IN THE SUPREME COURT OF THE STATE OF NEVADA

GUSTAVO RAMOS, Appellant, vs. THE STATE OF NEVADA, Respondent.	Supreme Court Case No. 79781 District Court Case No. C269839

APPELLANT'S OPENING BRIEF

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Appeal from Judgment of Conviction

Eighth Judicial District Court, Clark County

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RULE 26.1 DISCLOSURE

Pursuant to Rule 26.1, Nevada Rules of Appellate Procedure, the undersigned hereby certifies to the Court as follows:

1. Appellant Gustavo Ramos is the Appellant in Ramos v. State, Nevada Supreme Court Docket #79781.

2. The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. Appellant is represented in this matter by the undersigned and the law firm of which counsel is the owner, Resch Law, PLLC, d/b/a Conviction Solutions. Appellant was represented in the proceedings below by Ivette Maningo, Esq. and Abel Yanez, Esq.

RESCH LAW, PLLC d/b/a Conviction Solutions

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I. JURISDICTION

This is an appeal from a judgment of conviction following a jury trial in State v. Ramos, Case No. C269839. The written judgment of conviction was filed on September 20, 2019. 9 AA 1658. A timely notice of appeal was filed on October 7, 2019. 9 AA 1660. This Court has appellate jurisdiction over the instant appeal pursuant to NRS 177.015(3) and NRAP (c).

II. ROUTING STATEMENT (RULE 17)

According to NRAP 17, this matter is neither presumptively assigned to the Court of Appeals nor is it presumptively retained by the Supreme Court because pursuant to Rule 17(b)(1), some convictions at issue are for Category A felonies, thereby exempting this case from presumptive assignment to the Court of Appeals. The Supreme Court should consider retaining this matter given its relative seriousness.

III. ISSUES PRESENTED FOR REVIEW

A. Whether, after the Justice Court dismissed the sexual assault charge for lack of probable cause, the District Court erred by granting the State's motion to re-file the charge by affidavit.

B. Whether the District Court erred by denying a motion to dismiss the re-filed sexual assault charge based on the statute of limitations.

C. Whether the evidence of guilt was insufficient to convict Ramos beyond a reasonable doubt of all charges.

D. Whether the District Court erred by granting the State's motion to admit into evidence the preliminary hearing testimony of a deceased witness or erred by denying a defense motion to suppress Ramos' statements to police.

E. Whether the District Court erred by denying a defense motion to dismiss based on the State's failure to collect evidence.

F. Whether the District Court erred by denying a motion to eliminate life without parole as a possible sentencing option.

G. Whether Ramos' convictions and sentences should be reversed based on cumulative error.

IV. STATEMENT OF THE CASE

Appellant Gustavo Ramos ("Ramos") was at first charged with two counts of open murder with use of a deadly weapon victim 65 years of age or older, sexual assault with use of a deadly weapon victim 65 years of age or older, and sexual penetration of a dead human body. 1 AA 3.

A noteworthy point is that although the charges were filed in 2010, the actual offenses occurred in 1998. 1 AA 7.

The case proceeded to a preliminary hearing on December 16, 2010. 1 AA 41. At the end of the hearing, the Justice of the Peace found that the State failed to meet its meager burden of proof as to the sexual assault and sexual penetration charges and those charges were not bound over to District Court. 1 AA 75.

In District Court, the State filed a notice of intent to seek the death penalty. 1 AA 102. The State then sought leave to re-file the sexual offenses by affidavit. 1 AA 105. Despite vigorous opposition, the court granted the State's motion. 2 AA 179, 186.

Later, the defense sought to dismiss the sexual offenses as untimely. 2 AA 191. The court ultimately dismissed the sexual penetration charge under the statute of limitations, but denied the motion to dismiss as to the sexual assault charge. 2 AA 241. Both the filing by affidavit and the statute of limitations issues were presented by Ramos to this Court through an extraordinary petition. See NSC #71462 (declining to exercise jurisdiction over the writ and directing Ramos to raise the issues on appeal if convicted).

In June 2018, Ramos and the State reached an unusual agreement in which the notice of intent to seek the death penalty was withdrawn, and Ramos agreed to waive his right to a jury trial. 3 AA 250.[1]

Before trial, the defense again sought to dismiss the case, this time on grounds that the State had failed to collect or preserve exculpatory evidence. 3 AA 255. As explored in the statement of facts below, the chief defense centered on the fact that substantial evidence pointed to a known

[1] Despite the unique nature of this agreement, Ramos presents no particular issue with it in this direct appeal. Any challenge to the wisdom of it is better suited for post-conviction review.

suspect other than Ramos. The motion led to an evidentiary hearing held in November 2018. 3 AA 290. After the hearing, supplemental briefing was submitted to the court. 3 AA 435. The court ultimately denied the motion. 4 AA 481.

Additional motions filed before trial are also relevant to this appeal. The State moved to admit the preliminary hearing testimony of Jerry Autrey, a crime scene analysist who died. 4 AA 493. The defense moved to exclude Ramos' statements to police following his arrest. 4 AA 506.

The bench trial started on May 28, 2019. 5 AA 525. Before taking testimony, the court granted the State's motion about Mr. Autrey. 5 AA 540. Later, the court denied the motion to suppress, although another argument focused on suppressing at least a portion of the interview after a time when Ramos allegedly invoked his right to remain silent. 5 AA 687-688. The specific statement was Ramos' response that "I don't got nothing to say about it," which the court found admissible. 5 AA 689.

After several days of testimony, the court announced its decision with a focus on providing the decision only and no rationale – somewhat like a

jury might have done had it heard the case. 9 AA 1480. The court found Ramos guilty on all counts. 9 AA 1483.

Before sentencing, Ramos moved to strike life without parole as a sentencing option based on the fact Ramos was only 18 years old at the time of the offenses. 9 AA 1520. In argument, the defense noted that at least one other court had extended protections granted to minors to an individual who was 18 at the time of an offense. 9 AA 1613. The court denied the motion, and found that there was a "clear distinction" between being over or under 18, and that at the time of the offenses Ramos was over 18 years old. 9 AA 1616. At the end of the hearing, the court sentenced Ramos to consecutive terms of life without parole for the murders, and a consecutive additional term for the sexual assault. 9 AA 1659. This appeal followed.

V. STATEMENT OF FACTS

The basic fact that two individuals were murdered at a retirement home is not in dispute. As the State alleged, Wallace Siegel was found dead at the Camlu Retirement Home on May 16, 1998. The next day, Helen

Sabraw was found dead at the same retirement home. 4 AA 491. Wallace had suffered fatal blows to the head, while Helen appeared to have been stabbed. 4 AA 492.

Camlu was a large assisted living facility that also included residential apartments. 5 AA 573. The facility locked its doors between 7:00 pm and 7:00 am. 5 AA 575. Residents of the independent living side of the facility, such as both victims, had the ability to come and go even during those hours. 5 AA 575.

The manager of the facility testified that he responded to Wallace's apartment around 4:50 a.m. on a Saturday. 5 AA 612. The police were already there when he arrived. The manager walked the outside of the property with police and found nothing unusual such as jimmied windows or signs of forced entry. 5 AA 622. Helen was not found until the next day and the manager responded to her apartment as well. 5 AA 614. The manager was aware from his interactions at the property that Wallace and Helen knew each other. 5 AA 617.

The manager also explained that all the apartments had call buttons which could be used to contact the main desk. 5 AA 618. But after Wallace was found, the manger did not check on the other residents – police had informed him there was no need as they thought they knew who did it. 5 AA 623. The manager testified that he knew that Wallace's son Jack lived with Wallace and was not happy that he had to care for Wallace on a 24/7 basis. 5 AA 624.

