


Eddie J. Thomas
 Name
96556
 Prison Number
N.N.C.C.
 Place of Confinement

<input checked="" type="checkbox"/> FILED	<input type="checkbox"/> RECEIVED
<input type="checkbox"/> ENTERED	<input type="checkbox"/> SERVED ON
COUNSEL/PARTIES OF RECORD	
<div style="border: 1px solid black; padding: 5px; display: inline-block;"> JUL 28 2010  </div>	
CLERK US DISTRICT COURT DISTRICT OF NEVADA	
BY: _____	DEPUTY _____

COPY RETURN

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Eddie James Thomas, Petitioner,)
 (Full Name))
 vs.)
Jack Padmer, Respondent,)
 (Name of Warden, Superintendent, jailor or)
 authorized person having custody of petitioner))
 and)
The Attorney General of the State of Nevada)

CASE NO. 3:09-CV-00455-HDM-(GRAM)
 (To be supplied by the Clerk)

"SECOND AMENDED"
PETITION FOR A
WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2254
BY A PERSON IN STATE CUSTODY
(NOT SENTENCED TO DEATH)

1. Name and location of court, and name of judge, that entered the judgment of conviction you are challenging: Eighth Judicial District Court, Clark County; Valerie Vega.
2. Full date judgment of conviction was entered: 12 / 10 / 07. (month/day/year)
3. Did you appeal the conviction? Yes No. Date appeal decided: 5 / 16 / 07.
4. Did you file a petition for post-conviction relief or petition for habeas corpus in the state court?
 Yes No. If yes, name the court and date the petition was filed: District Court Clark County 2 / 21 / 08. Did you appeal from the denial of the petition for post-conviction relief or petition for writ of habeas corpus? Yes No. Date the appeal was decided: 5 / 16 / 07. Have all of the grounds stated in this petition been presented to the state supreme court? Yes No. If no, which grounds have not? _____
5. Date you are mailing (or handing to correctional officer) this petition to this court: 7 / 27 / 10.
Attach to this petition a copy of all state court written decisions regarding this conviction.

6. Is this the first federal petition for writ of habeas corpus challenging this conviction? Yes
 No. If no, what was the prior case number? 3:09-CV-00455-ADM-LAM. And in what court was
the prior action filed? United States District Court District of Nevada.
Was the prior action denied on the merits or dismissed for procedural reasons (check
one). Date of decision: / / . Are any of the issues in this petition raised in the
prior petition? Yes No. If the prior case was denied on the merits, has the Ninth
Circuit Court of Appeals given you permission to file this successive petition? Yes No.
7. Do you have any petition, application, motion or appeal (or by any other means) now pending in
any court regarding the conviction that you are challenging in this action? Yes No.
If yes, state the name of the court and the nature of the proceedings: _____
8. Case number of the judgment of conviction being challenged: C219039
9. Length and terms of sentence(s): 3 consecutive 96 months to 240 months
10. Start date and projected release date: 4-19-07 Release Date unavailable
11. What was (were) the offense(s) for which you were convicted: 5 Counts of
Statutory Sexual Seduction
12. What was your plea? Guilty Not Guilty Nolo Contendere. If you pleaded guilty
or nolo contendere pursuant to a plea bargain, state the terms and conditions of the agreement:

13. Who was the attorney that represented you in the proceedings in state court? Identify whether
the attorney was appointed, retained, or whether you represented yourself *pro se* (without counsel).

	Name of Attorney	Appointed	Retained	<i>Pro se</i>
arraignment and plea	_____	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
trial/guilty plea	<u>Pacient and Yampolsky</u>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
sentencing	<u>Same</u>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
direct appeal	<u>Yampolsy</u>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
1st post-conviction petition	<u>Eddie Thomas</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
appeal from post conviction	<u>Eddie Thomas</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
2nd post-conviction petition	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
appeal from 2nd post-conviction	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 4

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 14th Amendment right to Due Process, Fair Trial and Effective Assistance of Counsel. based on these facts:

- 1) The Trial Court introduced the petitioner's 1995 conviction of Sexual Assault as Prior to Bad Acts. The prior to bad acts should not have been admissible under the law at trial because A) The Nevada law clearly states that the Trial Court must first explain to the Jury why they must require to give Limiting Instruction Prior to the Introduction of the evidence which could not be considered to show criminal predisposition. B) The Jury was not properly Instructed Prior to Deliberations.
- 2) Petitioner's appellant counsel filed on his direct appeal making arguments on district court committed manifest error by admitting prior bad act evidence at trial. Specifically appellant counsel claims that petitioner's 1995 conviction for sexual assault was too remote in time, and that the more recent allegation, for conduct involving the instant victim in Texas, was not proven by clear and convincing evidence. Appellant counsel further argues that the prior bad acts were admitted, in violation of NRS 48.045(2) to prove that he was "act in conformity therewith," and that the prejudicial nature of the evidence outweighed any potential probative value.
- 3) The Nevada Supreme Court disagreed by making its arguments on, the record reveal that the district court indeed conducted a Petrocelli Hearing and determine that the prior to bad acts were.

Exhaustion of state court remedies regarding Ground 4:

relevant to motive, proven by clear and convincing evidence, and more probative than prejudicial. Petitioner's appellant counsel should have argued what the Nevada Supreme Court made claims and grounds on. "We note that the District Court did not provide the Jury with a limiting instruction prior to the introduction of the evidence, informing them that evidence could not be considered to show criminal predisposition but only for the limited purpose allowable under NRS 48.045(2)." Petitioner is now making claims that appellant counsel was Ineffective for not making these claims in support for his client.

4) Appellant Counsel should have argued these issues on petitioner's direct appeal. "The jury was not properly instructed prior to deliberations and not providing the Jury with a limiting instruction prior to the introduction." Therefore petitioner is now making these claims and issue before the court. Resulting in violating the petitioner's 14th Amend. Rights under the United States Constitution of due process.

5) It was clear error by the trial court in admitting/allowing prior to bad acts evidence of the Sexual assault after an offer to stipulate based upon not properly instructing the prior to the jury when it's deliberation time occurred.

6) Due to not having Proper Jury Instruction given at trial deliberation which limited the scope of the Jury to deliberate and decide the petitioner's case. Petitioner's 14th Amend. Right under the United States Constitution were violated due to petitioner's counsel did not raise these issues and ground not having Proper Jury Instructions, depriving petitioner his due process rights.

