workshop	Las Vegas, NV	09/01
National DNA Auditor's Course	Washington, D.C.	02/01
6 th annual CODIS User's Conference	Washington, D.C.	02/01
CODIS / SAIC Training	Vienna, VA	01/01
Advanced 310 Genetic Analyzer & AmpFISTR® Training Group (AGAA) ₅₆ TG	Foster City, CA	08/00
American Academy of Forensic Sciences	Reno, NV	02/00
5 th annual CODIS User's Conference	Washington, D.C.	11/99
DNA Statistics - Forensic Reconstruction	Las Vegas, NV	10/99
The National Forensic Science Technology Center Laboratory Auditing Course	Las Vegas, NV	06/99
CIT 113 - Database	Las Vegas, NV	03/99
Forensic Evaluation of Hairs	Tampa, FL	06/98
STR's, the Next Generation	Orlando, FL	05/98
Perkin-Elmer STR Workshop	Longboat Key, FL	09/97
International Symposium on Human Identification	Scottsdale, AZ	09/96
Statistics for DNA Scientists	St. Petersburg, FL	01/96
Statistical Interpretation & Population Genetics of forensic DNA Analysis	Orlando, FL	09/94
Advanced PCR topics, Roche Biomedical Labs	Orlando, FL	05/94
International DNA Symposium	Quantico, VA	03/93
DNA Workshop - Non-Isotopic Methods of Forensic DNA Analysis	Tallahassee, FL	09/91

ADDITIONAL TRAINING / SEMINARS		
<i>Course / Seminar</i>	<i>Location</i>	<i>Dates</i>
Population Genetics & DNA Testimony	Orlando, FL	03/91
Forensic Applications, and Laboratory Applications of DNA Typing Methods School	Quantico, VA	01/91
Forensic Applications of DNA, Part II	Tallahassee, FL	04/89
Forensic Applications of DNA, Part I	Tallahassee, FL	09/88
Isoelectric Focusing Applications in Forensic Serology	Tallahassee, FL	03/88
Forensic Serology Workshop, Isoelectric Focusing	Gulf Shores, AL	09/86
Forensic Serology Seminar	Tallahassee, FL	09/85
Sequential Analysis of Semen Evidence	Tallahassee, FL	04/84
International Symposium on the Analysis of Sexual Assault Evidence	Quantico, VA	07/83
Basic Electrophoresis, Serological Research Institute	Emeryville, CA	04/80
Polarized Light Microscopy, Forensic Applications	London, OH	10/78
Investigative Hypnosis	London, OH	09/78
Survey in Forensic Glass Examinations	Quantico, VA	11/76
COURTROOM EXPERIENCE		
<i>Court</i>	<i>Discipline</i>	<i>Number of Times</i>
Florida Circuit Courts	DNA Analysis / & FRYE hearings	52
Florida & Ohio Circuit Courts / Air force Law Court	Forensic Serology	_ 250
Ohio Circuit / Courts	Trace Evidence	25
Ohio Circuit / Courts	Drug Analysis	10
EMPLOYMENT HISTORY		
<i>Employer</i>	<i>Job Title</i>	<i>Date</i>

EMPLOYMENT HISTORY		
Employer	Job Title	Date
Las Vegas Metropolitan Police Department	Criminalist II	10/99 to present
Las Vegas Metropolitan Police Department	Forensic Lab Technician	9/98 - 10/99
Florida Department of Law Enforcement	Senior Crime Laboratory Analyst	3/80 - 7/98
Ohio Bureau of Criminal Identification & Investigation	Criminalist II	9/75 - 3/80
Ohio State University	Research Technician	1/75 - 9/75
Miami University	Graduate Teaching Assistant	9/72 - 8/74
Wittenberg University	Laboratory Assistant	3/71 - 6/72

PROFESSIONAL AFFILIATIONS	
Organization	Date(s)
Southern Association of Forensic Scientists	1981 - present

PUBLICATIONS / PRESENTATIONS:
Linde, H.G. and K.E. Molnar, "The Simultaneous Identification of Seminal Acid Phosphatase and Phosphoglucumutase by Starch Gel Electrophoresis", Journal of Forensic Sciences, Vol. 25 No. 1, 1980, pp. 113-117.
Molnar, K.E., Stewart, K.D. and Mattox, K.R. 1975. Cell division in the filamentous <u>Pleurastrum</u> and its comparison with the unicellular <u>Platymonas</u> (Chlorophyceae). Journal of Phycology, Vol. 11, pp. 287-296
Molnar, K.E., Mitosis and Cytokinesis in the Genus <u>Pleurastrum</u> , May 1974, Miami University Press.
Guest lecturer: "DNA Methods in Crime Investigation", St. Leo College, Police Sciences Program - B.S.C.J. / St. Petersburg, FL.

OTHER QUALIFICATIONS:

Statement of Qualifications
Name: Kathy M. Guenther
Page: 2

Guest lecturer, "Crime Scene History and Biological Evidence" Ocala Community College, FL.
Guest lecturer and organizer of Crime Scene Analysis Academy for Largo Florida Police Dept.
Guest lecturer, "Trace Evidence: What Happens at the Lab" Pinellas County Sheriff's Office Academy.
Lecture: "How to Frye DNA" FDLE DNA Section seminar, Tampa, FL
Lecture: "Your Future as a Forensic Scientist" Wittenberg University Symposium.
Numerous other presentations to public school, scouts and civic groups.
Lecture: "Trace Evidence and Forensic Serology Evidence" Tampa Police Academy Recruits.

[Forensic Rev. 1, 6/01]

Statement of Qualifications

Name: Berch E. Henry, II

Page: 2

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
FORENSIC LABORATORY
STATEMENT OF QUALIFICATIONS**

Date: 6-2-03

Name: Berch E. Henry, II P#: 6161 Classification: Forensic Laboratory Manager

Current Discipline of Assignment: Management - Biology/DNA Detail/Technical Leader DNA

EXPERIENCE IN THE FOLLOWING DISCIPLINE(S)

Controlled Substances		Blood Alcohol	
Toolmarks		Breath Alcohol	
Trace Evidence		Arson Analysis	
Toxicology		Firearms	
Latent Prints		Crime Scene Investigations	
Serology	X	Clandestine Laboratory Response Team	
Document Examination		DNA Analysis	X
Quality Assurance		Technical Support /	

EDUCATION

<i>Institution</i>	<i>Dates Attended</i>	<i>Major</i>	<i>Degree Completed</i>
University of Arkansas	1967 - 1972	Biology / Chemistry	B.S.
University of Arkansas Medical Center	1972 - 1975	Medical Microbiology	M.S.
University of Mississippi Medical Center	1975 - 1979	Molecular Virology	Ph.D.
University of North Carolina, Cancer Center	1979 - 1983	Post Doctoral Fellowship	

ADDITIONAL TRAINING / SEMINARS

<i>Course / Seminar</i>	<i>Location</i>	<i>Dates</i>
Forensic Applications of DNA Typing Methods	FBI Academy - Quantico, VA	3/90

ADDITIONAL TRAINING / SEMINARS		
<i>Course / Seminar</i>	<i>Location</i>	<i>Dates</i>
Advanced Forensic DNA Typing School	FBI Academy, Quantico, VA	6/91
DNA Statistics in Forensic Science	Seattle, WA	2/95
Capillary Electrophoresis Workshop	New Iberia, LA	11/98
The National Forensic Science Technology Center Laboratory Auditing Course	Las Vegas, NV	6/99
Training in Statistical Analysis	Las Vegas, NV	10/99
American Academy of Forensic Sciences	Reno, NV	2/00
Leadership Conference for Managers and Supervisors	Las Vegas, NV	4/02
Convicted Offender Statute Meeting	Reno, NV	5/02
13 th International Symposium on Human Identification	Phoenix, AZ	10/02
American Society of Crime Laboratory Directors	Tampa, FL	10/02
Employee Performance Support System	Las Vegas, NV	11/02
DNA Auditor Training - Joint meeting of the CAC and the NWAFS - presented by the FBI Laboratory	Reno, NV	4/03

COURTROOM EXPERIENCE		
<i>Court</i>	<i>Discipline</i>	<i>Number of Times</i>
Nevada	DNA	16
Washington	DNA	5
Alabama	DNA	3
Idaho	DNA	2
California / Alaska	DNA	3

EMPLOYMENT HISTORY		
<i>Employer</i>	<i>Job Title</i>	<i>Date</i>

Statement of Qualifications

Name: Berch E. Henry, II

Page: 2

EMPLOYMENT HISTORY

<i>Employer</i>	<i>Job Title</i>	<i>Date</i>
Las Vegas Metropolitan Police Dept.	Forensic DNA Laboratory Manager	11/98 - present
Alabama Department of Forensic Sciences	Forensic Biology Coordinator	4/96 - 11/98
Washoe County Sheriff's Dept.	Criminalist	2/90 - 4/96
University of Nevada, Reno	Asst. Professor	7/84 - 2/90