The manager later clarified that two window screens were on the ground during his inspection, but that they appeared to have been there a while when found. 5 AA 628.

The State called Dr. Lisa Gavin to testify about the autopsies of the victims. 7 AA 1083. Dr. Gavin did not conduct the autopsies and did not even work at the coroner's office when they were conducted in 1998. 7 AA 1084. Reviewing photos, Dr. Gavin testified that Wallace died from blunt force trauma to the head. 7 AA 1089. The injuries fit with the use of a barbell as a weapon. 7 AA 1095.

As to Helen, Dr. Gavin explained that it appeared a knife was used to inflict as many as 20 to 30 sharp force injuries. 7 AA 1102, 1108. The only evidence of sexual assault was offered by Dr. Gavin. Reviewing a photo, she stated:

> The vagina is towards the right side of the photo and then the anus is towards the opposite, towards the left side of the photo. Within the anal verge, the anal opening, there are tears that are present in the anal opening here and some abrasions that are associated with that area as well.

7 AA 1109.

Dr. Gavin claimed to have training to recognize sexual assault of the anal area. 7 AA 1112. Reviewing the claimed injuries to Helen's anal area, Dr. Gavin stated they are "consistent with penetration by something." 7 AA 1116. The doctor could not offer a guess as to the type of object that could have caused the claimed injuries. 7 AA 1117.

Under cross-examination, Dr. Gavin admitted that constipation could cause the types of injuries to Helen's anal area that the doctor attributed to assault. 7 AA 1129. Dr. Gavin did not know if Helen suffered from constipation, but did acknowledge that a condition called diverticulitis

could cause constipation as a symptom. 7 AA 1129. Dr. Gavin agreed it would have helped to know if Helen did have diverticulitis. 7 AA 1130. She also agreed that because of Helen's advanced age at the time of death, her skin would have been more susceptible to injury. 7 AA 1131. The doctor also agreed that Helen had long fingernails, and that this could cause abrasions to the anal area. 7 AA 1132.

Even during the State's re-direct, Dr. Gavin admitted that constipation "can result in some of the injuries that we see here on the anus." 7 AA 1133. Dr. Gavin then admitted it was impossible from the photograph alone to tell if Helen's claimed anal injuries were because of something going into the anus, or something coming out of it such as constipated stool. 7 AA 1134-35. While the doctor maintained that abrasions were present and consistent with penetration, she also admitted they were equally consistent with someone who wipes their anal area with long fingernails. 7 AA 1136.

Subsequent laboratory analysis showed that no semen was found in any swabs taken from Helen. 7 AA 1189. Testing of fingernail clippings

from the sexual assault kit showed no DNA other than DNA attributable to Helen. 7 AA 1190.

What's more, the defense used a nurse examiner, Diana Faugno, to rebut the allegations of assault. 8 AA 1249. The nurse explained that she reviewed Helen's medical records and found that she suffered from diverticulitis. 8 AA 1253. The nurse agreed with the prior testimony that diverticulitis can cause constipation. 8 AA 1253. Advanced age also does cause skin to become more susceptible to injury or bruising. 8 AA 1254.

The nurse also testified that the photos of Helen were blurry and pixelated, possibly because of the technology used to take them. 8 AA 1255. The nurse confirmed that constipation and long fingernails could very easily account for the claimed anal injuries. 8 AA 1260. Still, having studied the same photos as the State's expert, the nurse disagreed that the photos showed either lacerations or abrasions to Helen's anal area in the first instance. 8 AA 1261.

Wallace Residence

Wallace's son Jack testified at the trial, and explained that Wallace had broken his hip, and Jack moved in with him to help him rehabilitate. 5 AA 692. They lived together in Wallace's first floor apartment, and Jack would take Wallace to physical therapy appointments. 5 AA 693. Jack moved into the apartment in February, and the offenses took place in May. 5 AA 694.

Jack explained that in May he suffered from gout in his knee. 5 AA 694. Around 1:00 am, just hours before Wallace was found dead, Jack took himself to Desert Springs Hospital for knee pain. 5 AA 695. Jack drove Wallace's car to the hospital, and while there the doctors removed some fluid from his knee. 5 AA 695. Jack stated he returned to the apartment around 5:00 a.m., and that's when he found Wallace injured or dead. 5 AA 699. Jack called 9-1-1, and police interviewed him when they responded. 5 AA 700.

An analyst explained that various items were impounded from Wallace's apartment. This included a dumbbell and pieces of newspaper;

some of the pieces of which had blood or fingerprints on them. 6 AA 891. Police also recovered an empty money clip found near Wallace. 6 AA 892. Police noted no signs of forced entry, but a window screen was found on the ground with "sliding finger marks observed on the windows." 6 AA 908.

Wallace's body was found in a recliner, and the evidence at the scene pointed to Wallace never having gotten out of the recliner. 6 AA 912. But, crime scene analysts confirmed that blood was found on at least two door handles around the apartment. 6 AA 928. Blood was also found on the carpet in Wallace's car, between the two front seats. 6 AA 930.

Jack's relationship to the investigation is explored in much greater detail below.

Helen Residence

Helen lived in an upstairs apartment on the second floor. Crime scene analyst testimony showed that there was a "hair like substance" on the doorframe to her apartment which was impounded. 5 AA 637. The apartment was a studio with no separate bedroom. 5 AA 640. Two knives

were impounded at the apartment; one found on a bed and one from under Helen's knee. 5 AA 641.

The apartment showed signs of a struggle. 5 AA 643. Helen's body was in the apartment and she was nude "except for somewhat of a nighty that was pulled up towards her head." 5 AA 645. There was blood and other fluids around the body. 5 AA 648.

The analyst explained he impounded a gray t-shirt found near the body as evidence. 5 AA 651. The shirt appeared to have bloodstains on it. 5 AA 652. A second muscle shirt type shirt was also found near the victim and impounded. 5 AA 656.

The analysis confirmed that there were no signs of forced entry anywhere at Helen's apartment. 5 AA 658. A wallet with $530 cash in it was found in plain view laying on Helen's bed. 5 AA 665. Various jewelry was left on Helen's body, which was recovered at the time of the autopsy. 6 AA 818.

A crime lab supervisor testified that after further testing, there was no evidence of spermatozoa detected on items tested at Helen's apartment.

6 AA 795. Hair described as "Negroid pubic hair" was recovered at Helen's apartment from a pink blanket, but it could not be tested for DNA. 6 AA 796.

Another analyst testified about gathering the gray t-shirt and white tank top shirt from Helen's apartment. 6 AA 809. Both had what appeared to be blood on them.

Evidence of Ramos' guilt

There were no suspects at first other than Jack. A crime lab supervisor explained that initial DNA testing did not reveal any useful information. 6 AA 797-798. But in 2009, items recovered from Helen's apartment were tested for DNA using then-current standards. On October 13, 2010 – some twelve years after the murders- police arrested Ramos for the murders. 6 AA 961.

Evidence of Ramos' guilt was limited. With respect to Wallace, the evidence was that a bloody palm print was found on a newspaper in Wallace's apartment. 8 AA 1245. Although that print eventually was linked

to Ramos, other fingerprints were also found and those prints remain unidentified. 8 AA 1246.

A crime scene analyst, Jerry Autrey, testified at the preliminary hearing that he impounded the newspaper and that it appeared to have a bloody print on it. 1 AA 52. Mr. Autrey also took a black and white "high contrast" photo of the print for use by a print examiner. 1 AA 54. A fingerprint examiner later testified that a known palm print from Ramos matched the print shown in the photo taken by Mr. Autrey. 8 AA 1300.