7) Prosecutorial Misconduct: ADA (Pate) committed Prosecutorial Misconduct when referring to the petitioner (Thomas) as a "Predator" in front of the jury. (Trial Transcripts Page 87, Line 1). That was intended to "invoke emotion" and try to cloud the jury's determination of the "facts" from the case before them, violating the petitioner's 14th Amend. Rights.

8) Given the similarities between the two cases and the equivalent

Nevada provision, petitioner conclude that the Court's analysis is compelling. More specifically, like its federal counterpart, NRS 48.035 (1) provides that "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." In the instant case and Texas one of petitioner's prior conviction were for the same or similar to this case, as that for which he was accused and the danger of unfair prejudice was clear. In petitioner views, the state's argument supposedly respecting jury nullification failed to establish a convincing, valid reason why acceptance of petitioner's concession of his ex-felon status, rather than the admission of the actual records of his prior conviction, would have hindered the effectiveness of its case. Rather, the prosecutor's remarks in this regard suggest that the state's goal was to subtly place petitioner's bad character in issue before the jury by making statements such as calling petitioner a "Predator" in front of the jury. The Prosecutor cannot give his or her own assumption or belief in front of the jury. The Prosecutor must stick with the facts at hand. Because of Prosecutor inappropriate comment calling petitioner a Predator and for not properly providing the Jury with a limiting instruction prior to the introduction. These are clear errors and should be vacated and remanded. back to the district court.

▶ **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

Yes No. If no, explain why not: Ineffective Assistance of Counseling

▶ **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

Yes No. If no, explain why not: Counsel refuse to turn over Direct Appeal Motion.

If yes, name of court: _____ date petition filed ____ / ____ / ____.

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____

If yes, did you raise this issue? Yes No. If no, explain why not: _____

▶ **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

Yes No. If yes, explain why: _____

If yes, name of court: _____ date petition filed ____ / ____ / ____.

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____

If yes, did you raise this issue? Yes No. If no, explain why not: _____

▶ **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? Yes No. If yes, explain: Tried to but the Nevada Supreme Court would not hear the issue because it was not litigated in the Lower Court

State concisely every ground for which you claim that the state court conviction and/or sentence is

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 5

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 6th Amendment right to Due Process, Fair Trial and Effective Assistance of Counsel during Direct Appeal, based on these facts:

- 1) Petitioner is now making arguments on his 6th Amend. Rights was violated when
A) Counsel did not obtain witnesses in favor for the petitioner during his trial
B) District Court allowed known perjury testimonies be presented to the Jury without correcting the facts. C) Counsel did not object to Proposed Jury Instructions was not used at trial which was, you may have to decide which witness to believe and which witness not to believe. You may believe everything a witness says or only part of it or none of it.
- 2) Petitioner contends that while he was preparing for trial his Trial Counsels made no contact visit or discuss Trial strategies with him, causing Ineffective Assistance of Counsel which violates his 6th Amend. Rights. Petitioner asserts that his Counsels visit with him only two times which was Aug. 25, 2006 and April of 2007. Petitioner went to trial on February of 2007. Petitioner wanted Julie Huggins Ross, Tiya Thomas, and Yvonne Alaga Baylis to testify on his behalf. Above said witness was Key witnesses for the defense, which petitioner will show.
- 3) Counsels performance was ineffective on a number of grounds which falls under adopting the Strickland ~~two~~ ^{two} prond test. Trial Counsels failed petitioner by not calling key witnesses to testify on his behalf, by not showing more inconsistencies, and for not cross-examining witnesses appropriate.
- 4) Known to be perjury testimonies to the jury: Detectives Molnar.

Exhaustion of state court remedies regarding Ground 5

and Fay conducted an interview with Bryt'ni Johnson. Detective Molnar leading the interview clearly ask Bryt'ni, "was there any other sexual activity going on." Bryt'ni replied, "no it was just sex." Please view Trial Transcript Page 81, Lines 6-10 and Trial Transcript Page 115, Lines 9-22 and T.T. Page 110, Lines 3-14. Before Detective Molnar began the interview he stated to Bryt'ni, "you must tell the truth at all times." View Police Report, Page 3.

5) During trial Prosecutor ADA (Pate) tried to cover up Bryt'ni's conflicting testimonies by telling the Jury that Bryt'ni was not comfortable speaking with a male figure about performing oral sex when Bryt'ni stated in her interview with detective that, "it was just sex." When asked, "was there any other sexual activity going on." Please view T.T. Page 59, Lines 18-25.

6) However Counsel for petitioner failed to bring out the true fact which counsel should have made arguments on Bryt'ni never made no such statement on, she was not comfortable speaking with a male figure about performing oral sex on petitioner during the interview or during trial. Petitioner believes this was done dilbrately to cloud the minds of the jury from seeing the true facts of this case. It was improper for (ADA) Pate to bolster the evidence or to mislead the jury an attempt to bolster or mislead the credibility of the states witness false statement which would be perjury to the jury.

7) When the testimony of the states witness is as conflicting as Bryt'ni was, this case should have been left to argument on the evidence. The jury may or may not have found Bryt'ni's testimony believable, however without the court room antics of ADA Pate the Jury was denied the opportunity on their own to decided if Bryt'ni's testimony was believable or not about performing oral sex on petitioner.

8) During cross-examination of Bryt'ni, Defense Counsel handed Bryt'ni a copy of her Police Report and asked her to read from it on performing oral sex on the petitioner. Her Police statement was conflicting from her testimony. Bryt'ni then testified that Detective Molnar did not let her finish her statement during the interview about performing oral sex. Please review Police Report Page 39. The states witness gave a false testimony to the jury. The Police Report clearly shows that Molnar did in fact allowed Bryt'ni

to finish her statement throughout the interview. Please view T.T. Page 91, Lines 2-14. The petitioner contends that he has submitted adquette proof by the record that Bryt'ni Johnson gave complete conflicting testimonies. Please view Bryt'ni's statement at trial Page 67, Lines 1-25. View Sophia's statement at trial Page 139, Lines 21-25 and Page 140, Lines 1-4.

9) Antiones statement concerning the allegation made by the allege victim Bryt'ni and her claim to have sex with petitioner. No drive was ever taken to picking up video games or anything else as claimed by the allege victim Bryt'ni, Brandaris, Jeremy, Petitioner, or myself. If their was a need to go and get anything we would have rode with Jeremy and not the petitioner because Jeremy owned his own car. Please view T.T. Page 171, Lines 1-25 and Page 172, Lines 1-14.

