IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL PHILLIP ANSELMO,

Appellant,

vs.

STATE OF NEVADA,

Respondent.

Supreme Court No. 81382

Second Judicial District Court
Case No. 271359

Appeal from Second Judicial District Court, State of Nevada, Washoe County
The Honorable Lynne K. Simons, District Judge

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies and makes the following representations to enable the judges of this Court to evaluate possible disqualification or recusal under NRAP 26.1(a):

There are no persons, entities, or pseudonyms required to be disclosed.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRS 176.09183(6). The final judgment of the district court on Appellant Michael Anselmo's ("Appellant" or "Michael") Post-Conviction Petition Requesting Genetic Marker Analysis of Evidence Within the Possession or Custody of the State of Nevada ("Petition") was entered on May 11, 2020, with notice of entry filed on May 19, 2020 and served via electronic means on counsel and via mail on Michael. The notice of appeal was timely filed with the district court on June 18, 2020.

ROUTING STATEMENT

This appeal arises out of Michael's Petition for Genetic Marker Analysis ("DNA testing"), relating to a 1972 felony conviction by jury for a category A offense. This matter would therefore not be presumptively assigned to the Nevada Court of Appeals under NRAP 17(b)(2)(A) (presumptively assigning to the Nevada Court of Appeals "[a]ppeals from a judgment of conviction based on a jury verdict that: (A) **do not** involve a conviction for any offenses that are category A or B felonies") (emphasis added).

This Court should retain the case under NRAP 17(a)(11) because it raises as principal issues two questions of first impression. First, this case concerns the proper application of the standard for defendants convicted of a felony to obtain an order directing the State to conduct genetic marker analysis of physical evidence in its possession or custody, as set forth by the Legislature in NRS 176.0918.[1] There is a dearth of caselaw in Nevada interpreting this standard, which is whether a "reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence." NRS 176.0918(3)(b). Thus, this appeal concerns the ability of a defendant to potentially prove his/her innocence of a felony crime due

[1] Appellant's Appendix ("App.") Volume ("Vol.") 5 946-954; App.Vol.8 1645-1654.

to the fairly recent availability of genetic marker analysis that may not have been available at the time of conviction. In this case, the genetic marker analysis now requested was not available during the 1970s, when the conviction was entered. The outcome of this appeal determines whether Michael may be able to prove his innocence through testing of evidence that has amazingly survived and remains preserved in the possession of the State decades after his conviction. Hinging on this appeal is the issue of whether justice was served in this case, not only for the defendant who could be exonerated here, but for the victim of the crime at issue.

Second, this appeal concerns the adequacy of the inventory of evidence the State is required by NRS 176.0918(4)(c)(2)(and, here, also by court order) to prepare so that a defendant may assess and select which physical evidence he/she requests be so tested.[2] The importance of an adequately specific and detailed inventory cannot be understated. Without one, as here, the defendant requesting genetic marker analysis may find the courthouse doors slam shut without even the possibility to begin the process of proving his/her actual innocence. And not because the evidence has been lost to time and decay, but because of the State's failure to accurately and precisely describe the physical evidence in its custody or

[2] App.Vol.5 1010-1021; App.Vol.6 1032-1039.

possession, thereby preventing defendant from specifying the evidence to be tested.

STATEMENT OF THE ISSUES

1. Whether the district court erred in concluding that no reasonable possibility exists that Michael would not have been prosecuted or convicted if the results of the requested DNA testing of the physical evidence from his 1972 conviction were exculpatory, and therefore denying Michael's request for post-conviction DNA testing of the victim's fingernails, hairs found in her car, her pantyhose, her leather purse, and her rape kit under NRS 176.0918(3)?

2. Whether the district court erred in ruling that the evidence custodians complied with NRS 176.0918(4)(c) when they submitted inventories that described the containers in which the evidence was held rather than the evidence itself (such as "film canister," "one cardboard 'FONDA ONE PINT U.S. LIQUID MEASURE' canister," and "folded up piece of white butcher paper sealed with evidence tape."[3])?

[3] App.Vol.5 998-1003.

STATEMENT OF THE CASE

In 1972, Appellant Michael Anselmo ("Appellant" or "Michael") was convicted of murdering Trudy Hiler.[4] He was sentenced to life in prison.[5] On October 31, 2018, Michael filed a Post-Conviction Petition ("Petition") for Genetic Marker Analysis ("DNA testing") of some of the remaining evidence in the case.[6] He argued that the test results could conclusively identify the perpetrator, and in turn exculpate him.[7]

On March 7, 2019, the district court granted Michael's Petition in part, and, pursuant to NRS 176.0918(c), the court held a hearing on April 19, 2019 on the Petition, where it ordered the State's evidence custodians to prepare inventories of the evidence in their possession.[8] On May 6, 2019 and June 6, 2019, two custodians submitted inventories.[9] On June 20, 2019, Michael filed a Motion for Order to Show Cause, arguing that the inventories were insufficient because they described the containers in which the evidence was held, rather than the evidence

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[4] App.Vol.5 934.
[5] App.Vol.5 934.
[6] App.Vol.5 937-945. The Petition was refiled on November 2, 2018 due to a missing affirmation. App.Vol.5 946-954.
[7] App.Vol.5 941-43.
[8] App.Vol.5 962-63, 966-992.
[9] App.Vol.5 993-1009.

itself.[10] The district court denied the motion and ruled that the inventories satisfied the statute.[11]

On November 27, 2019, the State file its opposition, arguing that the petition should be denied.[12] The district court held a hearing on the State's opposition and Michael's reply on February 25, 2020.[13] The parties then submitted cross post-hearing briefs at the direction of the court.[14] On May 11, 2020, the district court dismissed the Petition, ruling that Michael failed to demonstrate that a reasonable possibility exists that he would not have been prosecuted or convicted if exculpatory DNA test results had been obtained.[15]

STATEMENT OF FACTS

A. Michael moves to Lake Tahoe and starts his new job.

Michael moved to the Lake Tahoe area in July of 1971.[16] His father's friend, the general manager at the Cal-Neva Lodge, had arranged for him to get a job as a busboy there.[17] Michael was 19 years old.[18]

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[10] App.Vol.5 1010-1021.
[11] App.Vol.6 1032-1039.
[12] App.Vol.6 1040-1238.
[13] App.Vol.7 1272-1336.
[14] App.Vol.7-8 1337-1644.
[15] App.Vol.8 1652-53.
[16] App.Vol.4 624.
[17] App.Vol.4 623, 666.
[18] App.Vol.3 486.