A DNA analyst testified about evidence that linked Ramos to Helen. The analyst explained that she took samples from the collar and armpit areas of a t-shirt found at Helen's apartment. 7 AA 1148. Those samples revealed DNA that included up to three individuals, one of whom was male and another likely Helen herself. 7 AA 1149. The analyst chose the unknown sample with the most data and entered it into a database of DNA profiles known as CODIS. 7 AA 1150.

The CODIS results led to Ramos, and after Ramos was arrested, police obtained a DNA sample from him. 7 AA 1151. The DNA sample found on

the collar of the shirt was attributed to Ramos at an estimated frequency rate of 1 in 882,000. 7 AA 1151. The armpit sample matched Ramos at a frequency rate rarer than 1 in 30 million. 7 AA 1152. But further testimony showed that the DNA of a third individual, an unidentified individual, was also present. 7 AA 1195.

The analyst also discussed DNA testing on samples taken from Wallace's apartment, but none of those were a match for Ramos. In fact, a "full female DNA profile that was unknown" was obtained from a blood sample taken from the east stairway door near Wallace's apartment. 7 AA 1162.

Detective Hall testified that he questioned Ramos at the time of his arrest. 7 AA 1071. The interview with Ramos was read into the record. 7 AA 1071. Detective Hall explained that Ramos lived .3 miles away from Camlu at the time of the 1998 murders. 7 AA 1071. Ramos informed police that he had nothing to do with the murders. 7 AA 1076.

Evidence of Jack's guilt

Substantial evidence connected Jack to the murders. A crime lab supervisor testified that human blood was found on the steering wheel of Wallace's car as well as on the carpet. 6 AA 790, 6 AA 793. Human blood was also found on at least two door handles at Camlu, and Wallace could not be eliminated as the source of that blood. 6 AA 793.

A former resident at Camlu testified that she remembered that Helen and Wallace knew each other, and were "good friends." 6 AA 849. Helen and Wallace would sometimes ride the same bus to casinos. 6 AA 849. Helen sometimes walked the in the hallway towards Wallace's room. 6 AA 854. The witness also knew Jack, and recalled him as "not a real pleasant person." 6 AA 850. Jack did not enjoy taking care of Wallace. 6 AA 858.

Wallace's daughter Leslie testified at trial. While reluctant, Leslie acknowledged that she had discussed with police that Jack used methamphetamine around the time of the murders. 6 AA 971. Leslie agreed she had testified at the suppression hearing that she told detectives that Jack may have been responsible for Wallace's death, along with Jack's

girlfriend or another individual named John Valdez. 6 AA 973. Leslie did not recall whether she had informed detectives that Jack said a man named "Ax" had killed Helen. 6 AA 974.

Leslie stated on cross-examination that Jack had served in Operation Desert Storm. 6 AA 978. She noticed changes in Jack's behavior after he retired from the military. 6 AA 978.

Detective Hardy testified that he was the officer assigned to investigate Wallace's murder. 7 AA 1020. Detectives Vaccaro and Ramos were assigned to Helen's murder, though everyone shared information with one another. 7 AA 1022. Detective Hardy explained the obvious – that "The suspect that was being focused on would have been the son, Jack." 7 AA 1024. The reasons for this were:

> Well to me, the fact that he went to the emergency room at midnight, in the middle of the night, the door was left unlocked when he left, there was – he was aware of financial gain also if – as to what his father possessed, as far as financially. But more, I think that when Detective Mikolainis and Chandler, it wasn't – there was a suspicion about his story in the early morning.

7 AA 1025.

Detective Hardy also explained that Jack "didn't want to be there over money." 7 AA 1028. Nor was there any evidence of forced entry. 7 AA 1029. Jack also had access to the entire Camlu facility. 7 AA 1029. Additionally, blood was found in Wallace's car, and Jack was the only person known to drive that car because Wallace could not drive. 7 AA 1029. Additionally, although Jack placed the initial call to 911, the Detective found it suspicious that Jack declined to perform CPR although directed to do so by the 911 operator. 7 AA 1033. Despite all this, police never arrested Jack.

In the year 2000, Leslie approached Detective Hardy with more information, although Detective Chandler ultimate ended up talking with her. Detective Chandler testified later in the trial, and confirmed the initial suspicions about Jack. 8 AA 1231. Besides all the evidence already noted, Detective Chandler added that the severe beating Wallace suffered suggested the person who committed the offense was angry with him. 8 AA 1233.

Detective Chandler specifically testified about his conversation with Leslie. According to that conversation, Leslie believed Jack's girlfriend and her friends were responsible for Wallace's death. 8 AA 1236. The girlfriend was named Martha Morales, and possible additional suspects were named John Valdez or Mierto. 8 AA 1237-38. Leslie also informed the detective that Jack told her a guy named "Ax" killed Helen. 8 AA 1238. Even though this information came directly from Jack, the detective decided the information was not credible and failed to even interview Martha. 8 AA 1239-40.

In 2004, Jack contacted detectives for a meeting. 7 AA 1049. Jack drove to Las Vegas from California to explain that "he felt someone was setting him up and framing him for the death." 7 AA 1050. The interview was not recorded even though it was clear during it, that Jack was still worried about being a suspect. 7 AA 1050. Jack brought materials with him to this interview, but the detectives did not keep copies of any of those documents. 7 AA 1062.

Despite all this evidence, the detective incredibly suggested that police lacked probable cause to arrest Jack. 7 AA 1054.

Other relevant facts are stated and discussed in the argument section of each claim.

VI. SUMMARY OF ARGUMENT

The sexual assault conviction must be reversed for three reasons. Aside from the fact the trial court erred by allowing the charge to proceed by affidavit, and by refusing to dismiss it based on the statute of limitations, the charge was also supported by nothing other than one witness' guess that a sexual assault occurred based on a single photograph. The sexual assault conviction is legally and factually infirm and must be reversed.

But the murder charges also suffer from weak evidence, in that equal or arguably stronger evidence pointed to a suspect other than Ramos. The State failed to investigate or preserve evidence related to that suspect, while pinning the murder on Ramos solely with forensic evidence. That evidence, DNA which revealed other unknown suspects and a photo of a partial palm print, are much less compelling than the evidence against

other suspects. If it is equally or more likely someone else committed the murders, then it follows Ramos was not proven guilty beyond a reasonable doubt. The convictions and sentences should be reversed.

VII. ARGUMENT

A. The District Court erred by granting leave to file the sexual assault charge by affidavit.

The sexual assault charge was dismissed by the Justice of the Peace at Ramos' preliminary hearing. 1 AA 75. As the Justice of the Peace explained, "there has been no proof of any type of sexual assault penetration" other than guessing. 1 AA 75. A detective had testified to his opinion that a sexual assault occurred, based on Helen's underwear being removed with her gown over her head, and fluid located near her rectal area. 1 AA 60. But on cross examination, the detective admitted there was evidence of a struggle and this could account for the position of Helen's gown. 1 AA 62. The Justice of the Peace found there was "no evidence other than guessing." 1 AA 75.

Standard of Review

This Court reviews a trial court's grant of leave to file an information by affidavit de novo. Martin v. Sheriff, 88 Nev. 303, 306, 496 P.2d 754 (1972) (applying de novo review to determine whether magistrate committed egregious error). That is, leave to file by affidavit can be granted to correct an egregious error, but not to correct deficiencies in the evidence at the preliminary hearing. State v. Sixth Judicial Dist. Ct., 114 Nev. 739, 964 P.2d 48 (1998). An error is egregious if it is plain, and where a charge is erroneously dismissed on the magistrate's error. See Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984 (1995).

The trial court should not have granted leave to file by affidavit

The preliminary hearing was held on December 16, 2010. 1 AA 41. On January 28, 2011, the State moved to refile the sexual assault charge by affidavit. 1 AA 105. The motion was supported by the affidavit of Detective Vaccaro, but the affidavit contained nothing other than the detective's continuing opinion that a sexual assault occurred. 2 AA 165.