10) Bryt'ni made more statements stating that they were alone when Bryt'ni and petitioner left the residence to go too El Pollo Loco, however under Sophia's statement she recall that Bryt'ni jumped up and asked if she could go with petitioner and step-son Christopher to get some ice cream. Please view Bryt'ni's statement at trial Page 48, Lines 10-25, also view Sophia's statement at Trial Page 143, Lines 1-4.

11) Bryt'ni went on by given many more prejury testimonies to the Jury. Petitioner's 5 witnesses who was allowed to testified continue upon exposing Bryt'ni character but (ADA) Pate told the jury the petitioner's witnesses could not be trusted because they were his family members and that they would do anything or say anything to protect him (petitioner) but ADA Pate never provided proof to the jury that all 5 of petitioner's witnesses presented or gave any false statements or testimonies to the trial court or to the jury. 12) Petitioner argues he has a Constitutional Right to Compulsory Process to obtain witnesses in his favor. Petitioner will show clear and convincing evidence how (excluded) witnesses would have expose Bryt'ni's false testimonies given to the trial jury.

●) Defense witnesses : Yvonne Alaga Baylis could have testified to if trial counsel had subpoena or call to testify for petitioner. Yvonne was not at the Thomas resident for the month of June or July of 2004. That Sophia and Ash'li never took her home or any place of the matter as Bryt'ni alleged.

Sophia Thomas would have testified to the fact if trial counsel had asked during cross-examining that Yvonne did not visit their home during June of 2004 while Bryt'ni and Ash'li visited and stayed at the Thomas home. Therefore Sophia could not have taken Yvonne home.

Tiya Thomas could have testified to if trial counsel had subpoena or call to testify for petitioner. Tiya would have testified to petitioner dropped off Bryt'ni and Ash'li at her apartment to visit with her daughter Rey'elle and that petitioner did not get out of his vehicle, only Bryt'ni, Ash'li. Therefore petitioner and Bryt'ni could not have arrived and left his brother-in-law and sister-in-law's apartment together, then drove to a laundry room and allegedly had sex on top of a wash machine.

13) If trial counsel had ask Rey'elle Thomas during cross-examining Rey'elle would have testified to the jury that petitioner did in fact dropped off Bryt'ni and Ash'li over to spend time with her (Rey'elle) but petitioner never got out of the car. He simply dropped off the girls then left.

14) Julie Huggins Ross questioned Bryt'ni about giving Jeremy money. Bryt'ni gave sworn testimony that she did not give Jeremy money. If Julie was given a chance to testify, she would have testified to the jury that Bryt'ni did in fact give Jeremy money.

15) If trial counsel had subpoena and cross-examined all the above witnesses, this would have been a great chance for the trial counsel to prove his clients innocences before the jury. Instead counsel allowed these matters go unchallenged. Because of counsel ineffectiveness which clearly violates petitioner's 6th Amend. Rights. Please view Sentencing Day Transcript Page 13, Lines 16-25 and Page 14, Lines 1-7. T.T. Page 56, Lines 1-7 and Page 57 Lines 2-4. T.T. Page 87, Lines 9-16. T.T. Page 111, Lines 13-15. T.T. Page 61, Lines 21-23. T.T. Page 73, Lines 10-23 and T.T. statements from Rey'elle Thomas Page 181, Lines 3-25.

16) Ineffective Assistance of Counsel not objecting to Jury Instruction not being applied to during deliberation: Counsel fell below an objective standard when counsel allowed the D.A. and the district court to Omit Jury Instructions that could have been used to decide petitioners case.

17) As the district court presented inconsistent, and inaccuracies throughout the petitioner's case with their witness Brytni Johnson. Please view Proposed Jury Instructions Not Used at Trial. This particular Jury Instructions was taken out so the Jurors could not see it. Petitioner's 6th Amend. Rights under the United States Constitution were violated due to Counsel not objecting to district court withholding Jury Instructions given during deliberation, which limited the scope of the jury to decide on how to make any decision on false statements and testimonies such as harmless error or perjury which could determine the factor and decision of petitioner's case.

18) Petitioner has clearly shown how the State witness (Brytni Johnson) has given many perjury testimonies to the jury. Because of the many perjury testimonies and statements, the petitioner is asking for Impeachment of the state witness (Brytni Johnson) If the court do decide with the petitioner that the witness did comment many perjury testimonies and grant petitioner Impeachment of the witness. Petitioner is asking the court to vacate and remand back to the district court.

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

Yes No. If no, explain why not: Ineffective ~~and~~ Assistance of
Counseling

▶ **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

Yes No. If no, explain why not: Counsel did not turn over Trial
Transcripts so I could show inconsistencies and false statements

If yes, name of court: _____ date petition filed ____ / ____ / ____

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____

If yes, did you raise this issue? Yes No. If no, explain why not: Could not prove
or show the false statements and inconsistencies

▶ **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

Yes No. If yes, explain why: _____

If yes, name of court: _____ date petition filed ____ / ____ / ____

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____

If yes, did you raise this issue? Yes No. If no, explain why not: _____

▶ **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? Yes No. If yes, explain: _____

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two

unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 6

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 14th Amendment right to Assistance of Counsel Due Process, Fair Trial, and Effective based on these facts:

1) Petitioner is making arguments on his 14th Amend. Rights was violated when the district court brought in alleged sexual assault that was from alleged victim Bryt'ni Johnson statement from Texas. The trial court allowed admit evidence of other crimes into trial based on Texas non-conviction charge. Sufficient proof of the sexual assault that was pending in Texas was dismissed, not charging petitioner with the sexual assault. Therefore the district court should not have used or allowed alleged pending charge from Texas brought into trial because the petitioner never went to trial or was never convicted of the Crime, violating petitioner's 14th Amend. Rights.

2) The district court violated petitioner's 14th Amend Rights by holding an Evidentiary Hearing so they may present the non-conviction testimony from Texas into trial. The statements from Texas was based on hearsay. Therefore the district court violated petitioner's 14th Amend. Rights by allowing state witness Bryt'ni's inconsistent testimonies into trial. State witness Bryt'ni's testimonies cannot be trusted because of many inconsistencies during trial. Bryt'ni constantly changes her statements. Because of conflicting statements and testimonies. Bryt'ni's testimonies does not collaborate with her trial transcripts and with her evidentiary hearing. The district court allowed the state witness (Bryt'ni) knowingly and willingly

Exhaustion of state court remedies regarding Ground 6:

▶ Direct Appeal:

give perjury statements which violates petitioner's 14th Amend. Rights to a fair trial.