Michael arrived at Lake Tahoe on Monday, July 12, 1971[19] The next day, July 13, he hitchhiked to the sheriff's substation in Incline Village and, because he had been convicted of misuse of a credit card, he registered as an ex-felon.[20] He also tried to get a sheriff's card, but he was not able to at that time.[21] He then hitchhiked to Sears in Reno to buy black pants for his new job.[22]

At Sears, Michael ran into an old friend from Las Vegas, John Soares ("John").[23] John had been Michael's next door neighbor.[24] Michael had been friends with John's son, and Michael looked up to John as a father figure.[25] Unfortunately, John obtained his income through burglaries, robberies, and cheating casinos.[26] John had a lengthy criminal history, including armed robbery, interstate transportation of stolen Picasso etchings, and possession of a sawed-off shotgun.[27] Indeed, at the time of Michael's trial, John was in custody and being transported to Terminal Island, a federal prison in Los Angeles.[28] Michael's father had warned Michael to stay away from John, but Michael had not listened. When

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[19] App.Vol.4 624.
[20] App.Vol.4 622, 626.
[21] App.Vol.4 626.
[22] App.Vol.4 627.
[23] App.Vol.4 620-21, 627.
[24] App.Vol.4 619-620.
[25] App.Vol.4 621-21, 645.
[26] App.Vol.4 645, 665; App.Vol.5 792, 808, 811.
[27] App.Vol.4 773; App.Vol.5 790, 801, 804-05, 809.
[28] App.Vol.4 773.

he met John at Sears, Michael told John that he had moved to the area and that he was staying at the staff dorms at the Cal-Neva.[29] John claimed to be in a hurry and had to leave, and Michael hitchhiked back to Lake Tahoe.[30]

B. John shows Michael the victim's body then threatens him.

The next day was Wednesday, July 14, the day Trudy Hiler ("Trudy") was killed. In the morning, Michael met his probation officer who was visiting the Cal-Neva and asked again about getting a sheriff's card.[31] The probation officer told him to come to Carson City the next morning and they would try to get one.[32]

Michael then went back to his dorm and slept for most of the day because he was going to have to hitchhike to Carson City in the overnight hours in order to arrive there for the morning meeting with his probation officer.[33] He awoke at around 7:00 p.m. that evening, and he and his roommate then had dinner and played cards and pool.[34] He then left around 10:30 p.m. to play some more pool and pinball at the Cal-Neva Lodge game room.[35] At some time after eating dinner, he ingested some acid, something he had been doing since he was 12 years old.[36]

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[29] App.Vol.4 627.
[30] App.Vol.4 627.
[31] App.Vol.4 628.
[32] App.Vol.4 628.
[33] App.Vol.4 629.
[34] App.Vol.4 629.
[35] App.Vol.4 629.
[36] App.Vol.4 648-49.

He testified that it never caused him to hallucinate.[37] Michael hung out with some people at the casino and played pool and pinball until a little after 1:00 a.m., then headed back to the dorm.[38] On his way, he heard what he described as a scream or a cry.[39] When he went to investigate, he saw John Soares coming out of the bushes.[40]

John asked Michael how long he had been standing there, and he told Michael to keep his mouth shut.[41] Michael was scared and responded that he did not know what John was talking about.[42] John was acting in a way that Michael had never seen him act and again told Michael to keep his mouth shut.[43] John then led Michael through the bushes to a rock where Michael saw a woman's body.[44] She was naked and her clothes were laying all over.[45]

John told Michael to keep his mouth shut about it or Michael would "end up like that."[46] John began to pick up the clothes.[47] He then gave Michael a coat and

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[37] App.Vol.4 648-49, 768.
[38] App.Vol.4 630.
[39] App.Vol.4 693.
[40] App.Vol.4 630.
[41] App.Vol.4 630.
[42] App.Vol.4 631.
[43] App.Vol.4 697.
[44] App.Vol.4 631.
[45] App.Vol.4 631.
[46] App.Vol.4 631.
[47] App.Vol.4 631.

told him to throw it in the lake.[48] Michael obeyed him.[49] On the way down to the water, a set of keys fell out of the coat pocket, and Michael threw the keys in the lake too.[50] Michael never touched any of the other clothes or shoes.[51]

When Michael returned, John told him to follow him.[52] John led Michael to Trudy's car in the Cal-Neva employee parking lot.[53] Before John turned and left, John repeated that he would kill Michael if he told anyone what happened.[54]

Michael felt sick.[55] He went to the drug store to buy a 7-Up to settle his stomach, and on his way back to the dorm, he ran into some police officers.[56] Michael approached them because he wanted to tell them what happened.[57] But he was still too afraid of John—and afraid of being arrested for associating with an ex-felon—so he asked a question about registering in California instead.[58] The officer he talked to testified that Michael had no blood on his clothing, and nothing about the interaction gave him any concern.[59]

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[48] App.Vol.4 631.
[49] App.Vol.4 631.
[50] App.Vol.4 631, 742.
[51] App.Vol.4 631, 742-2743
[52] App.Vol.4 646-47.
[53] App.Vol.4 646-47.
[54] App.Vol.4 647.
[55] App.Vol.4 631, 698.
[56] App.Vol.4 632.
[57] App.Vol.4 632.
[58] App.Vol.4 632, 697, 710-11.
[59] App.Vol.1 164.