PROFESSIONAL AFFILIATIONS

<i>Organization</i>	<i>Date(s)</i>
Diplomat of the American Board of Criminalistics	7/97 - present
National Judicial College, Faculty	6/90 - present
Technical / Scientific Working Group on DNA Analysis Methods	3/92 - 1/99

PUBLICATIONS / PRESENTATIONS:

Proceedings of the Eighth International Symposium on Human Identification, 1997
Journal of Forensic Sciences, Publication, 1993 - "Effects of Argon Laser Light, Alternate Light Source and Cyanoacrylate Fuming on DNA Typing of Human Bloodstains"
Journal of Forensic Sciences Publication, 1997 - "The Applicability of Formalin Fixed and Formalin Fixed Paraffin Embedded Tissues in Forensic DNA Analysis"
"STR's - the Next Generation", DNA Training Session, Presentation, 1998
Technical working Group on DNA Analysis Methods (TWGDAM), Member, 1992 - present
Faculty, The National Judicial college, 1990 - present

OTHER QUALIFICATIONS:

University of Arkansas Medical Center - Research - Analysis and Characterization of DNA 1972 - 1975

University of Mississippi Medical Center - Research & Teaching - Molecular Biology 1975 - 1979
University of North Carolina - Research - Molecular Biology 1979 - 1983
University of North Carolina - Research - Molecular Biology 1983 - 1984
University of Nevada - Teaching and Research, Molecular Biology 1984 - 1990

[Forensic Rev. 1, 6/01]

Curriculum Vitae
LINDA L. EBBERT R.N. S.A.N.E.

3655 S. Decatur Blvd., #14-149
Las Vegas, Nevada 89103

EXPERIENCE

Sexual Assault Nurse Examiner
Rose Heart Inc.
3655 S. Decatur Blvd. #14-149
Las Vegas, NV 89103

Years Employed 1995-present

Co-owner and President of Rose Heart, Inc. Responsible for administration and daily business tasks. Function actively as a sexual assault nurse examiner. Over 550 sexual assault examinations completed in the past four years. Appear in court as expert witness and present testimony regarding forensic evidence collected and interpretation of results of examinations.

Registered Nurse
University Medical Center
Emergency Dept.
1800 W. Charleston Blvd.
Las Vegas, NV 89102

Years Employed 1990-present

Work full time as R.N. caring for patients in the Fast Track area of the E.R.

Northeastern Ohio General Hospital
Ob/Gyn as Labor and Delivery Nurse
Supervision As Shift Supervisor and as Coordinator E.R.

Years Employed 1993-1988

Lake Hospital System
Emergency Room Staff Nurse
Coordinator Emergency Room...Lake Medical Center Madison

Madison Clinic Ambulance Service
5 years
Experience in Transporting Critical Patients

EDUCATION

Meadville Area Senior High School
Meadville, PA 16335
High School Diploma

1957-1960

LINDA L. EBBERT, R.N.
CURRICULUM VITAE

- 1 -

Meadville City Hospital School of Nursing
Graduate Diploma School of Nursing
Registered Nurse Program – 3 Year Program

1960-1963

Urseline College
Pepper Pike, Ohio
Majoring in Humanities for B.A. in Health Care Administration

1987-1989

CREDENTIALS / CERTIFICATION

R.N. Registered Nurse

A.C.L.S. Advanced Life Care Support, Successful Completion of all Course Requirements

T.N.C.C. Trauma Nurse Course, Successful Completion of all Course Requirements

S.A.N.E. Sexual Assault Nurse Examiner, Successful Completion of all Course Requirements

LINDA L. EBBERT, R.N.
CURRICULUM VITAE

- 2 -

Statement of Qualifications

Name: David Welch

Page: 2

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
FORENSIC LABORATORY
STATEMENT OF QUALIFICATIONS**

Date: 11-26-02Name: David Welch P#: 1418 Classification: Criminalist IICurrent Discipline of Assignment: DNA Analysis

EXPERIENCE IN THE FOLLOWING DISCIPLINE(S)			
Controlled Substances	X	Blood Alcohol	X
Toolmarks		Breath Alcohol	X
Trace Evidence - hairs	X	Arson Analysis	X
Toxicology	X	Firearms	
Latent Prints		Crime Scene Investigations	X
Serology	X	Clandestine Laboratory Response Team	X
Document Examination		DNA Analysis	X
Quality Assurance		Technical Support /	
EDUCATION			
Institution	Dates Attended	Major	Degree Completed
Northeastern University; Boston, Ma	1975 - 1976, 1984	Forensic Chemistry	MS
UNLV; Las Vegas, Nv	1972 - 1975	Biology	BS
USAF	1968 - 1969	Electronics/Navigation Repair	Certified
ADDITIONAL TRAINING / SEMINARS			
Course / Seminar	Location	Dates	
Mixture Interpretation Workshop	Arlington, VA	11/02	
Perkin Elmer Florida DNA Training Session V	Miami, FL	5/00	
Advanced AmpFISTR and 310 Genetic Analyzer	New Iberia, LA	11/98	
Forensic Statistics in DNA Analysis	San diego, CA	7/98	

Statement of Qualifications

Name: David Welch

Page: 2

ADDITIONAL TRAINING / SEMINARS		
<i>Course / Seminar</i>	<i>Location</i>	<i>Dates</i>
Capillary Electrophoresis Workshop	Las Vegas, NV	11/97
Principles of DNA Typing	FBI Academy / Fredricksburg, VA	9/97
Forensic Amplitype PM/DQA1 PCR	Perkin-Elmer / Foster City, Ca	6/96
Forensic Amplitype DQA PCR	California Institute of Criminalistics / Sacramento, Ca	1/96
ETS-Plus training, E.M.I.T.	SYVA Company / San Jose, Ca	8/92
Laboratory Aspects of Forensic Urine Drug Testing	University of Utah, Center for Human Toxicology / Salt Lake City, Utah	11/90
Instrumental Analysis of Explosives and Explosive Residues	FBI Academy / Quantico, Va	4/88
Chromatographic Methods in Forensic Science	FBI Academy / Quantico, Va	5/86
Current concepts in Toxicology	University of Texas / San Antonio, Tx	3/86
Arson Accelerant Detection Course	Bureau of Alcohol, Tobacco, and Firearms / Rockville, Maryland	12/83
Internship - Forensic Laboratory	LVMPD / Las Vegas, Nv	6/75 thru 8/75
Electronics Course/Navigation Repair	United States Air Force / Biloxi, Mi	9/68 thru 5/69
Symposiums:		
8 th CODIS User's Conference	Arlington, VA	11/02
12 th International Symposium on Human Identification (Promega)	Biloxi, Mississippi	10/01
6th International Symposium on Human Identification	Phoenix, Az	10/95
International Symposium on Forensic Toxicology	Quantico, Va	6/92
International Symposium on Controlled Substance	Quantico, Va	3/88
National Symposium on Arson Investigation	Las Vegas, Nv	10/84
Meetings:		
American Academy of Forensic Science	Seattle, WA	02/01
American Academy of Forensic Science	San Francisco, CA	2/98
Joint Meeting: CAT, NWAFFS, SWAFFS, SAT	Las Vegas, NV	11/97
American Academy of Forensic Science	Seattle, Wa	2/95

Statement of Qualifications
Name: David Welch

Page: 2

ADDITIONAL TRAINING / SEMINARS		
Course / Seminar	Location	Dates
International Association for Chemical Testing	Denver, Co	4/94
Joint Meeting: Society of Forensic Toxicologists & California Association of Toxicologists	Phoenix, Az	10/93
Nevada Judges Winter Seminar	Las Vegas, Nv	1/92
American Academy of Forensic Science	Las Vegas, Nv	2/89
California Association of Toxicologists	Long Beach, Ca	11/88
California Association of Toxicologists	San Francisco, Ca	4/88
American Academy of Forensic Science	Las Vegas, Nv	2/85
American Academy of Forensic Science	Anaheim, Ca	2/84

COURTROOM EXPERIENCE		
Court	Discipline	Number of Times
United States District Court	Various	_ 10
Clark County District Court	Various	_ 150
Las Vegas Justice Court	Various	_ 300
Clark County District Court	Serology / DNA	_ 25
Various other Courts	Controlled Substance / Toxicology / Alcohol	_ 25
Las Vegas Municipal Court	Toxicology/Alcohol	_ 50
Esmeralda County District Court	Controlled Substance / Toxicology / Alcohol	_ 1
Lincoln County District Court	Controlled Substance / Toxicology / Alcohol	_ 1
Nye County District Court	Controlled Substance / Toxicology / Alcohol	_ 1