3) The district court may not knowingly use perjury testimony which is material to guilt or punishment. A conviction obtain by introduction of perjury testimony violates petitioner's 14th Amend Rights to a fair trial if A) The prosecution knowingly solicited the perjury testimony or B) The prosecution failed to correct testimony it knew was perjured. A new trial is required if the false testimony could in any reasonable likelihood have affected the judgement of the jury. This clearly violates petitioner's 14th Amend. Rights to a fair trial.

4) The district court has not proven beyond a reasonable doubt that the state witness testimonies are clear and convincing to admit as evidence once petitioner's has and will ^{Show} inconsistencies and false statements given to the jury. [Due Process] is a requirement that cannot be deemed to be stratified by mere notice and hearing if the district court has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a petitioner of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjury."

5) "[This] court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgement of the jury.

6) In those cases, the court has applied a strict standard of materiality, not just because they involve prosecution misconduct, but more importantly because they involved a corruption of the truth seeking functions of the trial process.

7) It is fundamentally unfair for a prosecutor to knowingly present perjury to a jury. Over forty years ago the Supreme Court made it clear that a conviction obtained through the use of false evidence, known to be such by representatives of the State must fall under the 14th Amend. . The same result obtained when the district court, although not soliciting false evidence allows it to go uncorrected when it appears.

8) Because of state witness inconsistencies (Brytni) and perjury testimonies given at trial to the jury. The statements from Texas should not have been admissiable in trial. This clearly violates petitioner's

14th Amend. Rights to a fair trial. Petitioner is asking for impeachment of the witness Bryt'ni Johnson.

9) Bryt'ni's Inconsistencies and Perjury statements given to the Jury:

Please view Evidentiary Hearing Transcripts Pages 15-17, Lines and Pages 26-34 Lines 1-24. Bryt'ni's statements during Evidentiary Hearing and Trial Transcript (T.T.) Page 138, Lines 7-20. Q: And before you spoke to the detectives in Las Vegas, you spoke to detectives in Texas, correct? A: Correct Q: And you gave them information? A: Yes, I did. Q: And you obviously wanted to tell them the truth? A: Correct Q: And you wanted to be accurate -- A: Yes. Q: -- and complete as possible? A: Yes. View T.T. Page 87, Lines 9-13. Q: Did you see Eddie and his family once you returned to Texas? A: Correct. They came with us to go back to Texas. Q: Oh, so you'd all flown in the plane together? A: Correct. Q: And when you get there, did they stay with you and your family for any period of time? A: Yes, they did. They with us for two days, Please view Julie Ross's Affidavit statement Lines 14-21. Suzanne Huggins, Bryt'ni Johnson, and Ash'li Davis all testified under oath that Bryt'ni and Ash'li flew back to Texas with defendant Eddie Thomas, his wife Sophia Thomas, and their four (4) children. I am here to state that Bryt'ni and Ash'li did not fly back to Texas with defendant Eddie Thomas, his wife, and children. I personally drove my own vehicle; picked up the Thomas family at their home on July 1, 2004. I dropped off the Thomas family at McCarran Airport to catch a flight to attend their family reunion in Louisiana. Bryt'ni and Ash'li were not present in my vehicle or at McCarran Airport on the day that I picked up and dropped off defendant Eddie Thomas and his family at the airport. Bryt'ni and Ash'li had previously flown back four (4) days earlier to Texas. Evidentiary Hearing Page 34, Lines 1-24

Q: About how long were you at the pool? A: I don't know. Maybe twenty minutes.

Q: Did you go in the water? A: No, I couldn't go in Q: Why not? A: I was on my cycle. Q: Oh, okay. So when you had sex, you were on your cycle?

A: Yes. Q: And this was on your bed? A: Yes. Q: On -- on the bedspread?

A: Yes. Q: Was there any blood or discoloration on the bedspread? A: No, there wasn't. Q: And when you did the load of laundry, ~~and~~ didn't wash

your bedspread? A: Not at that time, but later on I did. Q: Later on that day? A: No. The next day. Evidentiary Hearing Page 28, Lines 6-21. Q: Now, he -- After he was kissing you, were you backing up towards your bed? A: At that time, yes

By that time I had already had my clothes off. Q: Okay. And you took -- you took your capri pants off? A: Yes, I did. Q: And you took your underwear off? A: Yes. Q: And then at that time was Eddie fully clothed? A: No, he wasn't. Q: He had taken his pants off? A: His shorts. Yes. Q: Oh, he was just wearing shorts. So he took his shorts off, and he didn't have anything below the shorts? A: No, he didn't. Evidentiary Hearing Page 30, Lines 1-5. Q: And did -- While he was in your room, did he wipe himself off? A: No. Q: He didn't. He -- he just pulled his shorts up? A: Yes. Trial Transcript Page 91, Lines 11-13. Q: Okay. So what happens after he kind of shuts -- cracks the door as you described? A: He told me to come here. And I had on capri pants and a tee shirt. And he kissed me, and took off my capri pants and underwear. Trial Transcript Page 135, Lines 24 and 25. Q: Okay. At that time, he was wearing red shorts, correct? A: No, he had on clothes. Q: He had on clothes and he took his -- was he wearing pants or shorts? A: He had on pants. Q: Okay. He took his pants off? A: No, he didn't need to. Q: He unzipped his pants? A: Correct. Q: So he just unzipped his pants? A: Correct. Q: And he took out his penis? A: Correct. Q: He didn't take his pants off? A: No. Q: Okay. Now, you took -- you took your pants off, (Continue from page 135-137) A: Capri's? My Capri's, correct. Q: And your underwear off? A: Correct, with assistance. Q: And Eddie didn't take his pants off? A: No. Q: Do you remember testifying in this courtroom on Oct. 26 of 2006? A: Yes, I do. Q: Now, do you remember saying that Eddie took his pants off, at that time? A: No, I don't.

10) After reviewing the Trial Transcripts and the Evidentiary Hearing Transcripts, the testimonies and statements clearly are untrusting and conflicting with each other. These statements are clearly perjury to the jury. With testimonies like these, how can petitioner receive a fair trial. This is clearly Plain error and should be reverse and remanded back for a new trial or vacant and remand back to court.