Michael then hitchhiked to Carson City where he needed to meet his probation officer in the morning.[60] On the way, he realized that he had forgotten his wallet.[61] To get cash, he burglarized a motel in South Lake Tahoe—he entered through a window and took $15 and a wooden piggy bank.[62] He did not sleep on Wednesday night.[63]

C. Michael worries about the body and his own safety

On Thursday morning, Michael arrived at his probation officer's office around 9:30 a.m.[64] Again, Michael wanted to tell him about the murder, but the more he thought about it, the more scared he became.[65] The probation officer drove Michael back to the Cal-Neva around noon.[66] Michael did not tell the officer what happened.[67]

Michael then went to work and worked from 3:00 p.m. until 11:00 p.m..[68] When his shift was over, he went back to the body.[69] He felt sorry for her and he wanted to tell someone, but he was afraid of being killed himself.[70] He closed her

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[60] App.Vol.4 632.
[61] App.Vol.4 632.
[62] App.Vol.4 632.
[63] App.Vol.4 648.
[64] App.Vol.4 633.
[65] App.Vol.4 633.
[66] App.Vol.4 633.
[67] App.Vol.4 633.
[68] App.Vol.4 634.
[69] App.Vol.4 634.
[70] App.Vol.4 634.

eyes and turned her over so she was laying on her stomach.[71] As he put it, "I felt it wasn't right for her to be laying out there."[72] He never noticed her wounds.[73] He then returned to his dorm, but he did not sleep at all that night.[74]

D. Michael leads police to the body

On Friday, Michael did his laundry and again worked from 3:00 p.m. to 11:00 p.m.[75] However, he still could not stop thinking about the body, so he returned to it again on Friday night.[76] He decided he needed to help her be found, so he went to the security office at the Cal-Neva and told a security officer that he had seen a man dragging a woman into the bushes.[77] Michael hoped that the security officer would then find the body.[78] As he put it, "the more I thought about it, I couldn't leave her out there because there were flies all around and everything. I just couldn't leave her out there. So I went back to the club and told the security guard that I saw a man dragging a girl up there, in hopes that they'd find the body, you know, to take care of it."[79]

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[71] App.Vol.4 701.
[72] App.Vol.4 714.
[73] App.Vol.4 762.
[74] App.Vol.4 634.
[75] App.Vol.4 635.
[76] App.Vol.4 635.
[77] App.Vol.4 635-36.
[78] App.Vol.4 635-36.
[79] App.Vol.4 635.

The security guard called the police, and together, Michael searched the area with them.[80] Michael tried to lead them to the body, but he was unsuccessful.[81] After the police left, Michael and the security guard saw a person at the end of the road with a large purse.[82] When the security guard yelled at the person, who Michael believed was male, the "guy took off."[83]

Although the police and the security guard gave up, Michael did not because he desperately wanted her to be found.[84] Michael told the security guard that he was going to continue to search and, at the security guard's suggestion, Michael got a flashlight from the front desk.[85] Michael "waited a little while," and then came back and told the security guard that he found a body.[86] He then took the security guard to Trudy's body.[87]

After police arrived, they put Michael in a police car and began asking him questions.[88] They asked Michael where he was when the murder happened.[89] Michael told them that he had been in South Lake Tahoe, committing the

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[80] App.Vol.4 635-36; App.Vol.2 228, 276.
[81] App.Vol.4 635-36.
[82] App.Vol.4 636.
[83] App.Vol.4 636.
[84] App.Vol.4 636.
[85] App.Vol.4 636.
[86] App.Vol.2 229-231; App.Vol.4 636.
[87] App.Vol.2 230-31.
[88] App.Vol.4 637-38.
[89] App.Vol.4 639.

burglary.[90] With Michael's cooperation and consent, police searched Michael's dorm.[91] Police then took Michael to the sheriff's substation, keeping him in custody.[92] He did not eat or sleep on Friday night.[93]

E. Police interrogate Michael

Early Saturday morning, around 4:30 a.m. or 5:00 a.m., police began interviewing Michael about the murder.[94] They then took Michael back to the Cal-Neva where they again searched his dorm room, spoke to his roommate and again took Michael to where the body was located.[95] The police then took Michael back to the police station and continued to question him.[96] Michael was then transferred to the Sparks police department where the interrogation continued.[97] Ultimately, the police booked Michael on the burglary charge and Michael asked them why John Soares was not in custody.[98] Michael then gave the police the information he had about John and told him about his belief that John had committed the murder.[99] During the next few hours, police continued to interrogate Michael and Michael

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[90] App.Vol.4 639.
[91] App.Vol.4 639.
[92] App.Vol.4 642.
[93] App.Vol.4 648.
[94] App.Vol.3 425-26.
[95] App.Vol.4 640.
[96] App.Vol.4 640.
[97] App.Vol.4 642.
[98] App.Vol.4 642-43.
[99] App.Vol.4 643.

told them he was afraid that John would kill him.[100] Police were aware of John—he had been known to them for seven or eight years.[101] In addition, they understood that John was in the Lake Tahoe area at that time.[102]

Police questioned Michael repeatedly, and Michael maintained that John was the killer even though the police told him Michael did it.[103] Police sent out an all-points bulletin for John, but nonetheless repeatedly told Michael that Michael was the killer.[104] Michael was confused and afraid.[105] He had not eaten or slept since Wednesday, before he saw the body.[106] And he did not eat or sleep on Saturday.[107]

On Sunday morning, the interrogation resumed.[108] After being questioned all weekend without food or sleep and repeatedly accused of committing the murder, at some point during the continuing interrogation, Michael became unresponsive and had to be taken to the hospital.[109] He was unconscious.[110] At the hospital, he

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[100] App.Vol.3 585; App.Vol.4 643.
[101] App.Vol.3 562.
[102] App.Vol.3 586.
[103] App.Vol.3 471, 488; App.Vol.4 649.
[104] App.Vol.3 557; App.Vol.4 649-651.
[105] App.Vol.4 651.
[106] App.Vol.3 531, 533; App.Vol.4 648-49, 752.
[107] App.Vol.4 649.
[108] App.Vol.4 650.
[109] App.Vol.3 491, 510.
[110] App.Vol.3 529.

was revived with nikethamide, a respiratory and circulatory stimulant.[111] The doctor who revived Michael testified that his condition was caused by an extreme "shock or fear or anxiety."[112]

Michael did not recall losing consciousness, he did not recall being given the medication, and he did not remember whether or not he spoke with hospital personnel.[113] Michael only remembered waking up in the hospital.[114] Police then took him back to the police station to continue interrogating him.[115] Michael did not recall the substance of that interrogation or who interrogated him except that he recalled that the interrogators continued to accuse him of the murder, demanding that he confess.[116] He did not eat or sleep on Sunday.[117]

F. Michael falsely confesses to Trudy's murder

By Monday morning, Michael had not eaten or slept for more than four days (since before John showed him the body Wednesday night).[118] In addition, he had been subjected to intense police interrogation for more than fifty hours. Nonetheless, police interrogated him most of the day on Monday and into the