EMPLOYMENT HISTORY		
Employer	Job Title	Date
Las Vegas Metropolitan Police Department	Criminalist II	1982 - present
University of Nevada, Las Vegas	Staff / Part time - Department of Criminal Justice	1985 - present

Statement of Qualifications

Name: David Welch

Page: 2

EMPLOYMENT HISTORY		
<i>Employer</i>	<i>Job Title</i>	<i>Date</i>
Space Flex Corporation, Los Angeles, Ca	Manufacturing Engineer / Project Manager	1980 - 1982
Las Vegas Metropolitan Police Department	Crime Laboratory - Criminalist I	1976 - 1980
United States Air Force - Nellis AFB	Electronic Navigation Technician	1968 - 1972
PROFESSIONAL AFFILIATIONS		
<i>Organization</i>	<i>Date(s)</i>	
American Academy of Forensic Scientists	1993	
PUBLICATIONS / PRESENTATIONS:		
None		
OTHER QUALIFICATIONS:		
Fellow - American Board of Criminalistics, 1999 - "Certified Molecular Biologist"		
Diplomate - American Board of Criminalistics, 1996 - "Certified Generalist - Criminalistics"		

[Forensic Rev. 1, 6/01]

*** TX REPORT ***

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1 NOTC
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 STACY KOLLINS
6 Chief Deputy District Attorney
7 Nevada Bar #005391
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

-vs-

12 JOSEPH ALEXANDER HENDERSON,
13 #1502730

Defendant.

CASE NO: C212968

DEPT NO: XIV

NOTICE OF WITNESSES AND/OR EXPERT WITNESSES
[NRS 174.234]

TO: JOSEPH ALEXANDER HENDERSON, Defendant; and

TO: PUBLIC DEFENDER, Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF
NEVADA intends to call the following witnesses in its case in chief:

These witnesses are in addition to those witnesses endorsed on the Information and

0026
PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

FILED

2001 JAN 19 P 2:13

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

JOSEPH ALEXANDER HENDERSON,

Defendant.

CASE NO. C212968X

DEPT. NO. XIV

DATE: January 23, 2007

TIME: 9:00 A.M.

MOTION TO CONTINUE TRIAL DATE

COMES NOW the Defendant, JOSEPH ALEXANDER HENDERSON, by and through his attorney, KRISTEN M. LYNCH, Deputy Public Defender, and respectfully moves this court for an order vacating the February 13, 2007 trial date and proceeding at the August 27, 2007 trial date currently set before this honorable court.

This Motion is made based upon all the papers and pleadings on file herein, the attached Declaration of Counsel, Memorandum of Points and Authorities in support hereof, and oral argument at the time set for hearing this Motion.

DATED this 19 day of January, 2007.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By Kristen M. Lynch
KRISTEN M. LYNCH, #6399
Deputy Public Defender

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POINTS AND AUTHORITIES

Pursuant to NRS 174.515, the court may, upon sufficient cause shown by either party by affidavit, direct the trial to be postponed to another day. Therefore, a request for continuance in the ordinary course is respectfully requested. Further, this motion is not made for the purpose of delay.

There is sufficient cause for this Honorable Court to continue the trial date in this matter for the reasons contained within the following declaration.

DECLARATION

KRISTEN M. LYNCH makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am the Deputy Public Defender assigned to represent the Defendant in the instant matter, and I am familiar with the facts and circumstances of this case.

2. JOSEPH ALEXANDER HENDERSON, hereinafter "the Defendant," is presently charged by Information with: sexual assault with use of a deadly weapon; conspiracy to commit sexual assault; first degree kidnapping with use of a deadly weapon; conspiracy to commit first degree kidnapping; burglary while in possession of a firearm; robber with use of a deadly weapon; conspiracy to commit robbery; open or gross lewdness; batter with use of a deadly weapon resulting in substantial bodily harm; conspiracy to commit burglary; burglary while in possession of a firearm.

3. That previously assigned counsel, James J. Ruggeroli, is no longer an attorney in the Clark County Public Defender's Office.

4. That the preliminary hearing in this matter required approximately 3 days of testimony and argument in justice court.

6. That the Defendant has a trial date presently set for February 13, 2007 and August 27, 2007.

7. That the upcoming trial could reasonably require more than one to two weeks to complete.

8. That the upcoming trial may deal extensively with experts, as well as lay witnesses.

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9. That the present trial setting does not have priority on the court's calendar.

10. That the Defendant did not invoke his right to a speedy trial.

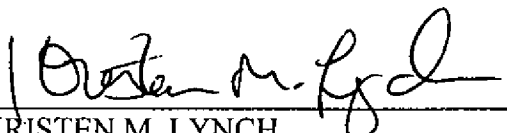
11. That counsel has explained the scheduling difficulties with the Defendant, and the Defendant fully concurs with counsel's request to proceed at the August 27, 2007 trial date in this matter.

12. That in order to effectively and fairly defend the Defendant against the very serious charges in this matter, counsel respectfully requests a continuance to adequately prepare for trial and present a competent, diligent and effective defense.

13. That the request to continue said trial date is made in good faith and not done for any unnecessary or inappropriate delays.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 19 day of January, 2007.


KRISTEN M. LYNCH

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NOTICE OF MOTION

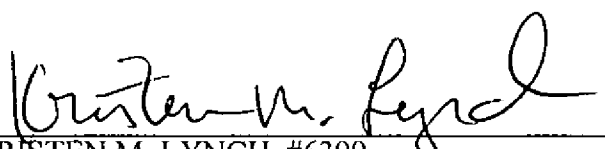
TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the foregoing Motion to Continue Trial
Date will be heard on January 23, 2007 at 9:00 a.m. in Department No. XIV of the District Court.

DATED this 19th day of January, 2007.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By


KRISTEN M. LYNCH, #6399
Deputy Public Defender

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Motion to Continue Trial Date is
hereby acknowledged this 19 day of January, 2007.

CLARK COUNTY DISTRICT ATTORNEY

By



CASE NO. C212968

FILED ORIGINAL

IN THE JUSTICE COURT OF LAS VEGAS TOWNSHIP
COUNTY OF CLARK, STATE OF NEVADA

AUG 20 8 41 AM '07

-000-

CLERK OF THE COURT

THE STATE OF NEVADA,)
)
Plaintiff,)
)
vs.)
)
JOSEPH HENDERSON,)
)
Defendant.)
_____)

CASE NO. 05F05146X

REPORTER'S TRANSCRIPT OF PRELIMINARY HEARING

VOLUME IV

BEFORE THE HON. WILLIAM D. JANSEN

JUSTICE OF THE PEACE

Wednesday, June 22, 2005

8:30 a.m.

APPEARANCES:

For the State: ROBERT B. TURNER, ESQ.
Deputy District Attorney

For the Defendant: JAMES RUGGEROLI, ESQ.
Deputy Public Defender

Reported by: KIMBERLY A. HANCOCK, RPR, CCR NO. 757

KIMBERLY A. HANCOCK, RPR, CCR NO. 757

RECEIVED
AUG 20 2007
CLERK OF THE COURT

1 LAS VEGAS, CLARK COUNTY, NV, WEDNESDAY, JUNE 22, 2005

2 8:30 A.M.

3 -o0o-

4 P R O C E E D I N G S

5
6 THE COURT: Now, we have Mr. Henderson.

7 MR. RUGGEROLI: He's present in custody, Judge.

8 THE COURT: Do you want him down or to stay there
9 or what?

10 MR. RUGGEROLI: We can leave him there to make the
11 argument. I believe the State has representations.

12 MR. TURNER: Good morning, Judge. Judge, we
13 submit it on the original criminal complaint that was
14 filed. We believe we've proved up all those counts.

15 I would ask the Court to make an addition of an
16 additional sexual assault count for digital penetration as
17 to Julie Kim. I believe that's set forth on page 24 of the
18 preliminary hearing transcript where she testified to that
19 fact. I'd ask the Court to add a count of that.

20 Additionally, I'd ask the Court we have
21 conspiracies pled in the kidnappings and the robberies.
22 I'd also add -- obviously ask the Court to add language
23 regarding alternative theories of liability in terms of
24 conspiracy, and the defendant's also liable under theories
25 of aiding and abetting because of the three -- or two other

1 individuals that were also present with him.

2 Based on those additions, I'd submit it, Judge.

3 THE COURT: Do you want to respond to that?

4 MR. RUGGEROLI: Judge, first, I don't believe we
5 did this last time because I don't think the State
6 officially rested. I've advised Mr. Henderson of his right
7 to testify. He won't be doing so at this time. We have no
8 other witnesses.