Exhaustion of state court remedies regarding Ground 3:

▶ **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

Yes No. If no, explain why not: Ineffective Assistance of Counsel

▶ **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

Yes No. If no, explain why not: Could not prove the inconsistencies that I'm providing now, didn't have the Trial Transcripts.

If yes, name of court: _____ date petition filed / /

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____

If yes, did you raise this issue? Yes No. If no, explain why not: _____

▶ **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

Yes No. If yes, explain why: _____

If yes, name of court: _____ date petition filed / /

Did you receive an evidentiary hearing? Yes No. Did you appeal to the Nevada Supreme Court? Yes No. If no, explain why not: _____

If yes, did you raise this issue? Yes No. If no, explain why not: _____

▶ **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? Yes No. If yes, explain: I filed a Supplement Brief with Nevada Supreme Court, they place the Brief on received, not filed.



Eddie J. Thomas
(Name of person who wrote this
complaint if not Plaintiff)

Eddie Z
(Signature of Plaintiff)

July 27, 2010
(Date)

(Signature of attorney, if any)

(Attorney's address & telephone number)

DECLARATION UNDER PENALTY OF PERJURY

I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury. **I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.** See 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

Executed at N.N.C.C. on July 27, 2010.
(Location) (Date)

Eddie Z
(Signature)

96556
(Inmate prison number)

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDDIE JAMES THOMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 51156

District Court Case No. C219039

REMITTITUR

TO: Charles J. Short, 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: May 20, 2008

Tracie Lindeman, Clerk of Court

By: A. Ingersoll
Deputy Clerk

cc (without enclosures):

Hon. Valorie Vega, District Judge
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eddie James Thomas

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 _____.

District Court Clerk

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

EDDIE JAMES THOMAS, JR.,
Petitioner,
vs.
JAMES BENEDETTI, et al.,
Respondents.

Case No. 3:09-CV-00455-HDM- (RAM)

ORDER

Petitioner has submitted an amended petition (#11). The court has reviewed it pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. Petitioner must further amend the petition.

Ground 1 is actually two separate claims. First, petitioner alleges that he did not receive adequate notice that the prosecution intended to seek adjudication of him as a habitual criminal. Second, he alleges that his counsel provided ineffective assistance by not objecting to the lack of adequate notice. The ineffective-assistance claim is distinct from the underlying claim and should be pleaded in a separate ground. See Kimmelman v. Morrison, 477 U.S. 365, 373-74 & n.1 (1986).

Also in ground 1, petitioner argues that Nev. Rev. Stat. § 34.810 is not an adequate and independent state-law reason for

1 denying relief. This argument is premature. Respondents would
2 first need to move to dismiss ground 1 because of procedural
3 default before this argument becomes relevant.

4 In ground 2, petitioner first alleges that the
5 prosecution did not conduct a hearing fifteen days before
6 sentencing on whether petitioner's prior convictions were obtained
7 with the effective assistance of counsel. This allegation has two
8 defects. First, the Constitution does not require a particular
9 method of proving the existence of prior convictions that are used
10 to support a finding of habitual criminality. Dretke v. Haley, 541
11 U.S. 386, 395-96 (2004). Second, the state statutes that
12 petitioner cites do not support his allegations. The prosecution
13 may charge petitioner with being a habitual criminal either in the
14 criminal information or in a separate filing after conviction of
15 the primary offense. If the prosecution chooses the latter method,
16 then sentencing must occur no less than 15 days after the filing of
17 habitual-criminal charges. Nev. Rev. Stat. § 207.016(2). If there
18 is some question about the existence of the prior convictions, then
19 the state district court must conduct a hearing on the matter, but
20 nothing requires that hearing to be separate from, let alone
21 fifteen days before, the sentencing hearing. See Nev. Rev. Stat.
22 § 207.016(3). This part of ground 2 is without merit on its face,
23 and amendment cannot cure the defect.¹

24
25
26 ¹To the extent that petitioner is claiming that he did not
27 receive adequate notice of the intent to seek habitual-criminal
28 adjudication, ground 2 duplicates ground 1, and the court would
dismiss it for being redundant.

1 Second, petitioner alleges that counsel provided
2 ineffective assistance because counsel did not raise the above-
3 discussed issue before petitioner was sentenced. A petitioner
4 claiming ineffective assistance of counsel must demonstrate (1)
5 that the defense attorney's representation "fell below an objective
6 standard of reasonableness," Strickland v. Washington, 466 U.S.
7 668, 688 (1984), and (2) that the attorney's deficient performance
8 prejudiced the defendant such that "there is a reasonable
9 probability that, but for counsel's unprofessional errors, the
10 result of the proceeding would have been different," id. at 694.
11 "[T]here is no reason for a court deciding an ineffective
12 assistance claim to approach the inquiry in the same order or even
13 to address both components of the inquiry if the defendant makes an
14 insufficient showing on one." Id. at 697. Counsel did not perform
15 deficiently, because, as noted above, the statutes do not require
16 what petitioner alleges that they require.

17 As with ground 1, petitioner argues that Nev. Rev. Stat.
18 § 34.810 is not an adequate and independent state-law reason for
19 denying relief. This argument is moot because the court is
20 dismissing ground 2 for lack of merit.

21 Ground 3 clarifies a vague allegation of how petitioner
22 was adjudicated to be a habitual criminal. In the original
23 petition (#4), petitioner appeared to allege that the prosecution
24 was relying upon multiple counts from one prior judgment of
25 conviction to justify treatment of petitioner as a habitual
26 criminal. Nev. Rev. Stat. § 207.010 does not allow prior judgments
27 of conviction to be used that way. Rezin v. State, 596 P.2d 226,
28 227 (Nev. 1979). Accord, Halbower v. State, 606 P.2d 536, 537

1 (Nev. 1980). The court gave petitioner leave to amend to allege
2 what one prior judgment of conviction was used in this fashion. In
3 ground 3 of the amended petition (#11), the claim has changed.
4 Petitioner was convicted of five counts of statutory sexual
5 seduction. The trial court imposed the enhanced sentence for being
6 a habitual criminal on all counts, with some terms running
7 concurrently and some terms running consecutively. Petitioner now
8 alleges that the trial court should have applied the enhanced
9 sentence as a habitual criminal to only one count of statutory
10 sexual seduction. However, Nev. Rev. Stat. § 207.010 authorizes a
11 habitual-criminal sentence for each count. Ground 3 is without
12 merit on its face.