The defense opposed the State's request. 2 AA 168. But at a hearing on the matter the State outlined the "evidence" of sexual assault: "86 years old, underwear off, bra off, fecal matter running from her anal cavity and a man's shirt in her apartment where nothing was taken." 2 AA 179. The trial court granted the State's motion without making any specific finding of egregious error by the magistrate. 2 AA 179.

Leave to file an information by affidavit is authorized by NRS 173.035. The universe of cases interpreting that statute is small, and both parties cited the applicable cases. The State relied heavily on Ryan v. District Court, 88 Nev. 638, 503 P.2d 842 (1972) and Cranford v. Smart, 92 Nev. 89, 545 P.2d 1162 (1976). But even those cases recognize that the "statute contemplates a safeguard against egregious error by a magistrate in determining probable cause, not a device to be used by a prosecutor to satisfy deficiencies in evidence at a preliminary examination through affidavit." Id. at 90.

The defense relied on those cases as well as Parsons v. State, 116 Nev. 928, 10 P.3d 836 (2000). 2 AA 168. In Parsons, this court also rejected the

State's attempt to refile a charge by affidavit; noting that the affidavit included evidence never presented to the Justice Court. Id. at 938.

The term "egregious error" is not especially well defined in the law, but does contemplate something greater than a mere disagreement over the evidence. This Court has stated that the fact a District Court may have reached a different conclusion than the Justice Court about the failure to bind over a charge is not egregious error. Cipriano v. State, 111 Nev. 534, 894 P.2d 347 (1995), overruled on other grounds by State v. Sixth Judicial Dist. Ct., 114 Nev. 739, 964 P.2d 48 (1998).

Here, the Justice of the Peace's decision was a rejection of the State's evidence, not some error of law about the elements of sexual assault. The Justice Court held: "Wait a minute. Before going into that, there's no indication of any sexual assault or sexual penetration." 1 AA 74. The State informed the Justice Court that the evidence of sexual assault was Detective Vaccaro's testimony. 1 AA 74. The evidence, summarized by the State, consisted solely of Helen's state of dress, the lack of items taken from the

apartment, and that there was fecal matter found running out of her body. 1 AA 74.

But the Justice of the Peace heard all of those points of evidence and chose to reject them. The magistrate found it well understood that fecal matter exits the body after death. 1 AA 75. At trial the State's medical expert would say exactly the same thing: that dilation of the anus was no evidence of sexual assault or penetration by an objection. 7 AA 1133.

As for the state of Helen's clothing, the Justice of the Peace heard and rejected the significance of that evidence as well. At best, Detective Vaccaro testified that he had "suspicions there had been a sexual assault." 1 AA 60. The detective later testified that the clothing could have been pulled over Helen's head as part of the obvious struggle in her apartment. 1 AA 62. The Justice of the Peace rejected all of this testimony, noting that the detective was not an expert. 1 AA 74.

Detective Vaccaro's suspicions were just a hunch based on his opinion. But a hunch does not even satisfy the reasonable suspicion standard, much less probable cause. US v. Santiago-Garcia, 655 F. Supp. 2d

1031 (D. Ariz. 2009); Navarette v. California, 572 U.S. 393 (2014). As the detective acknowledged, it is equally possible Helen was wearing her bed clothing (a nightgown and not much else) which got displaced during the struggle.

The evidence of sexual assault was exceptionally flimsy and the Justice of the Peace recognized as much. The District Court's disagreement does not constitute egregious error, and as a result it was an abuse of discretion to grant leave to file the sexual assault charge by affidavit. This Court should reverse Ramos' conviction for sexual assault on that basis.

B. The district court also erred by failing to dismiss the sexual assault charge as untimely.

After granting leave to file the sexual assault charge by affidavit, the District Court compounded its error by refusing to dismiss the sexual assault charge as untimely. The defense moved to dismiss the sexual assault count as outside the statute of limitations. 2 AA 191. As explained in it, the applicable statute of limitations for sexual assault at the time was four years. 2 AA 193, NRS 171.085(1). Because the offense occurred in

1998, the State had to file charges by no later than 2002. 2 AA 193. The information filed by affidavit was not filed until 2011. 2 AA 192.

Standard of Review

Questions of law, such as those about application of a statute of limitations, are reviewed de novo. State v. Quinn, 117 Nev. 709, 30 P.3d 1117 (2001). The statute of limitations which applies is what was in effect when the offense occurred. Id.

The sexual assault charge was untimely

As the defense explained, the sexual assault charge was some ten years late. 2 AA 193. In response, the State relied on NRS 171.083, which removes the limitations period if the "a victim of a sexual assault or a person authorized to act on behalf of a victim of sexual assault filed with a law enforcement officer a written report concerning the sexual assault…" 2 AA 199. According to the State, Helen's friend Peggy and son Mark discovered her body and immediately called 911, and were unquestionably" authorized to act on Helen's behalf. 2 AA 199. The State also noted Peggy filed a written report with law enforcement. 2 AA 205.

The argument advanced here mirrors that raised by the defense in its reply. First, even assuming Peggy's report was a "written" report that nullified the statute of limitations, the same was not a report "concerning the sexual assault" as the statute requires. 2 AA 230. That is, Peggy's report does not say a word about sexual assault. The plain language of the statute so requires.

Second, while the State may have no questions about the authorization of Peggy or Mark to report a sexual assault, Ramos is not so sanguine. The State offers no evidence of any express authorization, nor would that even make sense because Helen unfortunately died during the incident. The most sensible interpretation of the statute is that someone "authorized" to report sexual assault is someone the victim asked to do so, such as a friend or counselor or advocate. This is particularly applicable here where as noted, neither Peggy nor Mark reported a sexual assault.

The District Court's rationale for denying the motion appeared to turn exclusively on the filing of the written report. 2 AA 241. But in so holding, the District Court read the phrases "authorized to act" and "concerning the

sexual assault" out of the statute. The plain language of the statute contains those important phrases, and it should have been interpreted to avoid rendering those phrases meaningless. Clay v. Eighth Judicial Dist. Ct., 129 Nev. 445, 451, 305 P.3d 898 (2013).

To be sure, this issue is likely unique given that the Legislature amended NRS 171.085 in 2015 to extend the statute of limitations for sexual assault to twenty years. But in this "cold case," the distinction matters. A report to law enforcement that failed to mention sexual assault is not a report "concerning" sexual assault for purposes of NRS 171.083, and Ramos' conviction for sexual assault should be reversed.

C. The evidence of guilt was insufficient to convict Ramos beyond a reasonable doubt of all charges.

If this Court does not agree that the sexual assault charge was improvidently filed by affidavit or was untimely, Ramos offers yet one more basis to dismiss it which is that it was not supported by the evidence at trial. For that matter, neither were the murder charges and therefore all the convictions and sentences should be reversed.

Insufficient evidence concerning the sexual assault

The evidence of the sexual assault was set forth above. Perhaps recognizing the issues Detective Vaccaro's testimony at the preliminary hearing raised, the State called a medical examiner at trial to testify about the sexual assault. But that examiner was not the one involved in the initial investigation, and she never examined the bodies or scene directly. In fact, the exclusive source of evidence of sexual assault turned on the examiner's interpretation of a single photograph.

In its best light, the parties' experts disputed whether Helen had minor abrasions and lacerations around her anal area. 7 AA 1129-31. But even if she did, the State's own expert agreed those same injuries could have come from a medical condition and Helen's long fingernails, and it was impossible to determine which was which. If the facts were "equally susceptible to two or more constructions," then at least one court has stated reasonable doubt exists as a matter of law. Wilson v. Commonwealth, 16 Va. App. 717, 432 S.E.2d 520 (1993).