9 THE COURT: Okay.

10 MR. RUGGEROLI: And I don't know if Mr. Turner
11 would like to argue other than that. If not, let me
12 address some of the counts here, Judge.

13 THE COURT: I'll go ahead and amend that
14 accordingly. Okay?

15 MR. RUGGEROLI: In terms of the kidnapping, Judge,
16 I'm going to cite some law and make a record on this
17 because the district attorney's office is screening through
18 a number of kidnapping charges that are getting to district
19 court and we're having to litigate this through writs.

20 I don't think they met the standard to show an
21 increased risk of harm during the commissions of these
22 allegations or crimes to meet any kidnapping charges.

23 I'm going to state Staley versus State, which is a
24 91 Nevada 671, 1975, where the Supreme Court adopted the
25 California and New York rule for determining when double

1 jeopardy principals bar of first-degree kidnapping
2 conviction when it's charged in connection with other
3 underlying charges.

4 Here the underlying charges are the sex assault
5 and robbery. There is no increased risk of harm. This
6 kidnapping, Judge, is that they were tied up in the house,
7 never transported anywhere else. The only evidence that
8 showed any movement within the house was even limited.

9 So there is no increased risk of harm above and
10 beyond the allegation of the robbery and above and beyond
11 the allegation of the sexual assault. Mere confinement
12 does not equate to first-degree kidnapping, Judge, and we
13 shouldn't have this light standard be abused by the State
14 to include first-degree kidnapping any time somebody is
15 withheld against their will.

16 I don't believe they've met the standard, Judge.
17 I'm also going to cite Wright versus State, 94 Nevada 415.
18 That is a similar ruling where convictions for robbery and
19 first-degree kidnapping will not lie where the movement of
20 the victim was incidental to the robbery.

21 And if you recall the facts here, sexual assault,
22 tied up, moved to a different room, and that's supposed to
23 be kidnapping. And as far as the male victim involved, he
24 was just tied up in one instance. I don't think there was
25 any movement after he was tied up. So I don't think

1 they've met the requisite standard for any of the
2 kidnappings. That would include the conspiracy to commit
3 kidnapping. So Counts III, IV and V, I'm asking, your
4 Honor, to seriously consider not binding those over.

5 Additionally, on Count VI --

6 THE COURT: Hold it. Let's address each one
7 individually. I think it would be best. Go ahead.

8 MR. TURNER: Judge, counsel cited to some cases,
9 but it's black letter law when victims are actually bound,
10 and there's actually binding involved. There doesn't have
11 to be an increased risk of harm or asportation. A simple
12 act of binding a victim is sufficient purposes of
13 kidnapping because it goes above and beyond the other
14 counts.

15 I don't have a case in front of me because it's
16 black letter law, but the cases he's cited to are cases
17 where individuals were dragged around without being bound,
18 but in a circumstance like this where the victim is
19 actually bound with some form of rope or whatever,
20 increased risk of harm or movement as an asportation isn't
21 necessary.

22 THE COURT: Well, I'm not familiar with that, and,
23 you know, it's been awhile since I've done any type of
24 research in this issue.

25 MR. TURNER: Judge, we can pass it. I can get the

1 court case law on it.

2 MR. RUGGEROLI: I'll submit it to your Honor on
3 that issue. Certainly for the male victim he was not moved
4 while he was bound, according to my recollection of the
5 testimony. He was moved, bound and left, so even under --
6 even if that was true, I don't think just because you have
7 binding at one point -- even if the state is correct, which
8 I disagree with -- at least for the male victim those
9 kidnapping charges shouldn't lie.

10 So I'll submit it to your Honor. If you want to
11 take it under advisement or allow us to brief the issue, I
12 just don't think we have enough here, and there is no
13 increased risk of harm just by binding alone.

14 MR. TURNER: And, Judge, you don't need it. I've
15 gone to trial and been upheld on a case where an individual
16 was bound. It's an issue, if you're moving it's incidental
17 to the crime, but when an individual is actually bound,
18 Supreme Court has held that that's sufficient. I'll
19 provide the Court with a case law.

20 THE COURT: I'm not familiar with that. I wish
21 you would provide me the cases on that and also to the
22 defense, if you will. So I'm going to reserve my ruling on
23 that issue. If you could find the cases that so state that
24 so we'll know.

25 MR. RUGGEROLI: Do you want me to find it?

1 MR. TURNER: I'll find it.

2 THE COURT: He'll find it.

3 MR. RUGGEROLI: Can I have an opportunity to
4 respond when they get that to us?

5 THE COURT: Yes, that's fine. It's just
6 withholding it going up to district court.

7 MR. RUGGEROLI: And that would include, I believe,
8 Counts III, IV and V.

9 THE COURT: Kidnapping.

10 MR. RUGGEROLI: I can argue Count VI today, then,
11 if you'd like.

12 THE COURT: Go ahead.

13 MR. RUGGEROLI: This is the conspiracy to commit
14 sexual assault. If you recall the testimony by Ms. Kim,
15 she indicated that the assailant, the rapist, in her words,
16 tried to keep her quiet because he indicated he didn't want
17 the other two to know what was going on.

18 I think certainly that action alone would support
19 the fact that there was no conspiracy to commit sexual
20 assault. If anything, he didn't want them to know, so
21 there could have been no agreement in the first instance
22 for this to take place.

23 Additionally, aiding and abetting is not a
24 sufficient grounds to try to bind up a conspiracy for that
25 act. And based on her own testimony, I think there is no

1 evidence of a conspiracy to commit sexual assault.

2 THE COURT: Do you wish to respond to that?

3 MR. TURNER: Yes, Judge. Ms. Kim also testified
4 on two separate occasions that one of the other individuals
5 came down and actually spoke with the defendant who was in
6 the process of sexually assaulting her.

7 At one point I think the defendant told one of the
8 individuals she heard him say something to the middle
9 eastern guy while he had her downstairs on the couch, and
10 that he referred to her as being tight in terms of actually
11 sexually assaulting her. So there was a conversation
12 engaged.

13 These two individuals who had Mr. Burnswig
14 upstairs with the gun tied up, at least one of those
15 individuals who he conspired with to commit the robbery was
16 aware of the fact that he was sexually assaulting her. The
17 defendant even told him, "He told me it was tight."

18 He then went back upstairs by then keeping
19 Mr. Burnswig away. He assisted the defendant in allowing
20 him to make it easier for him to sexually assault her. We
21 have at least one of the other coconspirators who was aware
22 of the fact that the defendant was sexually assaulting her.

23 I believe there was another occasion where the
24 defendant -- and I don't recall exactly where it is in the
25 record, but Ms. Kim testified that he spoke with that same

1 gentleman again about her, that there was a conversation
2 between the two when the defendant had her downstairs.

3 But at least we know that one incident where the
4 individual was specifically aware of the fact that the
5 defendant had had sex with her and then went right back
6 upstairs.

7 MR. RUGGEROLI: Just being aware of something is
8 not enough to constitute a conspiracy. He would have had
9 to have some type of agreement or something to further --

10 THE COURT: Agreement can happen any time prior or
11 even during the act.

12 MR. RUGGEROLI: And, Judge, I think the evidence
13 was that --

14 THE COURT: -- to establish conspiracy.

15 MR. RUGGEROLI: I think it would have been -- the
16 evidence would have shown at the most that it would have
17 been after the act, because during the course she testified
18 that he did things to make it where he didn't want them to
19 know what was going on.

20 THE COURT: It was happening downstairs -- didn't
21 he take her upstairs into the bedroom and committed the
22 acts again?

23 MR. TURNER: That's correct.

24 MR. RUGGEROLI: Right. But there is no evidence
25 that there was any new agreement to have that take place.

1 Apparently, even if the State's allegations were true, the
2 other two were involved in trying to get money. There was
3 no participation or even assistance to allow this act to
4 take place, which she said she didn't think that he wanted
5 the other two to know what was going on.

6 And I believe that Mr. Burnswig testified that he
7 never went into the room, and he wasn't sure if the other
8 two were in the room when that was taking place, the second
9 time upstairs in the bedroom. So I just don't think
10 there's any evidence that there was a conspiracy, an
11 agreement of any kind to commit the sexual assault.

12 THE COURT: Well, slight or marginal is there.
13 Beyond a reasonable doubt is another thing. So I think
14 that will be a question of the fact for the jury. I think
15 for slight or marginal, the State has met their burden, but
16 whether beyond a reasonable doubt, that will be a question
17 of fact for the jury.

18 MR. RUGGEROLI: As to the counts, Judge, one last
19 thing, I'm going to ask you to consider not binding over
20 these burglaries, and here's the basis for that.