13 Ground 4 contains multiple claims. In paragraphs 1, 5,
14 and 7 through 15, Petitioner again alleges that the prosecution
15 violated Nev. Rev. Stat. § 50.090 when witnesses testified about
16 his prior sexual conduct. The court already has explained to
17 petitioner once that § 50.090 prohibits him from inquiring into the
18 victim's prior sexual conduct, but the statute does not prohibit a
19 witness from testifying against petitioner about his prior sexual
20 conduct. Petitioner needs to omit allegations concerning § 50.090
21 from his second amended complaint.

22 In paragraphs 7 through 15, petitioner also argues that
23 the prosecution violated a witness' privilege against self-
24 incrimination, guaranteed by the Fifth Amendment. "A defendant has
25 no standing to argue that a witness' effort to exercise the
26 privilege against self-incrimination was in some way undermined."
27 United States v. Cenicerros, 427 F.2d 685, 689 (9th Cir. 1970)
28 (citing Bowman v. United States, 350 F.2d 913, 915 (9th Cir.

1 1965)). Petitioner needs to omit ^{leave out} allegations concerning the
2 privilege against self-incrimination from his second amended
3 complaint.

4 In addition to correcting the defects noted above,
5 Petitioner needs to re-allege his other grounds in the amended
6 petition, or they will be waived. King v. Atiyeh, 814 F.2d 565,
7 567 (9th Cir. 1987).

8 Petitioner has submitted an application to proceed in
9 forma pauperis (#13). The application is moot because petitioner
10 has paid the filing fee.

11 Petitioner has submitted a motion for appointment of
12 counsel (#14). Whenever the court determines that the interests of
13 justice so require, counsel may be appointed to any financially
14 eligible person who is seeking habeas corpus relief. 18 U.S.C.
15 § 3006A(a)(2)(B). "[T]he district court must evaluate the
16 likelihood of success on the merits as well as the ability of the
17 petitioner to articulate his claims pro se in light of the
18 complexity of the legal issues involved." Weygandt v. Look, 718
19 F.2d 952 (9th Cir. 1983). There is no constitutional right to
20 counsel in federal habeas proceedings. McCleskey v. Zant, 499 U.S.
21 467, 495 (1991). The factors to consider are not separate from the
22 underlying claims, but are intrinsically enmeshed with them.
23 Weygandt, 718 F.2d at 954. After reviewing the petition, the court
24 concludes that appointment of counsel is not warranted.

25 IT IS THEREFORE ORDERED that the application to proceed
26 in forma pauperis (#13) is **DENIED** as moot.

27 IT IS FURTHER ORDERED that the motion for appointment of
28 counsel (#14) is **DENIED**.

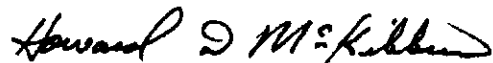
1 IT IS FURTHER ORDERED that grounds 2 and 3 of the amended
2 petition (#11) are **DISMISSED**.

3 IT IS FURTHER ORDERED that the clerk of the court shall
4 send Petitioner a petition for a writ of habeas corpus pursuant to
5 28 U.S.C. § 2254 form with instructions. Petitioner shall have
6 thirty (30) days from the date that this order is entered in which
7 to file a second amended petition to correct the noted
8 deficiencies. Failure to comply with this order will result in the
9 dismissal of grounds 1 and 4.

10 IT IS FURTHER ORDERED that petitioner shall clearly title
11 the second amended petition as such by placing the phrase "SECOND
12 AMENDED" immediately above "Petition for a Writ of Habeas Corpus
13 Pursuant to 28 U.S.C. § 2254" on page 1 in the caption, and
14 petitioner shall place the docket number, 3:09-CV-00455-HDM-(RAM),
15 above the phrase "SECOND AMENDED."

16 DATED: July 12, 2010.

17
18
19
20
21
22
23
24
25
26
27
28



HOWARD D. MCKIBBEN
United States District Judge

JOC

ORIGINAL

FILED

ORIGINAL

MAY 1 1 30 PM '07

DISTRICT COURT

Cliff
CLERK OF THE COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

EDDIE JAMES THOMAS
#0801243

Defendant.

CASE NO. C219039

DEPT. NO. II

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNTS 1 - 5 - STATUTORY SEXUAL SEDUCTION (Category C Felony), in violation of NRS 200.364, 200.368; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNTS 1 - 5 - STATUTORY SEXUAL SEDUCTION (Category B Felony), in violation of NRS 200.364, 200.368; thereafter, on the 19TH day of April, 2007, the Defendant was present in court for sentencing with his counsels, MACE J. YAMPOLSKY, ESQ. and MICHAEL D. PARIENTE, ESQ. , and good cause appearing,

RECEIVED

MAY 01 2007

CLERK OF THE COURT

1 THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses under the
 2 Small Habitual Criminal Statute and, in addition to the \$25.00 Administrative
 3 Assessment Fee, \$150.00 DNA Analysis Fee including testing to determine genetic
 4 markers, and \$800.00 Psycho-Sexual Evaluation Fee, the Defendant is SENTENCED
 5 to the Nevada Department of Corrections (NDC) as follows: AS TO COUNT 1 - TO A
 6 MAXIMUM of TWO HUNDRED FORTY (240) MONTHS with a MINIMUM Parole
 7 Eligibility of NINETY-SIX (96) MONTHS; AS TO COUNT 2 - TO A MAXIMUM of TWO
 8 HUNDRED FORTY (240) MONTHS with a MINIMUM Parole Eligibility of NINETY-SIX
 9 (96) MONTHS, COUNT 2 to run CONSECUTIVE to COUNT 1; AS TO COUNT 3 - TO A
 10 MAXIMUM of TWO HUNDRED FORTY (240) MONTHS with a MINIMUM Parole
 11 Eligibility of NINETY-SIX (96) MONTHS, COUNT 3 to run CONSECUTIVE to COUNTS
 12 1 & 2; AS TO COUNT 4 - TO A MAXIMUM of TWO HUNDRED FORTY (240) MONTHS
 13 with a MINIMUM Parole Eligibility of NINETY-SIX (96) MONTHS, COUNT 4 to run
 14 CONCURRENT with COUNTS 1, 2, & 3; AS TO COUNT 5 - TO A MAXIMUM of TWO
 15 HUNDRED FORTY (240) MONTHS with a MINIMUM Parole Eligibility of NINETY-SIX
 16 (96) MONTHS, COUNT 5 to run CONCURRENT with COUNTS 1, 2, 3, & 4; with FOUR
 17 HUNDRED FORTY-EIGHT (448) DAYS credit for time served.