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[111] App.Vol.3 530; National Center for Advancing Translational Sciences, https://drugs.ncats.io/substance/368IVD6M32, last visited September 24, 2020.
[112] App.Vol.3 530, 540.
[113] App.Vol.4 651-52.
[114] App.Vol.4 651-52.
[115] App.Vol.4 651-52.
[116] App.Vol.4 652.
[117] App.Vol.4 650, 653.
[118] App.Vol.4 634, 648-650, 653.

evening.[119] They continued to tell Michael that he was the killer.[120] Michael told them he was tired, could not sleep, and was not feeling well.[121] Moreover, Michael consistently responded that John had done it.[122] As Michael put it, "I kept on telling them about John. I told them the truth about John, and they never did anything about it."[123] Michael also testified that "[Detective Jenkins] refused to quit hassling me, is what it came down to. He wouldn't let me alone. They wouldn't let me alone."[124]

On Monday night, Michael finally relented.[125] He told police that he was alone with Trudy, and he claimed that he had killed her at her request.[126] Specifically, he told police that he and Trudy had gone out in her car but something was wrong with the drive shaft and the car would not go into gear.[127] He then claimed that they had taken some drugs, then walked towards the beach where they had sex.[128] He said that Trudy got a small pocket knife out of her purse and asked Michael to kill her.[129] Michael said he then "stuck part of her clothes around

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[119] App.Vol.4 650.
[120] App.Vol.4 653-54.
[121] App.Vol.4 653.
[122] App.Vol.4 754.
[123] App.Vol.4 754.
[124] App.Vol.4 653.
[125] App.Vol.4 654-55, 726.
[126] App.Vol.4 655, 726.
[127] App.Vol.3 433.
[128] App.Vol.3 433-34.
[129] App.Vol.3 435-36.

her neck and killed her."[130] When asked what part of her clothes, Michael suggested it was her "nylon shirt."[131] When asked to clarify whether he said it was with her "nylons,' Michael indicated that he was "not real sure."[132] Michael then claimed that he stabbed her "three or four" times "in the body."[133] When asked if he could have possibly stabbed her more times, he replied, "I don't think so."[134] When asked to be more specific about where in the body he stabbed her, he replied, "I don't know."[135] Michael also said he then picked up her clothes, put them in her purse, and carried it to the beach.[136] He said he then returned to the body and carried it to a different location.[137]

On Tuesday, after Michael had purportedly "confessed," police took him to the area where the body was found so Michael could show them where the knife was.[138] Michael had no idea where the knife was and so suggested it could have been at the dorm or near the store.[139] After searching those areas, the police did not find the knife.[140] And, although he did not know that exact spot, he tried to lead

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[130] App.Vol.3 435.
[131] App.Vol.3 436.
[132] App.Vol.3 436.
[133] App.Vol.3 436.
[134] App.Vol.3 436.
[135] App.Vol.3 436.
[136] App.Vol.3 436.
[137] App.Vol.3 437.
[138] App.Vol.3 517.
[139] App.Vol.4 658.
[140] App.Vol.4 659; App.Vol.3 520.

them to where he claimed to have thrown the coat and keys into the water.[141] Michael was also asked where Trudy's purse was and he told them that he "didn't know anything about it."[142]

Once police received Michael's "confession," they recalled the all-points bulletin on John Soares and did not investigate him further.[143]

G. The physical evidence does not match Michael's purported "confession" nor does it identify the real killer

Based upon Michael's purported "confession" and his knowledge of where Trudy's coat and keys could be located, he was arrested and tried for Trudy's murder. The State introduced several pieces of physical evidence, none of which matched Michael's "confession" or identified the real killer.

First, the State introduced testimony from Dr. Frederick Laubsher, the pathologist who performed Trudy's autopsy.[144] Dr. Laubscher testified that the cause of Trudy's death was strangulation.[145] Based on the location and nature of abrasions under each of Trudy's ears, he testified that she had been manually strangled, most likely with a right hand.[146] Specifically, he testified that it was more likely that she had been strangled with a hand than with cloth because there

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[141] App.Vol.3 518.
[142] App.Vol.4 658.
[143] App.Vol.3 557.
[144] App.Vol.3 383.
[145] App.Vol.3 385.
[146] App.Vol.3 397-398.

were no burn marks on the front or back of her neck and her hyoid bone was not broken as would be expected if she had been strangled with a piece of clothing.[147]

Dr. Laubscher also testified that Trudy had been stabbed at least fifteen times—four times in the neck, nine times in the sternum and twice in the chest. [148] Further, Dr. Laubscher discovered more than 100 small abrasions and bruises on her extremities.[149] Finally, Dr. Laubscher testified that he did not detect any drugs or alcohol in her system; however, because there was no way to detect LSD in the body in 1971, he only tested for alcohol and barbiturates.[150]

Dr. Laubscher did find seminal fluid in Trudy's vagina, which led him to conclude that she had sex within a day or so before she died.[151] However, no sperm were present.[152] This meant one of two things—either there were never sperm present in the seminal fluid of the person who had sex with her due to a vasectomy or sterility, or the sperm had degenerated before the test.[153] Dr. Laubscher tested Michael's seminal fluid and found sperm.[154]

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[147] App.Vol.3 398.
[148] App.Vol.3 386.
[149] App.Vol.3 387.
[150] App.Vol.3 396.
[151] App.Vol.3 405.
[152] App.Vol.3 392.
[153] App.Vol.3 391-92, 403.
[154] App.Vol.3 407.

The State also introduced photos of the items that were found near Trudy's body.[155] Specifically, police found Trudy's purse in a nearby bush not at the beach as Michael had suggested.[156] Her clothing was protruding from it—a blouse, a slip, a pair of shorts, a bra, underwear, and black stockings.[157] Police found a pair of shoes nearby.[158] Trudy's friend confirmed that the clothing and shoes belonged to Trudy.[159]

Police also found the keys and coat that Michael had thrown into the lake.[160] Indeed, during the days Michael was interrogated, he led police to the locations where he threw those items into the water.[161] Neither Michael nor the police ever found Trudy's pocket knife.[162]

Next, the State introduced photos of the car Trudy was supposed to drive home after work on the night she was killed.[163] The clutch pedal was pressed all the way to the floor.[164] Wires were hanging down from the steering column.[165] The