21 Although the statute has modified the old common
22 law rule about the breaking and entering, there still needs
23 to be an element of entering without permission to commit
24 an act.

25 In this circumstance they were given permission to

1 come into the home. I don't think it satisfies the
2 breaking element, not in the sense that they forced their
3 way in or anything else, but they came in with permission.
4 I think that the acts, even though they may have been
5 contemplated to be committed prior to that time, they were
6 allowed to come in, so I would just argue that that doesn't
7 constitute burglary.

8 THE COURT: I have a recollection they pushed
9 their way in.

10 MR. TURNER: Two of them did, Judge, but
11 regardless that common law rule has changed for the exact
12 purposes of when you have individuals who go in and
13 shoplift. If you go into a store, obviously you have
14 permission to enter, but if you go in with the requisite
15 criminal intent, obviously the individuals inside aren't
16 aware of that fact. He still commits the crime.

17 THE COURT: You can enter anything with the
18 criminal intent regardless of how you got in there. The
19 common law used to be --

20 MR. RUGGEROLI: That's what I'm saying. Obviously
21 it's been changed. I'm just saying that there still is an
22 element that would equate to a form of breaking, and unlike
23 a commercial setting, which is open to anyone to come in,
24 this was a residential home that is not open to anyone but
25 was made available by --

1 THE COURT: I think it's the entering with the
2 intent. I don't care how to enter. If you enter an
3 establishment with the intent to commit a crime, how the
4 entry is made is immaterial.

5 MR. RUGGEROLI: I'll submit it, Judge.

6 THE COURT: Okay. I think the burglary charges
7 are there.

8 MR. TURNER: So, your Honor, do you want to just
9 reserve ruling on those kidnappings and pass it for a
10 couple days, and I can get the case law?

11 THE COURT: I'm going to be fair to both parties.
12 I want to be clear in that.

13 MR. RUGGEROLI: If you can just e-mail me the
14 cites, I'll take a look at it.

15 THE COURT: If you can get those and send them
16 down to me so I can read them, and you can have a chance to
17 respond. When do you --

18 MR. TURNER: It shouldn't take me very long,
19 Judge. I'll provide the Court with courtesy copies as soon
20 as I get them.

21 MR. RUGGEROLI: That's fine.

22 MR. TURNER: Hopefully this afternoon.

23 MR. RUGGEROLI: If we could have a week.

24 MR. TURNER: I'll just say, I'll try to get it to
25 you this afternoon.

1 THE COURT: Let's make it a week. I think that
2 will be best because of the fact that this afternoon I got
3 the DUI trials this afternoon.

4 MR. TURNER: Judge, do you want me to come in in a
5 week to provide that in open court or just provide a
6 courtesy copy to counsel and yourself?

7 THE COURT: No, have a courtesy copy and have it
8 read, and you can respond anyway. We'll do it in open
9 court. You don't have to put it in any writing or
10 anything. Give me the case so I can read it this weekend,
11 let's put it this way, and let me study it. And if you
12 have anything of the contrary, you give it to me so I can
13 read it or prepare it. Okay?

14 MR. TURNER: I'll do everything I can to get it
15 this afternoon or tomorrow.

16 THE COURT: And if you get to respond, let's do it
17 next Wednesday at the same time.

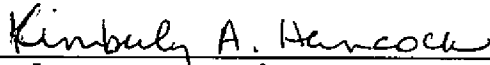
18 THE CLERK: June 29th at 8:30.

19 THE COURT: After the arraignments.

20 MR. TURNER: Thank you, Judge.

21 -o0o-

22 ATTEST: FULL, TRUE, ACCURATE AND CERTIFIED TRANSCRIPT
23 OF PROCEEDINGS.

24 
25 Kimberly A. Hancock, RPR, CCR No. 757

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FILED

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PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

2008 JUN -3 P 4: 00

CR. [Signature]
CLERK OF THE COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

v.

JOSEPH ALEXANDER HENDERSON,

Defendant.

CASE NO. C212968X

DEPT. NO. XIV

DATE: June 17, 2008
TIME: 9:00 a.m.

MOTION TO DISMISS FOR DESTRUCTION OF EVIDENCE

COMES NOW, the Defendant, JOSEPH ALEXANDER HENDERSON, by and through
NORMAN J. REED and VIOLET R. RADOSTA, Deputy Public Defenders and hereby submits
this motion to dismiss for destruction of evidence.

This Motion is made and based upon all the papers and pleadings on file herein, and oral
argument at the time set for hearing this Motion.

DATED this 3rd day of June, 2008.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By [Signature]
NORMAN J. REED, #3795
Deputy Public Defender

By [Signature]
VIOLET R. RADOSTA, #5747
Deputy Public Defender

RECEIVED
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CLERK OF THE COURT

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Joseph Henderson is charged in a fourteen count Information with multiple charges. He faces charges of conspiracy to commit burglary, burglary while in possession of a firearm, conspiracy to commit first-degree kidnapping, first-degree kidnapping with use of a deadly weapon, conspiracy to commit sexual assault, sexual assault with use of a deadly weapon, conspiracy to commit robbery, robbery with use of a deadly weapon, open or gross lewdness, battery with use of a deadly weapon resulting in substantial bodily harm. Trial is currently scheduled for June 23, 2008.

On September 3, 2004, the victims were asleep in their master bedrooms when the doorbell rang. The male victim opened the door and four suspects entered the house. Two of the suspects had handguns and started ordering the victims to produce money. One of the victims was attempted to be tied up while the suspects ransacked the house. One of the suspects sexually assaulted the female victim on the couch. The suspect then had the female victim go upstairs to the master bedroom and lay down on the bed. She was tied up by her feet and again sexually assaulted. The suspects fled the residence and the victims contacted 9-1-1.

The assailants were wearing masks, so they were unable to be identified. However, the government was able to collect DNA from the female victim's vagina, breast, and semen from a bed sheet. The foreign DNA was uploaded into the National DNA Index system for comparison. A DNA profile was developed from the reference standard and connected to Joseph Henderson.

Three separate tests were performed concerning the DNA. The records are clear that a portion of the swabs taken from Joseph Henderson were used for comparison. However, the same was not true regarding the suspect evidence collected at the scene. Breast swabs were extracted and apparently consumed to the point where retesting would be impossible. Additionally, DNA

1 was extracted from the bed sheets from the upstairs bedroom. However, nearly all of the material
2 was extracted in order to obtain a sufficient profile. Lastly, two vaginal swabs were collected and
3 apparently completely used during the course of the DNA testing. Thus, based on the records
4 provided by the Las Vegas Metropolitan Police Department Forensic Crime Lab, there is
5 insufficient DNA material in order for the defense to retest the DNA in the Joseph Henderson case.

6 JOSEPH HENDERSON IS PREJUDICED BY THE GOVERNMENT'S
7 CONSUMPTION OF THE DNA MATERIAL AS HE NOW CANNOT RETEST
8 TO SHOW THE INADEQUACY OF THE GOVERNMENT'S CONCLUSIONS
9 CONCERNING DNA EVIDENCE

10 Joseph Henderson was discovered by the Government by what is known as a "cold hit"
11 case. The unidentified DNA material was entered into a national database. This gave the
12 Government the possibility that Henderson may be the source of the DNA material left at the
13 crime scene and on the female victim. Based on this information, the Government obtained
14 sample swabs of Joseph's DNA material. These samples were then compared to the semen in the
15 vaginal swabs, on the bed sheets, as well as saliva collected from the breast of the female victim.
16 In the course of the testing, all or significant portions of this DNA material was consumed by the
17 Government. Joseph Henderson is now in the position where he cannot retest and challenge the
18 Government's expert's conclusions. Therefore, dismissal of the charges against Henderson is
19 appropriate.
20

21 Lost or destruction of the evidence by the State violates due process, "only if the defendant
22 shows either that the State acted in bad faith or that the defendant suffered undo prejudice and the
23 exculpatory value of the evidence was apparent before it was lost or destroyed." Leonard v. State,
24 117 Nev. 53, 68, 17 P.3d 397, 407 (2001). The Court should note that these standards are in the
25 disjunctive. In other words, Joseph has only to show either bad faith on the part of the State or that
26 he suffered prejudice from the lost. "To establish prejudice, the defendant must show that it could
27
28

1 be reasonably anticipated the evidence would have been exculpatory and material to the defense.”