Further, evidence of displaced clothing was held insufficient to prove sexual assault beyond a reasonable doubt by another court:

> Although the fact that the pants and underwear were removed is circumstantial evidence of sexual activity, we believe that under the facts in this case it is stretching matters too far to say that this alone establishes, beyond a reasonable doubt, that the Defendant raped or attempted to rape Able.

State v. Dunn, 1993 Tenn. LEXIS 332 (Tenn. 1993).

Finally, the State's own evidence here was that it is impossible to determine whether Helen's claimed anal injuries resulted from penetration, or the result of feces leaving the body. The expert's own testimony was that "You can't [tell] just from the photograph. You would need to be able to do microscopic on that- on those particular injuries." 7 AA 1134. This is the State's own expert during the State's own questioning, and even that expert could not tell the judge how the claimed anal injuries happened.

On this record the evidence of sexual assault fails to meet the standard of beyond a reasonable doubt, and the conviction for sexual assault must be dismissed.

Insufficient evidence concerning the murders

The State also failed to prove the murders beyond a reasonable doubt. Many of the same principles above apply. This was a "cold" case: Ramos had no connection at all to the case for the first ten years. During that time, Jack was a prime suspect and why wouldn't he be; Jack had the motive, means and opportunity to commit the murders.

To be sure, the bloody palmprint found at Wallace's apartment, and the DNA on the shirt found at Helen's apartment were allegedly linked to Ramos. But these forensic items were effectively the only evidence of guilt of the murders, and neither item directly connected Ramos to the offense. That is, neither the newspaper nor the shirt was used in the commission of the murder. The Ninth Circuit reversed a conviction for lack of evidence, where the conviction depended solely on fingerprints at the scene which were not directly connected to the offense itself. Mikes v. Borg, 947 F.2d 353, 357 (9th Cir. 1991).

More importantly, strong evidence pointed to Jack's guilt. The trial court should have found reasonable doubt that Ramos committed the

murders because the police failed to diligently investigate Jack as a suspect. Detective Chandler testified to the many reasons Jack was a suspect in the case: He had access to the entire facility, his knee injury story was suspect, there was blood found in Wallace's car (which only Jack was using then) and other evidence. 8 AA 1232-34. Jack also knew that Wallace had a life insurance policy. 6 AA 762.

Wallace's daughter Leslie called the detective and told him she believed Jack and Jack's girlfriend were responsible for the murder. 8 AA 1236. She also told the detective that Jack admitted a guy named Ax killed Helen; something only someone involved in the murder could possibly know. 8 AA 1238. Despite all this, the detective declined to follow up on the information. 8 AA 1240. Jack's girlfriend, Martha, was never even interviewed. 8 AA 1240-41. Police never collected Martha's DNA, despite an unknown female profile found in blood on the door to Wallace's apartment. 8 AA 1246-47.

Evidence of a third party's guilt may establish reasonable doubt of the defendant's guilt. State v. McCullar, 2014 UT App 215, *50, 335 P.3d 900,

910 (UT App. 2014); see also Coleman v. State, 130 Nev.Adv.Rep. 26, 321 P.3d 901 (2014) (recognizing defense of third-party guilt and reversing conviction on grounds other than sufficiency of evidence). Here, evidence of Jack's guilt was as strong as or stronger than Ramos' guilt.

In fact, any explanation for why Ramos would have committed these offenses was lacking. The State sought to argue that the motive for Wallace's murder was robbery, and the motive for Helen's was sexual assault. But as detailed above, there was no sexual assault. Moreover, if the same person committed both offenses, it stands to reason that the taking of property would be a factor in both cases. Yet here, valuables including cash were found in plain sight and untouched at Helen's apartment.

Evidence of Jack's guilt was presented and should have led the judge to conclude not that Jack was in fact guilty of the murders, but that Ramos had shown reasonable doubt of his own guilt. The trial court erred in finding Ramos guilty of the murders on this record and the convictions should therefore be reversed.

D. The District Court erred in its handling of two pretrial motions.

The District Court erred when it granted the State's motion to admit the preliminary hearing testimony of crime scene analyst Autrey. It also erred by denying a defense motion to suppress Ramos' statements to police. The individual and combined effect of these errors was prejudicial to Ramos and his convictions should be reversed as a result.

Standard of Review

A de novo standard of review appears to apply to this Court's review of a motion granting the State leave to use preliminary hearing testimony at trial. Grant v. State, 117 Nev. 427, 24 P.3d 761 (2001). The same de novo standard appears to apply to this Court's review of a motion to suppress a statement to police. Passama v. State, 103 Nev. 212, 735 P.2d 321 (1987).

Granting the State's motion to use preliminary hearing testimony was error

It was error to allow the State to use Autrey's testimony at trial. Ramos does not suggest that Autrey was available. There's no reason to

dispute the allegation that he died after the preliminary hearing but before trial, and that made him unavailable.

The problem instead is that admission of preliminary testimony that favors the State is governed by other restrictions. Chief among those is that the witness was thoroughly cross-examined at the preliminary hearing. Grant, 117 Nev. at 432 (noting that admission of such testimony must meets Constitutional standards under the Sixth Amendment).

In opposition to the State's request, the defense noted that consideration of the thoroughness of any cross-examination must be made case-by-case. 4 AA 503, citing Chavez v. State, 125 Nev. 328, 213 P.3d 476 (2009).

Two main failings are urged here. First, Ramos' counsel at trial did not have even the chance to cross-examine the witness at the preliminary hearing. Co-counsel refused to allow trial counsel (said co-counsel no longer associated with the case at trial) to ask any questions of Autrey at the preliminary hearing. 3 AA 533. While a black-and-white rule that bars the State from using preliminary hearing testimony anytime defense

counsel changes may be unworkable, the fact trial counsel was present at the preliminary hearing but not allowed to ask questions reduces the thoroughness of any claimed cross-examination.

Second, the cross-examination was not thorough, mainly because the State did not produce adequate discovery at the time of the hearing. The District Court did not seem concerned by this, stating, "So you all never really have everything in the time of prelim…" 5 AA 534. But in Chavez, this Court affirmed the admission of preliminary hearing testimony where the discovery was nearly complete. Chavez, 125 Nev. at 341.

Here, unlike the situation in Chavez, the defense did not have all of "the pertinent facts of the State's case in chief at the preliminary hearing." Id. Defense counsel argued below that they did not have all the impound reports or crime scene reports based on the questions asked of Autrey at the hearing. 5 AA 534.

Defense counsel therefore could not maximize the preliminary hearing to cross-examine Autrey, and his testimony was critical to the State's case in chief. For example, Autrey testified at the preliminary

hearing that he was the person who took a black and white Polaroid of the palm print eventually attributed to Ramos. 1 AA 53. Absent this critical testimony, there may well have been no foundation for admission of the palm print or testimony attributing it to Ramos at the time of trial.

Further, no party questioned Autrey about a crime scene report he apparently prepared that discussed possible manipulation of an exterior window at Wallace's apartment. Yet the State was not only able to question witnesses at trial about that report, but relying on the trial court's prior ruling about preliminary hearing testimony, it obtained actual admission of Autrey's hearsay report into evidence. 6 AA 951. The report, marked as Exhibit 229, is part of the record for this Court's review. 6 AA 834.

The admission of Autrey's preliminary hearing testimony and hearsay report violated Ramos' Sixth Amendment rights. Chavez, 125 Nev. at 337, citing Crawford v. Washington, 541 U.S. 36 (2003). This error was prejudicial for the reasons explained above and Ramos' convictions should therefore be reversed.