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[155] App.Vol.1 117.
[156] App.Vol.2 350; App.Vol.3 437.
[157] App.Vol.2 353.
[158] App.Vol.2 297.
[159] App.Vol.1 117.
[160] App.Vol.2 301, 304; App.Vol.3 504.
[161] App.Vol.3 518.
[162] App.Vol.3 506, 520.
[163] App.Vol.1 112, 167.
[164] App.Vol.1 166.
[165] App.Vol.1 167.

horn rim on the steering wheel was bent.[166] The drive shaft was broken and laying on the ground under the car.[167] A mechanic testified that the only way to break the drive shaft that way would be to apply an excessive amount of torque.[168] Further, there were skid marks where the wheels had dug a small hole in the sand on each side of the rear of the car.[169]

Inside the car, police found two strands of hair—one hanging on a loose wire on the steering column, and the other on the support bracket for the driver's seat.[170] The hairs were different in length and color.[171]

H. The circumstantial evidence does not implicate Michael nor does it identify the real killer

The State also introduced several pieces of circumstantial evidence in an attempt to paint Michael as the killer.

First, Michael's roommate, Louis Padilla, testified that Michael did not sleep in the dorm on Wednesday night, and that on Thursday, Michael had cash even though he was "broke" the night before.[172] He also testified that Michael told him "I must have driven the cops crazy last night."[173] This was consistent with

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[166] App.Vol.1 166.
[167] App.Vol.1 166.
[168] App.Vol.1 193.
[169] App.Vol.1 166.
[170] App.Vol.5 852.
[171] App.Vol.4 611, 614-15.
[172] App.Vol.1 20, 22.
[173] App.Vol.1 20-21.

Michael's testimony that he had not slept on Wednesday, but instead hitchhiked to Carson City to see his probation officer in the morning.[174] It is also consistent with Michael's testimony that he stole $15 and a piggy bank from a motel on the way.[175] Finally, it is consistent with Michael's testimony that he approached police in an effort to tell them about the body, but was still too scared.[176]

Second, one of Trudy's roommates testified that she had seen Michael in the parking lot the night before Trudy was killed, and that Michael looked "suspicious."[177] But her description of the person she saw did not match Michael as she described the individual as having "long, black, curly hair" and Michael's hair was neither long nor curly at the time.[178] John Soares, however, had long, black curly hair.[179]

Third, Trudy's roommates also testified that they had never seen her with a pocket knife.[180] This fact supports the contention that Michael's purported "confession" to police was false—in the confession, he told police that Trudy took "her knife" out of her purse when she started to talk about dying.[181] Even the State

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[174] App.Vol.4 632.
[175] App.Vol.4 632.
[176] App.Vol.4 632, 710-11.
[177] App.Vol.1 39, 49.
[178] App.Vol.4 686.
[179] App.Vol.4 761.
[180] App.Vol.1 96, 116, 129.
[181] App.Vol.3 434.

understood this was false, telling the jury in closing that the knife was Michael's.[182]

Next, the State introduced testimony that Michael led police to the areas where he had thrown Trudy's coat and keys into the water.[183] The State argued in closing that this showed that Michael was the killer.[184] But again, this was consistent with Michael's testimony that John Soares had instructed him to dispose of those items.[185]

Finally, the State put John on the stand.[186] John testified that he did not kill Trudy and that he never saw her clothing or purse.[187] Not surprisingly, he also testified that he was not at Lake Tahoe—or even in Nevada—at any time during the summer of 1971.[188] John's claims contradicted the testimony of Sargent Whitmire, who testified that police understood that John was in the Lake Tahoe area in 1971.[189] Further, John did admit that he was in the Los Angeles area in July of 1971, only eight hours from Lake Tahoe where Trudy was killed.[190] Interestingly, a car salesman testified that John bought a car from him on July 13,

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[182] App.Vol.5 866.
[183] App.Vol.3 518, 582.
[184] App.Vol.5 869, 873.
[185] App.Vol.4631.
[186] App.Vol.4 770.
[187] App.Vol.4 774, 778.
[188] App.Vol.4 774, 779.
[189] App.Vol.3 586.
[190] App.Vol.4 778-79.

the day before Trudy was killed.[191] The only testimony supporting John's account of where he was on July 14 and July 15 was his wife who testified that he went with her to the veterinarian on the afternoon of July 14.[192] John's wife also testified that "he spent each and every evening with" her during that week.[193]

I. The jury finds Michael guilty

At the close of the evidence, the jury was left to choose which version of events to believe. On the one hand, there was the version that Michael repeatedly told police in the days he was interrogated and at trial, the version that matched the physical and circumstantial evidence.[194] On the other hand, there was the version that Michael gave police—a purported "confession" that Michael gave only after several days without food or sleep, living in fear that John would kill him but also worried about the dead girl, and after having suffered a seizure caused by the shock, fear, or anxiety.[195] That version did not match the physical evidence and either did not match the circumstantial evidence or was wholly consistent with Michael's trial testimony. Michael was wrong about how Trudy was strangled, did not know where or how many times she had been stabbed, was mistaken about Trudy having a pocket knife, and did not know where any of her belongings were

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[191] App.Vol.5 835.
[192] App.Vol.5 843-44.
[193] App.Vol.5 846.
[194] App.Vol.3 449, 471, 488, 576; App.Vo.4 630-33.
[195] App.Vol.3 510, 530, 540; App.Vol.4 631, 634-35, 648-49, 697, 752.

aside from the coat and keys he threw in the lake.[196] Michael's seminal fluid contained sperm whereas the seminal fluid found in Trudy's rape kit did not.[197] Michael did not match the description given by one of Trudy's roommates of a suspicious looking man who she had seen with Trudy and Trudy's car was far more visibly damaged than the mere drive shaft issues that Michael described in his purported "confession."[198] The jury returned a verdict of guilty.[199] Michael was sentenced to life in prison.[200]

J. Michael seeks DNA testing

In 2018, after more than 46 years in prison, Michael filed the Petition seeking DNA testing of evidence related to the crime.[201] Specifically, he sought DNA testing of: (i) Trudy's fingernail clippings, (ii) hairs found in Trudy's car, (iii) genetic material found on her pantyhose, (iv) the handle of her leather purse, and (v) her rape kit.[202]

On March 7, 2019, the district court granted Michael's Petition and, pursuant to NRS 176.0918(4)(c), the court scheduled a hearing on the Petition and ordered the evidence custodians—the Washoe County Sheriff's Office and the

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[196] App.Vol.3 385, 397, 434-37, 464; App.Vol.4 657.
[197] App.Vol.3 391-92, 403, 407.
[198] App.Vol.1 39, 49, 166-67; App.Vol.4 686.
[199] App.Vol.5 934.
[200] App.Vol.5 934.
[201] App.Vol.5 937-954.
[202] App.Vol.5 947-48, 950-51.