2 Cook v. State, 114 Nev. 120, 125, 953 P.2d 712, 715 (1998).

3 When evidence is lost as a result of inadequate government handling, a conviction may be
4 reversed. Howard v. State, 95 Nev. 580, 600 P.2d 214 (1979); United States v. Heiden, 508 F.2d
5 898 (Cir. 1974). For more than 30 years, both the Nevada Supreme Court as well as the Ninth
6 Circuit Court of Appeals have reiterated that Joseph Henderson must show either 1) bad faith or
7 contrivance on the part of the government; or 2) prejudice from its lost. Id.

8
9 Henderson can show both in the instant case. First, the DNA evidence was mishandled in
10 bad faith. When the Government undertook the steps to attempt to match Joseph Henderson to the
11 DNA, it was aware that no suspect was initially developed. It is also proven that the results of the
12 DNA testing are extremely critical to solidifying Henderson as the individual who not only
13 participated in the crimes, but specifically performed the alleged sexual assaults.

14
15 Even more troubling is the fact that the Government was already aware that Joseph
16 Henderson had counsel when some of the testing which destroyed the remaining DNA was
17 performed. Joseph was arrested on or about March of 2005. The final testing performed by the
18 Forensic Laboratory was done in the end of July of 2005. Defense counsel was never contacted
19 and notified that the testing may diminish or completely eliminate the ability to retest the
20 materials. Thus, Henderson has shown bad faith on the part of the Government as outlined by
21 Leonard, Supra.

22
23 Additionally, and separately, Joseph Henderson has suffered undo prejudice from the lost
24 evidence. The lost evidence is material and potentially exculpatory to the defense. Cook, Supra.
25 Henderson had a DNA forensic expert review all the records of reports provided by the Forensic
26 Crime Lab. Based on the defense expert's review of the records there is several areas where the
27 extraction and examination of the DNA material is in question. Additionally, the records appear to
28

1 reflect that there is insignificant remaining DNA material to retest from all the swabbings. Thus,
2 Joseph has established that the sole piece of evidence linking him to the crime scene is potentially
3 exculpatory and certainly material to the defense.


4 Assuming arguendo that this Honorable Court feels that dismissal is inappropriate sanction;
5 Joseph requests in the alternative, that the government be precluded from presenting evidence
6 regarding the results of the DNA testing. See, Sandborn v. State, 107 Nev. 399, 812 P.2d 1279
7 (1991). In the second alternative, he requests an instruction that the mishandled DNA evidence
8 prejudiced him, and that the jury be instructed conclusively that the DNA material did not match
9 him. Id. 408, 812 P.2d at 1286.
10

11
12 **CONCLUSION**

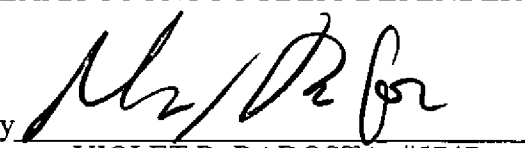
13 Based on the foregoing, all charges against Joseph Henderson should be dismissed. In the
14 alternative, the Prosecution should be precluded from presenting the results of the DNA testing. In
15 the second alternative, the jury should be specifically instructed that the DNA material does not
16 conclusively match Joseph.

17
18 DATED this 3rd June day of ~~May~~, 2008.

19
20 PHILIP J. KOHN
21 CLARK COUNTY PUBLIC DEFENDER

22 
23 By _____
24 NORMAN J. REED, #3795
25 Deputy Public Defender

26 PHILIP J. KOHN
27 CLARK COUNTY PUBLIC DEFENDER

28 
By _____
VIOLET R. RADOSTA, #5747
Deputy Public Defender

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NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion on for hearing before the Court on the 17th day of June, 2008, at 9:00 a.m.

DATED this 3rd day of June, 2008.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By 
NORMAN J. REED, #3795
Deputy Public Defender

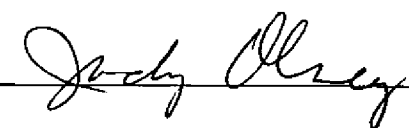
PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By 
VIOLET R. RADOSTA, #5747
Deputy Public Defender

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Motion to Dismiss for Destruction of Evidence is hereby acknowledged this 3 day of May, 2008.

CLARK COUNTY DISTRICT ATTORNEY

By 

ORIGINAL

ll

PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
(702) 455-4685
Attorney for Defendant

FILED

2008 JUN -3 P 4: 01

DISTRICT COURT

CLERK OF THE COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

JOSEPH ALEXANDER HENDERSON,

Defendant.

CASE NO. C212968X

DEPT. NO. XIV

DATE: June 17, 2008
TIME: 9:00 a.m.

**MOTION IN LIMINE TO PRECLUDE "PROSECUTOR'S FALLACY, ARGUMENTS
REGARDING DNA MATERIAL"**

COMES NOW, the Defendant, JOSEPH ALEXANDER HENDERSON, by and through
NORMAN J. REED and VIOLET R. RADOSTA, Deputy Public Defenders and hereby submits
this motion in limine to preclude "prosecutor's fallacy, arguments regarding DNA material.

This Motion is made and based upon all the papers and pleadings on file herein, points and
authorities and oral argument at the time set for hearing this Motion.

DATED this 3rd ^{June} day of ~~May~~, 2008.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By

NORMAN J. REED, #3795
Deputy Public Defender

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By

VIOLET R. RADOSTA, #5747
Deputy Public Defender

2008 JUN 3

RECEIVED

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CLERK OF THE COURT

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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

1
2
3 Joseph Henderson is charged in a fourteen count Information with multiple charges. He
4 faces charges of conspiracy to commit burglary, burglary while in possession of a firearm,
5 conspiracy to commit first-degree kidnapping, first-degree kidnapping with use of a deadly
6 weapon, conspiracy to commit sexual assault, sexual assault with use of a deadly weapon,
7 conspiracy to commit robbery, robbery with use of a deadly weapon, open or gross lewdness,
8 battery with use of a deadly weapon resulting in substantial bodily harm. Trial is currently
9 scheduled for June 23, 2008.
10

11 On September 3, 2004, the victims were asleep in their master bedrooms when the doorbell
12 rang. The male victim opened the door and four suspects entered the house. Two of the suspects
13 had handguns and started ordering the victims to produce money. One of the victims was
14 attempted to be tied up while the suspects ransacked the house. One of the suspects sexually
15 assaulted the female victim on the couch. The suspect then had the female victim go upstairs to
16 the master bedroom and lay down on the bed. She was tied up by her feet and again sexually
17 assaulted. The suspects fled the residence and the victims contacted 9-1-1.
18

19 The assailants were wearing masks, so they were unable to be identified. However, the
20 government was able to collect DNA from the female victim's vagina, breast and semen from a
21 bed sheet. The foreign DNA was uploaded into the National DNA Index system for comparison.
22 A DNA profile was developed from the reference standard and connected to Joseph Henderson.
23

24 Three separate tests were performed concerning the DNA. The records are clear that a
25 portion of the swabs taken from Joseph Henderson were used for comparison. However, the same
26 was not true regarding the suspect evidence collected at the scene. Breast swabs were extracted
27 and apparently consumed to the point where retesting would be impossible. Additionally, DNA
28

1 was extracted from the bed sheets from the upstairs bedroom. However, nearly all of the material
2 was extracted in order to obtain a sufficient profile. Lastly, two vaginal swabs were collected and
3 apparently completely used during the course of the DNA testing. Thus, based on the records
4 provided by the Las Vegas Metropolitan Police Department Forensic Crime Lab, there is
5 insufficient DNA material in order for the defense to retest the DNA in the Joseph Henderson case.

6 Additionally, Kathy Guenther states in her report dated July 25, 2005, the following:

7 "Joseph Henderson cannot be excluded from being the source of the semen indicted
8 in Item KMG 4, the top bed sheet, and the male DNA detected in Item DW 1
9 (KMG2) Item F, the vaginal swabs. The estimate of the DNA profile and the
10 population is rarer than 1 in 600 billion (identity assumed)."