Denial of motion to suppress statement

At trial, the parties agreed Ramos was read his rights but not questioned until around two hours later. 5 AA 681. Before trial, counsel moved to suppress the statement on that basis, as well because Ramos had invoked his right to remain silent. 4 AA 511. Ramos was aided by the court interpreter at both his preliminary hearing and at trial, but there is no indication police provided him any translation services. 1 AA 41, 5 AA 525.

The Fifth Amendment requires that a suspect's statements made during custodial interrogation are inadmissible at trial unless a warning is provided and any waiver of the right to remain silent is knowingly and voluntarily made. Koger v. State, 117 Nev. 138, 141, 17 P.2d 428 (2001), citing Miranda v. Arizona, 384 U.S. 436 (1966). Courts consider the totality of the circumstances to make this determination. Id.

The State mentioned Koger at trial and particularly the fact the gap of nearly two weeks between being Mirandized and being interrogated was not enough, alone, to negate the voluntariness of the waiver. 5 AA 683. But the totality of circumstances here is different from Koger. Ramos was a

native Spanish speaker, who spoke poor English. Nor was Ramos reminded that he had waived his rights before the actual interview began. 7 AA 987-88. The totality of circumstances, to include lack of English language skills, lack of reminder, and delay between waiver of rights and interview, show that the District Court should have suppressed Ramos' entire statement.

Alternatively, the defense moved to suppress anything in the statement after the response "I don't got nothing to say about it" due to the invocation of the right to remain silent. 5 AA 688, 7 AA 1005. Just two sentences after that response, Ramos mentioned wanting a lawyer. 7 AA 1005. As a result, it is reasonable to presume he intended to terminate the interview with his earlier response. That said, the trial court did not begin redaction of the interview until Ramos expressly requested a lawyer. 5 AA 688.

This Court again examines the totality of circumstances to determine if the right to remain silent was invoked. Dewey v. State, 123 Nev. 483, 491, 169 P.3d 1149 (2007), citing Miranda. In Dewey, the bulk of this Court's analysis highlighted the ambiguity surrounding the defendant's request for

a lawyer. But this Court did find that the terse negative response to whether the defendant wanted to talk to police did constitute an invocation of the right to remain silent. Id. at 490.

Ramos stated he had nothing to say to police when asked about critical evidence in the case. 7 AA 1005. This was an invocation of the right to remain silent. The trial court erred by concluding Ramos' response to the question about the bloody palm print was "not much of anything." 5 AA 688. But that just isn't true: the fact Ramos did not want to discuss the palm print was something the State immediately focused upon in its closing argument. 8 AA 1426.

As a result, Ramos was prejudiced by this error as it led to the admission of crucial evidence against him in violation of his right to remain silent. This error was prejudicial and Ramos' convictions should therefore be reversed.

E. The District Court erred by denying a defense motion to dismiss based on failure to collect or preserve evidence.

The greatest amount of pretrial litigation concerned a defense motion to dismiss based on the State's failure to collect or preserve evidence. 3 AA

255. In the motion, the defense raised most of the points previously set out in this appeal. Those points mostly pointed to Jack as the suspect in the murders, which included evidence police gathered when the murders were discovered, in 2000 when Leslie contacted police about things Jack told her, and again in 2004 when Jack contacted police directly with a strange story about being framed for the murders. 3 AA 259.

The defense requested, and received, an evidentiary hearing on these issues. 3 AA 260. The results of that hearing yielded several facts vital to the issues here.

Detective Mogg testified that he and Detective Hardy met with Jack in 2004 after he contacted them for a meeting. 3 AA 294. Jack drove from California to Las Vegas to meet with the detectives. 3 AA 299. Jack informed detectives that someone had set him up to take the fall for his father's murder. 3 AA 299. While the amount of paperwork was debatable, the detective acknowledged Jack brought at least some paperwork with him to the meeting. 3 AA 300. The detectives did not record the interview. AA 302.

Detective Mogg was not on the case at the time of the murders, and therefore seemed to lack knowledge about whether Jack was ever a suspect in the murders. 3 AA 304. The detective did not even know that Jack's family suspected him of the murders or that Jack had expressed frustration that he was stuck caring for Wallace. 3 AA 308. The detective did not know Jack had a girlfriend named Martha. 3 AA 316. But what Detective Mogg did know is that, at the 2004 interview, Jack was still concerned about whether he was a suspect in the murders. 3 AA 313.

Jack himself testified at the hearing as well, and confirmed that he had declined to speak with defense investigators about the murders. 3 AA 327. Jack stated he lived with Wallace for some three months before the murders because Wallace had broken his hip and had mobility issues. 3 AA 328.

Jack stated police interviewed him at least three times. 3 AA 331. All three interviews were on the same day. 3 AA 332-33. Police also collected Jack's palm and fingerprints. 3 AA 334. Jack told police he did not kill

Wallace. 3 AA 337. Jack told police there was no reason that blood would be found in Wallace's car. 3 AA 339.

Jack then explained that he did contact Detective Hardy in 2004. 3 AA 341. Jack acknowledged he was the only suspect in the murder. 3 AA 343. Jack believed this was the case since a dumbbell was the murder weapon and the dumbbell belonged to Jack. 3 AA 343. Still, Jack had evidence he felt would show he was being framed for the murder.

Jack came to Las Vegas accompanied by Martha and another individual named Yesenia. 3 AA 344. Documents Jack brought with him were paperwork from Los Angeles County that described record integrity and payroll documents. 3 AA 347-48. Jack told detectives that someone opened an account in his father's name in California the day after the murder. 3 AA 349. And someone cashed in savings bonds in Jack's name shortly after the murder. 3 AA 350.

Jack was clear that the detectives refused to even look at his documents, and instead gave him some excuse that only the FBI could look at them. 3 AA 350. Jack described them as a "large amount" of documents.

3 AA 350. Based on having moved several times over the years, Jack was unsure where the documents were now. 3 AA 351.

Jack denied ever telling police that someone named Ax may have murdered Helen. 3 AA 355. Jack did have a friend named John Valdez. 3 AA 356. Police never tried to interview Martha or Yesenia. 3 AA 360.

Leslie also testified at the evidentiary hearing, and her testimony largely mirrored what her trial testimony stated. Leslie explained that Jack was her brother and that he served in the military. 3 AA 366. When he exited the military, his behavior was different. 3 AA 366. Around the time of the murders, Jack was paranoid. 3 AA 367. After the murders, Leslie agreed Jack remained fixated on some employment issue with Los Angeles County. 3 AA 368.

Under cross-examination Leslie acknowledged that she did speak with the defense at some point, but eventually yelled at them for trespassing. 3 AA 370. Leslie denied ever telling police that she believed Jack or Martha were involved in the murders. 3 AA 374. She also denied telling police that Jack used methamphetamine. 3 AA 379.

Detective Hardy also testified, and explained that at the time of the hearing he was retired. 3 AA 394. Hardy clarified that the investigation notes showed Leslie did speak with officers in 2000, at which time she did identify Jack, Martha, and Ax as having been involved in the murder. 3 AA 399. This included specific information that Jack told her that Ax had killed Helen. 3 AA 399.

The investigation also developed evidence that caring for Wallace before the murder caused Jack stress. 3 AA 401. Jack had informed third parties that he did not want to keep caring for Wallace, and that Jack and Wallace had an argument about money in front of at least one witness. 3 AA 402. The investigation reaffirmed Wallace had investments and a life insurance policy at the time of his death. 3 AA 405. Hardy was sure that Jack informed police there would be no reason for them to find blood in Wallace's car. 3 AA 406. Police towed the car for processing, and blood on the steering wheel was matched to Wallace. 3 AA 407-08.

Hardy also explained that he was aware an unknown female's DNA was found on the door handle near Wallace's apartment. 3 AA 415.