Second Judicial District Court— to prepare inventories of the evidence in their possession.[203] The Second Judicial District Court produced a copy of its evidence inventory.[204] The inventory describes the evidence retained by the court, and includes Trudy's purse and its contents.[205]

The Washoe County Sheriff's Office also submitted an inventory.[206] For container "1 of 2," the inventory contains many descriptions of evidence including the hair strands and fingernail clippings.[207] But the inventory also listed descriptions of the containers (rather than the evidence), such as "film canister," "one cardboard 'FONDA ONE PINT U.S. LIQUID MEASURE' canister," "small paper canister," and "folded up piece of white butcher paper sealed with evidence tape."[208] For container "2 of 2," the inventory states "not opened, not examined."[209]

Michael filed a Motion for Order to Show Cause, arguing that the inventory filed by the Washoe County Sheriff's Office did not comply with the statute because it did not allow him to determine what evidence still exists.[210] He therefore could not determine whether he needed to amend his petition to seek testing of

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[203] App.Vol.5 962-63.
[204] App.Vol.5 1009.
[205] App.Vol.5 1009.
[206] App.Vol.5 98-1003.
[207] App.Vol.5 998.
[208] App.Vol.5 998, 1000-01.
[209] App.Vol.5 1003.
[210] App.Vol.5 1010-13.

additional items.[211] The State argued that it did not need to open evidence containers and disclose what was inside.[212] The district court agreed with the State, ruling that the inventories were sufficient.[213]

Under the statute, Michael is entitled to testing if he can show, among other things, "[t]he rationale for why a reasonable possibility exists that [he] would not have been prosecuted or convicted if exculpatory results had been obtained" through the DNA testing. NRS 176.0918(30)(b). Thus, in the Petition, Michael argued that each of the pieces of evidence has the potential to conclusively identify the perpetrator and exculpate himself.[214] Indeed, as he argued at the hearing on the Petition, if Michael's DNA is not found on any of the evidence, then "that is certainly a basis to conclude that there's a reasonable possibility that had the evidence been presented at trial, he would not have been convicted. And even more, if all of those, all that genetic material matches one person, not [Michael], that also goes to [his] defense that there was another person who committed the crime."[215]

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[211] App.Vol.5 1012-13.
[212] App.Vol.6 1024.
[213] App.Vol.6 1037.
[214] App.Vol.5 951-52.
[215] App.Vol.7 1326.

But the State opposed the Petition, arguing that the evidence (not including DNA evidence) "overwhelmingly pointed" to Michael's guilt.[216] The State pointed out that, at trial, Michael had already argued that no physical evidence connected him to the murder and had "placed the blame on another felon," but that "the jury's verdict indicates that they did not find these arguments compelling."[217] Of course, the question is whether exculpatory test results would have changed the jury's conclusion, not whether the jury was presented with the alternative narrative unsupported by DNA evidence. NRS 176.0918(2)(b).

The district court nonetheless agreed with the State and denied the Petition.[218] The district court noted that the jury heard about John Soares and Michael's explanation for why he knew where the body, keys, and coat were.[219] The court ruled that the jury necessarily rejected this evidence when it convicted Michael.[220] The court therefore concluded that exculpatory DNA test results could not have changed that result.[221]

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[216] App.Vol.7 1340; *see also* App.Vol.6 1057.
[217] App.Vol.6 1055.
[218] App.Vol.8 1652-53.
[219] App.Vol.8 1652.
[220] App.Vol.8 1652.
[221] App.Vol.8 1652-53.

In 2019, during the pendency of this litigation, Michael was released from prison on parole.[222] He served 48 years in prison and is still under the supervision of the Nevada Department of Corrections.[223]

SUMMARY OF THE ARGUMENT

The district court erred in denying Michael's Petition. Under Nevada law, a petitioner seeking DNA testing must demonstrate that "a reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through" DNA testing. NRS 176.0918(3)(b). Critically, this does not require Michael to prove that he would ultimately be successful on a motion for new trial if the results of testing turned out to be favorable, as this is the second part of the statutory scheme. NRS 176.09187. Michael's Petition is required only to demonstrate a reasonable possibility that he "would not have been prosecuted or convicted" in order to obtain an order directing testing of the evidence, and it is whether Michael met this standard at issue in this appeal.

In the underlying criminal case here, the jury was asked to choose between two different narratives—either Michael killed Trudy, or he was telling the truth when he said John Soares showed him the body and asked him to dispose of

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[222] App.Vol.7 1390.
[223] App.Vol.7 1390.

evidence. Without any physical evidence available to support or discount the available narratives, the jury believed that Michael killed Trudy. However, if the jury had heard that DNA on Trudy's fingernails, the seminal fluid in her rape kit, the DNA on the hairs found in her car, or the touch DNA on her purse and clothing belonged to John Soares—or anyone other than Michael—then it is more than possible that the jury would have acquitted. Indeed, had DNA testing been available in 1971, it is also possible that Michael would not have been prosecuted had the presence of someone else's DNA been found on the physical evidence related to the murder.

Presented another way, if John's DNA was on any of the evidence, then the jury would have known that John lied when he said he was not in the area. This would have corroborated Michael's testimony and undermined the State's theory. And if the DNA belongs to another person, then the results still would have undermined the State's theory. This is true of all of the physical evidence but especially true for the fingernail clippings and the rape kit. One of the State's theories was that Trudy had not only been murdered but that she had also been raped by her assailant. Even Michael's false confession admitted that he had sex with Trudy. None of the testimony at trial suggested a reason that DNA under Trudy's fingernails or in her vaginal cavity belonged to anyone other than her killer. Thus, the presence of another person's DNA would corroborate Michael's

story that another person killed Trudy, discredit his own false confession, and create a reasonable possibility that Michael would not have been prosecuted or convicted.