11 Ms. Guenther makes the same statement in her report dated March 19, 2005. She states
12 that the estimate of the DNA profile and population is rarer than 1 in 600 billion, and again states
13 that identity is assumed.
14

15
16 THE GOVERNMENT SHOULD BE PRECLUDED FROM ARGUING AND
17 PRESENTING EVIDENCE THAT JOSEPH HENDERSON'S IDENTITY IS
18 ASSUMED AS A RESULT OF THE DNA TESTING

19 Joseph Henderson has filed a separate motion to dismiss all charges based on mishandling
20 of DNA evidence. Just in case this Honorable Court denies that motion, Joseph now challenges
21 the nature and extent by which the expert can testify and the prosecuting attorney can argue
22 regarding conclusions of the DNA testing. This Court cannot allow inaccurate and unreliable
23 testimony concerning DNA evidence. The government should not present nor argue statistical
24 evidence to suggest that the DNA evidence indicates the likelihood of the defendant's guilt rather
25 than the odds of the evidence having him found in a randomly selective sample. Yet, the
26 government's expert's reports reflect exactly that. The State's expert should be precluded from
27 testifying in this regard.
28

1 The Court's have held that evidence cannot be present nor arguments made concerning the
2 "prosecutor's fallacy." The Prosecutor's fallacy occurs when the prosecutor elicits testimony that
3 confuses source probability with random match probability. Put another way, Prosecutor err when
4 he or she "presents statistical evidence to suggest that the [DNA] evidence indicates the likelihood
5 of the defendant's guilt rather than the odds of the evidence having been found in a randomly
6 selective sample." Brown v. Farwell, 208 U.S. App. Lexus 9637 (9th Cir. May 5, 2008), Citing,
7 United States v. Chischilly, 30 F. 3d 1144, 1157 (9th cir. 1994). In the Chischilly case, the Court
8 said:
9

10 "To illustrate, suppose the Evidence establishes that there is a 1 in 10,000
11 chance of a random match. The jury might equate this likelihood with source
12 probability by believing that there is a 1 in 10,000 chance that the evidentiary
13 sample did not come from the defendant. This equation of random match
14 probability with source probability is known as the prosecutor's fallacy."
15

16 Such a fallacy is dangerous, as the probability of finding a random match can be much
17 higher than the probability of matching one individual, given the weight of the non-DNA evidence.
18 See, William C. Thompson and Edward L. Schumann, *Interception of Statistical Evidence in*
19 *Criminal Trials*, 11 L.ANDHUM.BEHAV.167, 170-71 (1987)(noting that the prosecutor's fallacy
20 "could lead to serious error, particularly where the other evidence in the case is weak and therefore
21 the prior probability of guilt is low").
22

23 There is nothing wrong with the prosecution eliciting that the DNA match is one in
24 whatever number of people randomly selected from the population would also match the DNA
25 found. That is random match probability. However, given a percentage that the DNA was found
26 to be Joseph Henderson is impermissible. That is source probability. Additionally, the expert
27
28

2
1 should be precluded from stating, and the prosecutor precluded from arguing identity is assumed.
2 This is impermissible for the same reasons already mentioned herein. Brown, Supra.

3 The questioned testimony is also misleading for a second reason. The government's expert
4 and the District Attorney should not be allowed to inaccurately minimize the likelihood that Joseph
5 Henderson's DNA would match one of his brothers. This underestimates the likelihood that one of
6 the brothers could have been the perpetrator of the sexual assault and other crimes charged. The
7 prosecution expert has not even ventured to estimate the statistical probability of a DNA match of
8 a Henderson's sibling. The defense requests any and all information the government may allude to
9 in this regard be provided to the defense in advance of the trial so that they may consult an expert
10 to determine if Ms. Guenther's calculations are correct.
11

12 The science of human DNA is highly complex and difficult to understand, even for the well
13 educated patient student. It involves the matching of human genome materials or alleles and the
14 statistical calculation of how often that match might occur in a chosen population. Because of the
15 nature of DNA evidence, even the slightest miscalculation can severely prejudice Joseph
16 Henderson. The jury will likely either accept as gospel or be completely confused by the
17 testimony and arguments of counsel regarding DNA evidence. It would be even more prejudicial
18 for the defense, should the government be allowed to misrepresent the likelihood of the
19 defendant's brother or brothers being the source of the DNA material or even more importantly,
20 testifying concerning random match probability or assumption of identity based on DNA testing.
21 Thus, this portion of the testimony, as well as potential arguments by the government's attorney
22 should be precluded.
23
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CONCLUSION

Based on the foregoing, Joseph Henderson's motion to preclude evidence and argument regarding the prosecutor's fallacy should be granted in its entirety.

DATED this 2nd June day of ~~May~~, 2008.


PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By


NORMAN J. REED, #3795
Deputy Public Defender

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By


VIOLET R. RADOSTA, #5747
Deputy Public Defender

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NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion on for hearing before the Court on the 17th day of June, 2008, at 9:00 a.m..

DATED this 2nd day of June, 2008.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By 
NORMAN J. REED, #3795
Deputy Public Defender

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By 
VIOLET R. RADOSTA, #5747
Deputy Public Defender

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing Motion in Limine to Preclude "Prosecutor's Fallacy, Arguments regarding DNA Material" is hereby acknowledged this 3 day of June, 2008.

CLARK COUNTY DISTRICT ATTORNEY

By 


CLERK OF THE COURT

NOTC
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
STACY KOLLINS
Chief Deputy District Attorney
Nevada Bar #005391
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,	)	CASE NO: C212968
)	
-vs-	)	DEPT NO: XIV
)	
JOSEPH ALEXANDER HENDERSON,)	
#1502730)	
)	
Defendant.)	

SUPPLEMENTAL NOTICE OF WITNESSES AND/OR EXPERT WITNESSES
[NRS 174.234]

TO: JOSEPH ALEXANDER HENDERSON, Defendant; and

TO: PUBLIC DEFENDER, Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF NEVADA intends to call the following witnesses in its case in chief:

These witnesses are in addition to those witnesses endorsed on the Information and any other witness for which a separate Notice has been filed.

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF NEVADA intends to call expert witnesses in its case in chief as follows:

The substance of each expert witness testimony and copy of all reports made by or at the direction of the expert witness has been provided in discovery.

A copy of each expert witness curriculum vitae, if available, is attached hereto.

//

1	<u>NAME</u>	<u>ADDRESS</u>
2	BERCH, HENRY – LVMPD: Will testify as an DNA Expert.	
3	BERNZWEIG, ERIC – 3886 BILTMORE BAY, LVN 89147	
4	CRANE, I. – LVMPD P#3658	
5	CUSTODIAN OF RECORDS – LVMPD COMMUNICATIONS	
6	CUSTODIAN OF RECORDS – LVMPD RECORDS	
7	CUSTODIAN OF RECORDS – UNIVERSITY MEDICAL CENTER	
8	DAHN, ROBBIE – LVMPD P#5947	
9	EBBERT, LINDA – UNIVERSITY MEDICAL CENTER: Will testify as an expert	
10	Sexual Assault Nurse Examiner regarding the treatment of the victim in this case.	
11	GUENTHER, KATHY – LVMPD P#6109: Will testify as an DNA Expert.	
12	JEFFRIES, MICHAEL – LVMPD P#5302	
13	JOGODKA, LVMPD P#7587	
14	KIM, JULIE – 3886 BILTMORE BAY, LVN 89147	
15	KOVAL, K. – LVMPD P#7781	
16	*MURGA, KIM - LVMPD P#10140: Will testify as an expert as to the collection,	
17	analysis and identification of DNA evidence in the instant case.	
18	SCLZNICK, DR. J.	
19	STROBECK – LVMPD	
20	TREATING PHYSICAN OF ERIC BRENZWEIG	
21	WELCH, DAVID – LVMPD P#1418: Will testify as an DNA Expert.	
22	WILDS, MELISSA – LVMPD	
23	WOMACK, SHANE – LVMPDP#4953	

*indicates additional witness(es)

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY

STACY KOLLINS
Chief Deputy District Attorney
Nevada Bar #005391

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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Notice, was made this 3rd day of June, 2008, by
facsimile transmission to:

PUBLIC DEFENDER'S OFFICE
366-9370

BY M. Warner
Employee of the District Attorney's Office

mmw/SVU

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
FORENSIC LABORATORY
STATEMENT OF QUALIFICATIONS**

Date: 12/21/2007

Name: Kimberly B. Murga P#: 10140 Classification: DNA Technical Leader

Current Discipline of Assignment: Biology/DNA

EXPERIENCE IN THE FOLLOWING DISCIPLINE(S)			
Controlled Substances		Blood Alcohol	
Toolmarks		Breath Alcohol	
Trace Evidence		Arson Analysis	
Toxicology		Firearms	
Latent Prints		Crime Scene Investigations	
Serology		Clandestine Laboratory Response Team	
Document Examination		DNA Analysis	X
Quality Assurance	X	Technical Support /	
EDUCATION			
Institution	Dates Attended	Major	Degree Completed
Chaminade University of Honolulu	1990-1995	Biology	BA
Chaminade University of Honolulu	1990-1995	Criminal Justice	BS
George Washington University	1995-1997	Forensic Science	MFS
ADDITIONAL TRAINING / SEMINARS			
Course / Seminar	Location	Dates	
Mid-Atlantic Association of Forensic Scientists	Washington DC	May 2007	
Applied Biosystems 2-Day Workshop	Washington DC	May 2006	
National Seminars Group, "The Creativity Day Camp for Managers, Supervisors and Team Leaders"	Rockville, MD	November 2005	
The National Association of Medical Examiners Meeting	Los Angeles, CA	October 2005	
FBI DNA Auditor Training Program	Quantico, VA	September 2005	
The International Society for Optical Engineering, Defense and Security 2005: Homeland Security, Law Enforcement, and Battleship Technologies	Orlando, FL	March 2005	