22
 23
 24 DATED this 30th day of April, 2007

25
 26
 27 
 28 VALORIE J. VEGA
 DISTRICT JUDGE *dx*

1 2. On February 10, 2006, an Amended Information was filed charging Defendant
2 with five (5) counts of STATUTORY SEXUAL SEDUCTION (Felony – NRS 200.364,
3 200.368). Additionally, Defendant was placed on notice that, in accordance with NRS
4 207.010, punishment imposed pursuant to the above-stated habitual criminal statute would
5 be urged upon this Court if Defendant was found guilty on any of the primary offenses.

6 3. A jury trial in the matter began on February 26, 2007 and concluded on March
7 1, 2007. On March 1, 2007, the jury returned a verdict of guilty as to all five (5) counts.

8 4. Sentencing took place on April 19, 2007. In addition to the \$25.00
9 Administrative Assessment Fee, \$150.00 DNA Analysis Fee including testing to determine
10 genetic markers, and \$800.00 Psycho-Sexual Evaluation Fee, this Court sentenced
11 Defendant to the Nevada Department of Corrections (NDC) as follows: COUNT 1 –
12 MAXIMUM of TWO HUNDRED FORTY (240) MONTHS with a MINIMUM parole
13 eligibility of NINETY-SIX (96) MONTHS; COUNT 2 - MAXIMUM of TWO HUNDRED
14 FORTY (240) MONTHS with a MINIMUM parole eligibility of NINETY-SIX (96)
15 MONTHS, to run CONSECUTIVE with COUNT 1; COUNT 3 - MAXIMUM of TWO
16 HUNDRED FORTY (240) MONTHS with a MINIMUM parole eligibility of NINETY-SIX
17 (96) MONTHS, to run CONSECUTIVE with COUNTS 1 & 2; COUNT 4 - MAXIMUM of
18 TWO HUNDRED FORTY (240) MONTHS with a MINIMUM parole eligibility of
19 NINETY-SIX (96) MONTHS, to run CONCURRENT with COUNTS 1, 2 & 3; COUNT 5 -
20 MAXIMUM of TWO HUNDRED FORTY (240) MONTHS with a MINIMUM parole
21 eligibility of NINETY-SIX (96) MONTHS, to run CONCURRENT with COUNTS 1, 2, 3 &
22 4. With FOUR HUNDRED FORTY-EIGHT (448) DAYS credit for time served. Judgment
23 of Conviction was entered on May 1, 2007.

24 5. On May 16, 2007, Defendant filed a Notice of Appeal with the Nevada
25 Supreme Court. The Nevada Supreme Court affirmed Defendant's Judgment of Conviction
26 on December 10, 2007.¹ Remittitur issued on January 4, 2008.

27
28

¹ *Thomas v. State*, Case No. 49486.

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDDIE JAMES THOMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49486

FILED

DEC 10 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of statutory sexual seduction (counts I-V). Eighth Judicial District Court, Clark County; Valorie Vega, Judge. - The district court adjudicated appellant Eddie James Thomas as a habitual criminal and sentenced him to serve three consecutive prison terms of 96-240 months (counts I-III) and two prison terms of 96-240 months (counts IV-V) to run concurrently with counts I-III.

Thomas contends that the district court committed manifest error by admitting prior bad act evidence at trial. Specifically, Thomas claims that his 1995 conviction for sexual assault was too remote in time, and that the more recent allegation, for conduct involving the instant victim in Texas, was not proven by clear and convincing evidence. Thomas further argues that the prior bad acts were admitted, in violation of NRS

48.045(2), to prove that he was “acting in conformity therewith,” and that the prejudicial nature of the evidence outweighed any potential probative value. We disagree with Thomas’ contention.

The record reveals that the district court conducted a Petrocelli hearing¹ and determined that the prior bad acts were relevant to motive, proven by clear and convincing evidence, and more probative than prejudicial.² We agree. We note that the district court did not provide the jury with a limiting instruction prior to the introduction of the evidence, informing them that the evidence could not be considered to show criminal predisposition but only for the limited purposes allowable under NRS 48.045(2), because defense counsel objected to the State’s proffered instruction and expressly requested, for tactical reasons, that the district court not provide such an instruction at that time.³ And

¹Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

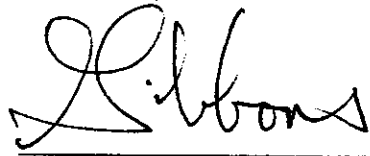
²See Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); see also Ledbetter v. State, 122 Nev. 252, 261-62, 129 P.3d 671, 678-79 (2006); Rhymes v. State, 121 Nev. 17, 21, 107 P.3d 1278, 1281 (2005).

³See Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001).

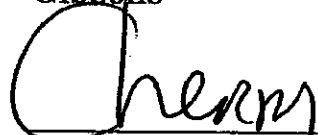
Thomas does not allege on appeal that the jury was not properly instructed prior to deliberations. Accordingly, we conclude that the district court did not err in admitting the prior bad act evidence.

Having considered Thomas' contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.⁴


_____ J.

Gibbons


_____ J.

Cherry


_____ J.

Saitta

⁴Because Thomas is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, this court shall take no action and shall not consider the proper person documents Thomas has submitted to this court in this matter.

ORIGINAL

15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ORDR
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
CARRIE MORTON
Chief Deputy District Attorney
Nevada Bar #0010160
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

ORIGINAL

FILED
May 1 3 12 PM '08
Chaf...
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

EDDIE J. THOMAS,
Eddie James Thomas
#0801243

Defendant.

CASE NO: C219039
DEPT NO: II

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

DATE OF HEARING: April 15, 2008
TIME OF HEARING: 9:00 A.M.

THIS CAUSE having come on for hearing before the HONORABLE JUDGE VALERIE VEGA, District Judge, on the 15th day of April, 2008, the Petitioner not being present, Proceeding in Forma Pauperis, the Respondent being represented by DAVID ROGER, District Attorney, by and through CARRIE MORTON, 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

1. On January 30, 2006, an Information was filed charging Eddie J. Thomas (hereinafter "Defendant") with two counts of STATUTORY SEXUAL SEDUCTION (Felony - NRS 200.364, 200.368).