Despite this, the investigation file revealed that police never even attempted to interview Martha. 3 AA 416.

In 2004, Jack contacted Hardy for a meeting. 3 AA 417. The interview was not recorded and any notes from it were destroyed. 3 AA 418. At the time of the meeting, the murders were unsolved and Jack was still a possible suspect. 3 AA 419. At the meeting, Jack was worried that he was still a suspect. 3 AA 419. Hardy found it unusual that Jack asked at the end of the interview how he came across. 3 AA 420.

As to the amount of paperwork Jack brought, Hardy believed it was multiple piles. 3 AA 421. Hardy was certain he took no copies of any paperwork, as he felt nothing was relevant. 3 AA 421-22. Hardy recalled there was some paperwork about an account at a credit union. 3 AA 423. Hardy had noted in his report that Jack stated he was being framed and that someone wanted Jack to be arrested for the murder. 3 AA 425. Hardy concluded by noting he couldn't tell the court whether the paperwork was relevant to the murders because he did not recall what it was. 3 AA 428.

After the hearing, both parties submitted supplemental briefing to the court. 3 AA 435. The defense suggested that the evidentiary hearing clarified the issue as one of failure to collect evidence. 3 AA 439. The State contended that any claim of error was speculative. 4 AA 451.

The trial court ultimately denied the motion, and found that the defense could not show the information police failed to collect was material. 4 AA 475. This was so, said the court, because forensic evidence connected Ramos to the murders, and Jack's claimed documents were financial. 4 AA 475. The court found that, at most, police were negligent in failing to collect Jack's documentation and therefore the only remedy available was that the defense could argue the police investigation was sloppy. 4 AA 477.

Argument

All parties and the trial court agreed that the appropriate legal framework to consider this issue is found in Daniels v. State, 114 Nev. 261, 956 P.2d 111 (1998) and Leonard v. State, 114 Nev. 639, 958 P.2d 1229 (1998). This Court reviews the denial of a motion based on failure to collect

evidence for an abuse of discretion. Guerrina v. State, 134 Nev.Adv.Rep. 45, 419 P.3d 705, 713 (2018).

Success on motion to dismiss based on failure to collect evidence requires that the evidence was "material" and that the State's failure to collect it was attributable to negligence, gross negligence, or bad faith. Guerrina, 419 P.3d at 713. Evidence is material when there is a reasonable probability that, had it been available to the defense, the result of the proceedings would have been different. Id.

If the failure to collect evidence was merely negligent, then the defense can examine the police about deficiencies in their investigation (arguably something the defense has a right to do in every case). Daniels, 114 Nev. at 267. If the failure resulted from gross negligence, the defense is entitled to a presumption the evidence would have been unfavorable to the State. And if bad faith was involved, dismissal of the charges could occur. Id.

Here, the trial court erred by concluding that the defense failed to show materiality or a level of culpability beyond negligence. Jack's

documentation was material in that there was a reasonable probability that the outcome of the case would have been different had those documents been available to police before trial, or to the defense during trial.

The most compelling aspect of the evidence was that a bank account had apparently been opened in Wallace's name the day after the murder. Jack brought with him a bank statement which purported to show exactly that. The court therefore erred by finding it was speculative that the documentation was material. 4 AA 469. Unlike this Court's prior decisions, the record here does contain evidence of exactly what the uncollected evidence would have shown: That a bank account was opened in a murder victim's name the day after the murder occurred.

The temporal value between stolen property and commission of a crime is well understood in criminal justice. Bollenbach v. United States, 326 U.S. 607, 615 (1946). In an unsolved murder, it stands to reason that if someone stole and used Wallace's identity just one day after the murder, that whoever opened that account likely had some connection to the murder, or committed it. Moreover, the fact Jack was worried about

money, knew Wallace's finances, and continued to worry that he was being "framed" for the murder was all evidence that suggested Jack may have both opened the account and committed the murder.

While the defense tried to investigate these issues, the burden ultimately fell to the State to collect evidence in accordance with this Court's prior decisions. In an unsolved murder where Jack remained a suspect with financial gain the primary motive, evidence of a bank account opened in the victim's name after the murder would have been powerful evidence that whoever opened the account committed the murder.

Yet when confronted with this specific and credible evidence, the detectives dismissed Jack as a quack; telling him he should "write a book" about his beliefs or some similar dismissive term. This conduct by detectives at least amounted to gross negligence, because the failure to act was more than a "slight" mistake but was in fact "substantially higher in magnitude than ordinary negligence." Batt v. State, 111 Nev. 1127, 1132 at n. 5, 901 P.2d 664 (1995).

These documents were directly relevant to the question of who committed the murder. Even beyond the financial documents, any evidence that someone was trying to frame Jack would be evidence of who committed the murder. Ramos' defense was that someone else committed the murder. The District Court's failure to grant the motion also violated Ramos' constitutional right to present a defense, because it deprived him of a presumption that the missing financial documents would have supported his defense that a third party committed the murder. Coleman v. State, 130 Nev.Adv.Rep. 26, 321 P.3d 901 (2014); Crane v. Kentucky, 476 U.S. 683 (1986).

Evidence of the identity of the person who opened the account was evidence of who committed the murder. The District Court's ruling deprived Ramos of a presumption that the documentation about that account was favorable to Ramos, and the failure of police to collect or investigate that information stemmed from at least gross negligence. Ramos' convictions should therefore be reversed based on the State's failure to collect material evidence.

F. The district court erred by denying a motion to strike life without parole as a sentencing option.

After Ramos was convicted but before sentencing, the defense moved to strike life without parole as a possible sentence. 9 AA 1517. The motion explained that Ramos was only 18 years old at the time of the offenses. 9 AA 1519. The motion noted recent Supreme Court precedent that banned mandatory life without parole sentences for juvenile offenders convicted of homicide. 9 AA 1520, Miller v. Alabama, 567 U.S. 460 (2012).

In response, the State mainly argued that Nevada does not have a mandatory sentence of life without parole for any murderer. 9 AA 1570-71. At the hearing before sentencing, the trial court effectively noted that there had to be a "line" someplace and that place in Nevada was exclusively limited to whether the defendant was under the age of 18 at the time of the offense. 9 AA 1611-12. The State also argued it would constitute "judicial activism" for the trial court to adopt any other rule. 9 AA 1613. The trial court denied the motion based on Ramos being over the age of 18 at the time of the offense. 9 AA 1617.

Argument

It's hardly "judicial activism" to ask the trial court, or this Court, to determine how far Constitutional rights extend. Determination of constitutional rights in criminal cases is a core function of the District Court, as is the review of those decisions by this Court.

It does not appear this Court has ever addressed whether protections available to juvenile homicide offenders disappear once a defendant turns 18. This Court's most recent published authority on the topic was State v. Boston, 131 Nev.Adv.Rep. 98, 363 P.3d 453 (2015). There, this Court recognized the Supreme Court's recent decisions, and concluded that aggregate sentences equivalent to life without parole violate the Supreme Court's mandates. Id. at 454, citing Graham v. Florida, 560 U.S. 48 (2010). The defendant in Boston was under the age of 16 at the time of the offenses, and no published or unpublished decision by this Court since that time ever reached the issue of an offender who was already 18 at the time of the offense.

As the defense noted below, other courts which this Court may find persuasive have extended these protections to offenders who were over 18, but not 19, at the time of the offense. Cruz v. United States, 2018 U.S. Dist. LEXIS 52924 (D. Conn. 2018), see 9 AA 1522. The protections have also been extended where a sentence of life without parole was discretionary rather than mandatory. Malvo v. Mathena, 893 F.3d 265, 273 (4th Cir. 2018) (finding Supreme Court precedent violated when life without parole imposed absent finding that crime resulted from "permanent incorrigibility").