ADDITIONAL TRAINING / SEMINARS		
Course / Seminar	Location	Dates
Applied Biosystems Future Trends in Forensic DNA Technology	Bethesda, MD	September 2004
Promega Annual Meeting	Phoenix, AZ	September 2003
Promega Annual Meeting, "Basic Principles in Statistics"	Phoenix, AZ	September 2003
American Academy of Forensic Sciences Annual Meeting	Chicago, IL	February 2003
SkillPath Seminars, "The Essentials of Communicating with Diplomacy and Professionalism"	Silver Spring, MD	October 2002
Midwestern Association of Forensic Scientists Annual Meeting	Milwaukee, WI	September 2002
Midwestern Association of Forensic Scientists Annual Meeting, "Court Room Testimony" Workshop	Milwaukee, WI	September 2002
George Carmody Statistics Course "Population Statistics and Forensic DNA Analysis"	Rockville, MD	July 2001
American Academy of Forensic Sciences Annual Meeting	Seattle, WA	February 2001
American Academy of Forensic Sciences Meeting, "The Testifying Expert" Workshop	Seattle, WA	February 2001
Joint Task Force Full Accounting Meeting	Honolulu, HI	January 2000
International Association of Forensic Scientists Meeting	Los Angeles, CA	August 1999
International Association of Forensic Scientists Meeting, "Bombing Crime Scene and Evidence" Workshop	Los Angeles, CA	August 1999
International Association of Forensic Scientists Meeting, "Human Bite Mark Investigation" Workshop	Los Angeles, CA	August 1999
American Academy of Forensic Sciences Annual Meeting	Orlando, FL	February 1999
American Academy of Forensic Sciences Annual Meeting, "DNA Proficiency Testing" Workshop	Orlando, FL	February 1999
Fred Pryor Systems, "How to Supervise People"	Bethesda, MD	May 1998
Mid-Atlantic Association of Forensic Scientists Annual Meeting	Rockville, MD	May 1998
American Academy of Forensic Sciences Annual Meeting	San Francisco, CA	February 1998
American Academy of Forensic Sciences Annual Meeting, "Forensic Expert Witness Court Testimony"	San Francisco, CA	February 1998

Statement of Qualifications

Name: Kimberly B. Murga

Page: 3

ADDITIONAL TRAINING / SEMINARS

Course / Seminar	Location	Dates
American Academy of Forensic Sciences Annual Meeting, "Recovery, Examination and Analysis of Decomposed and Skeletonized Remains" Workshop	San Francisco, CA	February 1998
Armed Forces Institute of Pathology, "DNA Databanks and Repositories"	Chicago, IL	November 1997
Armed Forces Institute of Pathology, "Basic Forensic Pathology"	Rockville, MD	October 1997
American Academy of Forensic Sciences Annual Meeting	New York, NY	February 1997
American Academy of Forensic Sciences Annual Meeting, "Deadly Paraphilias" Workshop	New York, NY	February 1997
American Academy of Forensic Sciences Annual Meeting, "Multi disciplinary Symposium on the Use of Forensic Science" Workshop	New York, NY	February 1997
Mid-Atlantic Association of Forensic Scientists, "Introduction to Criminalistics"	Gaithersburg, MD	October 1996
Mid-Pacific Association of Forensic Scientists, "Forensics on the Cutting Edge 1995"	Honolulu, HI	March 1995

COURTROOM EXPERIENCE

Court	Discipline	Number of Times
United States Military Court System	DNA: Autosomal STRs	2
United States Military Court System	DNA: Y-STRs	1
4 th Judicial District Court, Rusk County, Texas	DNA: Autosomal STRs	1

EMPLOYMENT HISTORY

Employer	Job Title	Date
Las Vegas Metropolitan Police Department	Technical Leader, DNA	7/07-Present
Armed Forces DNA Identification Laboratory	Assistant Technical Leader, DNA	9/05-7/07
Armed Forces DNA Identification Laboratory	Supervisory DNA Analyst	2/01-9/05
Armed Forces DNA Identification Laboratory	DNA Analyst	4/99-2/01
Armed Forces DNA Identification Laboratory	Branch Chief, Proficiency Test Operations	1/00-12/01
Armed Forces DNA Identification Laboratory	Mitochondrial DNA Technician/Technologist	11/97-4/99

EMPLOYMENT HISTORY

Employer	Job Title	Date
Armed Forces DNA Identification Laboratory	Quality Assurance Officer, Proficiency Test Operations Branch	5/96-11/97

PROFESSIONAL AFFILIATIONS

Organization	Date(s)
American Academy of Forensic Sciences, Member, Criminalistics Section	2003-Present
American Academy of Forensic Sciences, Student, Trainee, and Associate Member, Criminalistics Section	1996-2003
Mid-Atlantic Association of Forensic Scientists	1999-Present

PUBLICATIONS / PRESENTATIONS:

The International Society for Optical Engineering, Defense and Security Symposium 2007: "Caught in the Iraqi War: How DNA was used to Confirm the Genetic Link between an Injured Four-Year Old Girl and her Family", Orlando, FL, April 2007
The International Society for Optical Engineering, Defense and Security Symposium 2007: "An Overview of the Armed Forces Medical Examiner System and its Use of Cutting Edge Technologies to Deal the with Global War on Terrorism", Orlando, FL, April 2007
Sexual Assault Response Team Training Program, "DNA and Its Application to Forensic Science", Rockville, MD, April 2006
The International Society for Optical Engineering, Defense and Security Symposium 2005: "The CSI Effect on Science: The Real Issues Regarding Human Identification and Forensic Science", Orlando, FL, April 2005
Sexual Assault Response Team Training Program, "DNA and Its Application to Forensic Science", Bethesda, MD, April 2005
C Torwalt, K Murga , J Epp, AT Balancharna, Y Daoudi, DA Lee, BC Smith. Cervical Smears as an Alternative Source of DNA in the Identification of Human Skeletal Remains. Canadian Society of Forensic Science 2005; 38 (3): 165-169
XXXV International Congress on Military Medicine: "Terror in the Skies After the World Trade Towers: The Identification and Reassociation of Remains from the Pentagon and Somerset Plane Crashes", Washington DC, September 2004
American Academy of Forensic Sciences: "A DNA Paternity Case Involving a Two-Week Old Fetus", Chicago, IL, February 2003.
American Academy of Forensic Sciences, "The Bombing of the USS Cole: The Role of DNA in Sending Seventeen Heroes Home", Chicago, IL, February 2003
American Academy of Forensic Sciences, "Terror in the Skies After the World Trade Towers: The Identification and Reassociation of Remains from the Pentagon and Somerset Plane Crashes", Chicago, IL, February 2003
The 8 th National CODIS User's Conference, "Pentagon and Pennsylvania", Arlington, VA, November 2002

PUBLICATIONS / PRESENTATIONS:

Midwestern Association of Forensic Scientists, "Terror in the Skies After the World Trade Towers: The Identification and Reassociation of Remains from the Pentagon and Somerset Plane Crashes", Milwaukee, WI, September 2002

Midwestern Association of Forensic Scientists, "Laboratory Information Systems Applications for Analysis of DNA Typing in the Workplace: New and Improved Methods for Enhancing Efficiency of Case Working Units", Milwaukee, WI, September 2002

Chaminade University of Honolulu, "DNA Forensic Techniques and Case Studies", Honolulu, HI, November 2001

Sonoma State University, "When Bad Things Happen to Good People: The Use of DNA to Identify Remains", Sonoma, CA, February 2001

American Academy of Forensic Sciences Annual Meeting: "The Role of DNA Analysis in Mass Disasters", Seattle, WA, February 2001

Chaminade University of Honolulu, "Forensics and DNA", Honolulu, HI, January 2000

International Association of Forensic Sciences Meeting, "The Mount Baker Crash: Six World War II Soldiers Recovered and Identified After 52 Years Using mtDNA and Anthropological Methods", Los Angeles, CA, August 1999

Chaminade University of Honolulu, "Forensics and DNA", Honolulu, HI, March 1998

OTHER QUALIFICATIONS:

Dedication to the Mission Award, Armed Forces DNA Identification Laboratory, September 2003

American Academy of Forensic Sciences Regional Award on behalf of the Midwestern Association of Forensic Scientists, February 2003

Outstanding Achievement Award, Armed Forces DNA Identification Laboratory, Armed Forces Institute of Pathology, 1999