RECEIVED
MAY 1 2008
CLERK OF THE COURT

1 2. Under NRS 34.810(1)(b)(2) and *Franklin v. State*, 110 Nev. 750, 877 P.2d
2 1058 (1994), issues that a defendant failed to raise on direct appeal, are deemed waived. As
3 such, those claims are barred, and courts will not consider them. Nevada Revised Statute
4 34.810(1)(b)(2) provides as follows:

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

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

8 (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or
9 post-conviction relief; unless the court finds both cause for the failure to
present the grounds and actual prejudice to the petitioner.

10 3. "A lawyer may properly make a tactical determination of how to run a trial
11 even in the face of his client's incomprehension or even explicit disapproval." *Brookhart v.*
12 *Janis*, 384 U.S. 1, 8, 86 S.Ct. 1245 (1966). The client may make decisions regarding the
13 scope and ultimate objectives of representation, but the trial lawyer alone is empowered to
14 make decisions regarding legal tactics. *Rhynne v. State*, 118 Nev. 1, 8, 38 P.3d 163, 167
15 (2002).

16 4. In the case of court appointed counsel, "[o]nce counsel is appointed, the day-
17 to-day conduct of the defense rests with the attorney. He, not the client, has the immediate-
18 and ultimate-responsibility of deciding if and when to object, which witnesses, if any, to call,
19 and what defenses to develop." *Id.*, citing *Wainright v. Sykes*, 433 U.S. 72, 93, 97 S.Ct. 2497
20 (1977). Counsel's strategy decision is a "tactical" decision and will be "virtually
21 unchallengeable absent extraordinary circumstances." *Doleman v State*, 112 Nev. 843, 846,
22 921 P.2d 278, 280 (1996); *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990);
23 *Strickland v. Washington*, 466 U.S. 688, 691, 104 S.Ct. 2052, 2066 (1984).

24 5. In order to assert a claim for ineffective assistance of counsel the defendant
25 must prove that he was denied "reasonably effective assistance" of counsel by satisfying the
26 two-prong test of *Strickland v. Washington*, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 2063-
27 2064 (1984); *State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test,
28 the defendant must show first that his counsel's representation fell below an objective

1 standard of reasonableness, and second, that but for counsel's errors, there is a reasonable
2 probability that the result of the proceedings would have been different. *Strickland*, 466 U.S.
3 at 687-688 and 694, 104 S.Ct. at 2065 and 2068; *Warden v. Lyons*, 100 Nev. 430, 432, 683
4 P.2d 504, 505 (1984) (adopting *Strickland* two-part test in Nevada).

5 6. "Effective counsel does not mean errorless counsel, but rather counsel whose
6 assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" *Jackson v. Warden*, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970)). Based on the above law, the
7 role of a court in considering allegations of ineffective assistance of counsel, is "not to pass
8 upon the merits of the action not taken but to determine whether, under the particular facts
9 and circumstances of the case, trial counsel failed to render reasonably effective assistance."
10 *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing *Cooper v. Fitzharris*,
11 551 F.2d 1162, 1166 (9th Cir. 1977)).

12 7. This analysis does not mean that the court "should second guess reasoned
13 choices between trial tactics nor does it mean that defense counsel, to protect himself against
14 allegations of inadequacy, must make every conceivable motion no matter how remote the
15 possibilities are of success." *Donovan*, 94 Nev. at 675, 584 P.2d at 711. In essence, the
16 court must "judge the reasonableness of counsel's challenged conduct on the facts of the
17 particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690, 104
18 S.Ct. at 2066.

19 8. Even if a defendant can demonstrate that his counsel's representation fell
20 below an objective standard of reasonableness, he must still demonstrate prejudice and show
21 a reasonable probability that, but for counsel's errors, the result of the trial would have been
22 different. *McNelton v. State*, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
23 *Strickland*, 466 U.S. at 687). "A reasonable probability is a probability sufficient to
24 undermine confidence in the outcome." *Id.* (citing *Strickland*, 466 U.S. at 687-89, 694).

25 9. Counsel is not required to raise every issue Defendant felt was pertinent to the
26 case. *Ennis v. State*, 122 Nev. 694, 137 P.3d 1095, 1103 (2006). Also, trial counsel need not
27
28

1 lodge futile objections. *Id.* Rather, Defendant must show that, but for counsel's errors, there
2 is a reasonable probability that the result in the case would be different. *Id.* at 1102.

3 10. If a petition can be resolved without expanding the record, then no evidentiary
4 hearing is necessary. *Marshall v. State*, 110 Nev. 1328, 885 P.2d 603 (1994); *Mann v. State*,
5 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002).

6 11. A defendant must prove that he is entitled to an evidentiary hearing. *Mann*,
7 118 Nev. at 356, 46 P.3d at 1231; *Pellegrini*, 117 Nev. at 883, 34 P.3d at 534.

8 12. NRS 34.770 provides the manner in which the district court decides a post
9 conviction proceeding:

- 10 1. The judge or justice, upon review of the return, answer
11 and all supporting documents which are filed, shall determine
12 whether an evidentiary hearing is required. A petitioner must not
13 be discharged or committed to the custody of a person other than
14 the respondent unless an evidentiary hearing is held.
- 15 2. If the judge or justice determines that the petitioner is not
16 entitled to relief and an evidentiary hearing is not required, he
17 shall dismiss the petition without a hearing.

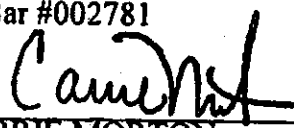
18 ORDER

19 THEREFORE, IT IS HEREBY ORDERED that Defendant's Petition for a Post-
20 Conviction Writ of Habeas Corpus and his Motion for an Evidentiary Hearing shall be, and
21 are, hereby denied.

22 DATED this 1st day of May, 2008.

23 
24 _____
25 DISTRICT JUDGE *

26 DAVID ROGER
27 DISTRICT ATTORNEY
28 Nevada Bar #002781

BY 
CARRIE MORTON
Chief Deputy District Attorney
Nevada Bar #0010160

CM/MR/slb

CERTIFICATE OF SERVICE BY MAIL

Pursuant to N.R.C.P. Rule 5(b), I hereby certify that I am the petitioner \ Defendant named herein and that on this 27th day of July 2010, I mailed a true a correct copy of the foregoing document to the following:
United States District Court District of Nevada

Eddie Thomas # 96556

Eddie Thomas # 96556

N.N.C.C.

Po Box 7000

Carson City, NV

89702