Moreover, the district court erred when it did not require the State to provide inventories of the evidence within its possession or control under NRS 176.0918(4)(c)(2). While the district court did initially require evidence inventories, the district court was satisfied with an evidence inventory that included only vague descriptions of evidence such as "hairs," or did not describe the evidence at all and instead described evidence containers, such as "glass slides" "film canister," "one cardboard 'FONDA ONE PINT U.S. LIQUID MEASURE' canister," and "small paper canister." Such an evidence inventory is almost as good as no inventory at all, and this Court should instruct the district court to require the State to provide an inventory adequately describing the *evidence* in the custody or possession of the State.

STANDARD OF REVIEW

While there is no definitive statement of the Nevada Supreme Court of the applicable standard of review of the denial of a petition for genetic marker analysis, in an unpublished decision, the Nevada Court of Appeals reviewed such an appeal under an abuse of discretion standard, citing NRS 176.0918(4) for the action the district court *may* take in resolving a petition for genetic market analysis.

Dillard v. State, 76377-COA, 2019 WL 1931900, at *1 (Nev. App. Apr. 29, 2019). However, because this appeal concerns the proper interpretation of a statutory standard for DNA testing, Appellant urges the Court to consider those issues of statutory interpretation *de novo*. *See Pressler v. City of Reno*, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002) (the Nevada Supreme Court generally reviews questions of law *de novo*).

ARGUMENT

The district court erred in denying Michael's petition. Michael showed more than a reasonable possibility that he would not have been prosecuted or convicted if another person's DNA is found on the evidence—particularly if the DNA belongs to John Soares.

The court also erred in denying Michael's motion for order to show cause. The district court is permitted by statute to require an evidence inventory of the State, and it should go without saying that such inventory needs to be reasonably detailed to permit the defendant/petitioner and the district court to understand what *evidence*, not just unspecified evidence *containers*, remain within the possession or custody of the State.

I. There Is a Reasonable Possibility That Michael Would Not Have Been Prosecuted or Convicted if DNA Tests Point to John Soares or Any Other Person.

The district court erred in denying Michael's Petition for DNA testing because Michael met his statutory burden to be granted the opportunity to conduct DNA testing on the physical evidence identified in his Petition. Michael showed a reasonable possibility that he would not have been prosecuted, let alone convicted, had exculpatory DNA test results been obtained. Indeed, if Michael's DNA is not on any piece of the evidence, those results will corroborate his testimony and undermine the State's theory of the case. And more importantly, if John Soares' DNA is on any piece of evidence, then the results will corroborate Michael's testimony and contradict John's testimony. There is much more than a "possibility" that a jury or prosecutor hearing such test results would have reached a different conclusion or forgone prosecution of Michael. The same is true if another individual is found on the evidence. Indeed, because Michael did not see John kill Trudy, it is possible that another person was involved in her killing. Had the DNA of another person been found, it is likely the investigative officers would have taken steps to investigate such a lead. Therefore, a reasonable possibility also exists that Michael would not have been prosecuted or convicted if DNA test results show the presence of another person.

A. The reasonable possibility standard for DNA testing in Nevada.

Under Nevada law, a petitioner seeking DNA testing must demonstrate that "a reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through" DNA testing. NRS 176.0918(3)(b).[224] Importantly, this is just the first step a petitioner must take to prove their innocence. NRS 176.0918, 176.09187. Once the DNA testing is complete, if it is favorable to the petitioner, they must submit a motion for a new trial where the burden falls squarely on them to prove that they are innocent and

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[224] Nevada is only one of three states that have adopted the "reasonable possibility" standard. The other two are Alabama (Ala. Code § 15-18-200(f)(2)) and Pennsylvania for those under State supervision (42 Pa. Stat. and Cons. Stat. Ann. § 9543.1(d)). The majority of states have adopted the "reasonable probability" standard for post-conviction DNA testing including: Alaska (Alaska Stat. Ann. § 12.73.020(9)); Arizona (Ariz. Rev. Stat. Ann. § 13-4240, Ariz. R. Crim. P. 32.17(d)(1)(A)); Arkansas (Ark. Code Ann. § 16-112-202); California (Cal. Penal Code § 1405(g)(5)); Connecticut (Conn. Gen. Stat. Ann. § 54-102kk); Florida (Fla. Stat. Ann. § 925.11(2)(f)(3)), Fla. R. Crim P. 3.853(c)(5)(C)); Georgia (Ga. Code Ann. § 5-5-41(c)(3)(D)); Hawaii (Haw. Rev. Stat. Ann. § 844D-123(a)(1)); Illinois (725 Ill. Comp. Stat. Ann. 5/116-3(c)(1)); Indiana (Ind. Code Ann. § 35-38-7-8); Iowa (Iowa Code Ann. § 81.11); Kentucky (Ky. Rev. Stat. Ann. § 422.285(6)(a)); Maryland (Md. Code Ann., Crim. Proc. § 8-201(d)(1)(i)); Mississippi (Miss. Code Ann. § 99-39-5(1)(f)); Missouri (Mo. Ann. Stat. § 547.035); Montana (Mont. Code Ann. § 46-21-110(5)); New Jersey (N.J. Stat. Ann. § 2A:84A-32a(d)(5)); New Mexico (N.M. Stat. Ann. § 31-1A-2(d)(5)); New York (N.Y. Crim. Proc. Law § 440.30(1-a)(a)(1)); North Carolina (N.C. Gen. Stat. Ann. § 15A-269); Oklahoma (Okla. Stat. Ann. tit. 22, § 1373.4(A)(1)); Oregon (Or. Rev. Stat. Ann. § 138.692); Pennsylvania for those not under State supervision (42 Pa. Stat. and Cons. Stat. Ann. § 9543.1(d)); Rhode Island (10 R.I. Gen. Laws Ann. § 10-9.1-12); Utah (Utah Code Ann.§ 78B-9-301(2)(f)(ii)); Vermont (Vt. Stat. Ann. tit. 13, § 5566(a)(1)); West Virginia (W. Va. Code Ann. § 15-2B-14(f)(5)); and Wisconsin (Wis. Stat. Ann. § 974.07).

should be released from prison. NRS 176.08187(1)(a). This appeal focuses only on the first step—whether Michael has demonstrated that "a reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through" DNA testing. NRS 176.0918(3)(b).