More recently, and much closer to home, the Nevada District Court found the "real possibility of constitutional error" in a Nevada state prisoner's allegation that these protections were unconstitutionally withheld from him because he was 18 at the time of the offenses. Harris v. Williams, 2019 U.S. Dist. LEXIS 178743 (D. Nev. 2019). The court based its reasoning on both Cruz and Malvo, which it found supported a claim that "Miller is not confined to instances in which the life without possibility of

parole sentence was imposed under a mandatory penalty scheme." Harris at 4.

While Harris appears to involve the early stages of a claim under 28 U.S.C. §2254, it is indisputable that Nevada's federal judiciary is at least open to the argument that 18-year-old offenders should receive the protections identified in Miller and its progeny. The issue is hardly one of activism, but one in immediate need of clarification for more than just Mr. Ramos' sake.

Because the trial court based its decision on the fact Ramos was over 18 at the time of the offenses, an understanding of how the Cruz court reached its decision may be helpful. The defendant in Cruz committed two murders when he was 18 years and about 20 weeks old, for which the court eventually sentenced him to life without parole. Id. at 3.

Considering a request for application of Miller, the court found that nothing in Miller prohibited application of its rule to an offender over the age of 18. Cruz, 2018 U.S. Dist. LEXIS at 38. This was so, said the court, because the narrow question before the Supreme Court in Miller involved

an offender who was undisputedly under 18 at the time of the offense. Id. at 39.

To be sure, the Cruz court faced multiple decisions from other jurisdictions that rejected application of Miller once a defendant turned 18. Id. at 41. The court found that very few of those decisions were supported by scientific literature on the development of adolescent brains, and that the court therefore had before it evidence on which to make its own decision. Id.

There are parallels to be found in the rest of the Cruz court's analysis. First, the court considered whether a national consensus existed "against a sentence for a particular class of individuals." Id. at 47, citing Miller, 567 U.S. at 482. The court rejected the government's request to simply add up where other state legislatures had drawn the line. Id. at 48. The court focused instead on the fact that at least 16 states recognized a class of "youthful offenders" as those who committed offenses between the age of 18 and the early 20s. Id. at 51. Nevada does recognize a similar class of inmate. See NRS 176A.780 (procedures governing regimental discipline

program), Nevada Dept. of Corrections AR 502 (defining "young adult" up to age 25).

Second, the court recognized what it called the "directional trend" towards treating eighteen to twenty-year olds as less fully mature than adults over that age. Id. at 55. This is reflected in that fact that while 18-year-olds can do many things, one must be age 21 to legally drink alcohol. Id. at 56. As of December 20, 2019, one must now also be age 21 or older to buy cigarettes. 21 U.S.C. §387f (as amended by H.R. 1865). The court summarized: "While there is no doubt that some important societal lines remain at age 18, the changes discussed above reflect an emerging trend towards recognizing that 18-year-olds should be treated different from fully mature adults." Id. at 59.

Third, the court examined the scientific evidence about maturity of 18-year old offenders. The Supreme Court's precedents reflect many of those considerations. Id. at 61. Specific to the issue of whether those protections are necessary once an offender turns 18, the court found that they are. This turned on literature, but also expert testimony admitted in

that case. Id. at 62. There's nothing magical about the expert's testimony and it largely mirrors what current literature holds: Brains are still developing between the ages of 18 and 20. Id. at 64-65. Ramos' literature said the same thing. 9 AA 1528.

The most critical point on this issue was that a better scientific understanding of how the human brain continues to develop past age 18 only developed after 2005. Id. at 70. The court held that Miller therefore applied to 18-year olds, which meant the Eighth Amendment prohibited imposing on an offender who was 18 at the time of the offense a sentence of life without parole. Id. at 71.

Ramos would therefore urge this Court to adopt a similar rule and hold that the protections against life without parole sentences for juvenile offenders also extend to those 18 years old at the time of the offense. This is a straightforward question of how to apply Supreme Court precedent along with the Eighth Amendment, so the State's lengthy discussion of changes made to state laws by the legislature or any related legislative history is irrelevant. 9 AA 1569-71.

The trial court's ruling was wrong then as much as it drew what it called a "very clear distinction" between offenders under the age of 18 and those over that age. 9 AA 1615-16. There is a distinction to be dawn, but it is one guided by a national and scientific consensus – not the anachronistic view that turning 18 magically makes one an adult for all purposes. The age of 18 no longer qualifies one to buy cigarettes, legalized marijuana, handguns, or alcohol, and it likewise no longer automatically qualifies a criminal justice defendant for a sentence of life without parole.

As a separate consideration, Ramos also contends the life without parole sentences given for an offense committed when he was 18 violate the Nevada Constitution. Nevada Constitution, Art. I, §6, Naovarath v. State, 105 Nev. 525, 779 P.2d 944 (1989). There, this Court held that "All but the deadliest and most unsalvageable of prisoners have the right to appear before the board of parole to try and show that they have behaved well in prison confines and that their moral and spiritual betterment merits consideration of some adjustment of their sentences." Id. at 526. Maybe Nevada was ahead of its time – the "deadliest and most unsalvageable" test

sounds functionally similar to the Supreme Court's eventual "permanent incorrigibility" test. See Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016).

This Court held that the sentence of life without parole, imposed on a thirteen year old, constituted cruel and unusual punishment. Id. at 532. Ramos is not arguing here than an 18-to-19 year old is the functional equivalent of a thirteen year old; no more or less than an 18 year old is a fully functioning mature adult. The rationale remains the same either way – Ramos was by definition less than the "deadliest and most unsalvageable of prisoners" because of his age at the time of the offense.

In the end, the Supreme Court has recognized that "juvenile" and "adult" may be insufficient labels to encompass all of humanity. The Cruz court simply stated what the Supreme Court already suggested: There is a class of youthful offenders that lurk between the age of eighteen and the early twenties, and those offenders are in many ways more like juveniles than adults. As a result, at least some of the protections extended to juveniles should be extended to youthful offenders.

Here, that means the denial of Ramos' motion to strike the penalty of life without parole, and the trial court's eventual imposition of sentence of life without parole, violated Ramos' right to be free from cruel and unusual punishment under the United States and Nevada Constitutions and those sentences should therefore be reversed.

G. Ramos's convictions and sentences should be reversed based on cumulative error.

Taken together with all of the other errors made during the trial and the fact that Ramos's conviction was not a certainty, the cumulative effect of all the errors was to violate Ramos's right to a fair trial. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Valdez v. State, 196 P.3d 465, 481 (Nev. 2008), quoting Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100,1115 (2002). When evaluating a claim of cumulative error, these factors are considered: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Valdez, 196 P.3d at 481 quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000); Rose v. State, 123 Nev. 194, 163 P.3d 408, 419

(2007). Ramos's guilt was not a foregone conclusion, given that strong evidence pointed to an assailant other than Ramos. The errors made during trial rose to the level of violating Ramos's constitutional right to a fair trial. The verdict would not have been the same without these errors. As a result, Ramos's convictions must be reversed.

VIII. CONCLUSION

Based on the above, Ramos requests this honorable Court reverse his convictions and sentences.

DATED this 31st day of March, 2020.

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RULE 28.2 ATTORNEY CERTIFICATE

1. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied upon is found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

2. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font of the Ebrima style.

3. I further certify this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 12,052 words.

DATED this 31st day of March, 2020.

RESCH LAW, PLLC d/b/a Conviction Solutions

By: 

JAMIE J. RESCH
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 31, 2020. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

STEVEN WOLFSON
Clark County District Attorney
Counsel for Respondent

AARON FORD
Nevada Attorney General

An Employee of RESCH LAW, PLLC, d/b/a Conviction Solutions