This Court has not specifically defined "reasonable possibility" in this context. However, in the *Brady* context, this Court has held that "reasonable possibility" is a lesser standard than "reasonable probability." *State v. Bennett*, 119 Nev. 589, 600, 81 P.3d 1, 8 (2003). A petitioner making a *Brady* claim satisfies the "reasonable probability" standard where the nondisclosure undermines confidence in the outcome of the trial. *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). "Reasonable possibility," on the other hand, is a "real possibility that the evidence would have affected the result." *Roberts v. State*, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994), *overruled on other grounds by Foster v. State*, 116 Nev. 1088, 13 P.3d 61 (2000). The Petition here satisfies the reasonable possibility standard. The district court erred in finding that it did not.

Importantly, it is undisputed that the Petition here also satisfies all of the other procedural requirements. This is important because petitions for DNA testing under NRS 176.0918 are generally denied for procedural errors in petitions, such as filing under the wrong statutory provision. *E.g.*, *Slaughter v. State*, No. 70676, 2017 WL 1483465 (Nev. App. Apr. 19, 2017) (petitioner improperly sought DNA

testing in his postconviction petition rather than in a separate DNA petition under NRS 176.0918). For example, in *Green v. State*, petitioner alleged another suspect was the actual perpetrator and sought DNA testing to prove that. No. 75448-COA, 2019 WL 1771934 (Nev. App. Apr. 18, 2019). The court found that petitioner had demonstrated a reasonable possibility that, had DNA testing been done, "it would have shown that [the alternative suspect] murdered the victim and [petitioner] was innocent." *Id.* at *1. However, the petitioner in *Green* failed to inform the court that some DNA testing had previously occurred in his case. *Id.*; *see also* NRS 176.0918(3)(d) & (e) (requiring certain disclosures, including of prior testing results and prior availability of testing at the time of trial). The court therefore concluded that he failed to meet the DNA testing statute's procedural requirements and that the district court had properly denied his petition. *Id.*

Denials on substantive grounds are rare, and for good reason. They are appropriate only when there is *no* reasonable possibility that DNA evidence would have assisted the petitioner, usually because the identity of the perpetrator was not in question. In fact, some state DNA testing statutes include a requirement that the identity of the perpetrator must be in question in order to request DNA testing. *E.g.*, Ga. Code Ann. § 5-5-41 ("The identity of the perpetrator was, or should have been, a significant issue in the case.").

To illustrate, Nevada has denied petitions for DNA testing in sexual assault cases where the defense was consent, in homicide cases where the defendant claimed self-defense, and in a driving under the influence case where the defendant's identity was not in question. *E.g.*, *Moraga v. State*, No. 64931, 2014 WL 37900915, at *1 (Nev. July 23, 2014) (no reasonable possibility that DNA testing would assist petitioner where the defense was consent); *Turpin v. State*, No. 64112, 2014 WL 982347, at *1 (Nev. Mar. 11, 2014) (no reasonable possibility that DNA testing would assist petitioner where the petitioner had asserted self-defense); *Bolich v. State*, No. 67236, 2015 WL 1879622, at *1 (Nev. App. Apr. 15, 2015) (no reasonable possibility DNA testing would assist petitioner where he had been charged and convicted of driving under the influence).

The Nevada Court of Appeals has purported to deny DNA testing in those cases where "'there was overwhelming evidence of [a defendant's] guilt' presented at trial even without DNA evidence." *E.g.*, *Nolan v. State*, No. 76572-COA, 2019 WL 4053954, at *2 (Nev. App. Aug. 27, 2019) (no reasonable possibility articulated where defendant was convicted of kidnapping, sexual assault, robbery, burglary, and unauthorized use of credit card—witnesses saw defendant follow the victim, defendant admitted he had sex with the victim and left her where she was found injured, and defendant repeatedly used victim's credit card after the incident). But, in *Nolan*, not only was the "amount of biological evidence

collected...too small for testing to develop a DNA profile," but the issue was not solely that the evidence was overwhelming, but that the defendant's defense was consent. *Id.* A defense of consent to a sexual encounter did not warrant DNA testing in that case because, and in addition to all the other circumstantial evidence demonstrating the contrary, DNA testing would do little in the way of resolving a contested consent defense. *Id.* Indeed, other courts have repeatedly granted DNA testing even where there is "significant" or "strong" circumstantial evidence supporting a guilty verdict. *See Huffman v. State*, 837 So. 2d 1147, 1149 (Fla. 2d DCA 2003) (holding that despite "significant circumstantial evidence of [defendant's guilt] presented at trial," post-conviction DNA testing was appropriate when the identity of the perpetrator was at issue); *State v. Demarco*, 904 A.2d 797, 807 (N. J. Super. 2006) (holding that "a state cannot preclude a defendant from presenting [DNA] evidence of third-party guilt simply because the evidence against him strongly supports a guilty verdict").

Thus, courts generally grant DNA testing in cases where there is a "real possibility that the evidence would have affected the result." *Roberts*, 110 Nev. at 1129, 881 P.2d at 8, *overruled on other grounds by Foster*, 116 Nev. 1088, 13 P.3d 61. For example, the Eighth Judicial District Court granted a petition for DNA testing in a case very similar to the one at bar. *State v. LaPena*, Case No. 059791,

Order Granting DNA Testing (dated October 25, 2011).[225] In *LaPena*, there was evidence that the victim had been killed by two perpetrators, one of whom confessed and implicated Mr. LaPena. *Id.* Mr. LaPena denied being involved but was ultimately convicted. *Id.* Thirty-seven years later, Mr. LaPena petitioned to have the hair that was removed from the victim's hands and her fingernail clippings DNA tested, claiming that it would show that the victim's husband was the actual second perpetrator. *Id.* The State opposed, arguing that Mr. LaPena had not met the "reasonable possibility" standard because the husband's DNA could be present because he lived in the house and further arguing that the jury had already heard that the victim's husband could have been involved. *Id.* The court disagreed with the State, citing the lack of physical evidence available at the time of trial (1974) and pointing out that DNA testing of the hair samples or fingernail clippings could have "substantially undermined the [co-defendant's] testimony" and, in turn, the State's case. *Id.*

Here, no physical evidence tied Michael to the crime so his "confession," despite its inconsistencies with the evidence, was the State's primary evidence implicating him. Like *LaPena*, should DNA testing implicate John Soares or

[225] Included within the Addendum at the end of this Opening Brief.

another individual, that DNA undermines the State's case and bolsters Michael's testimony about what actually occurred at the Cal-Neva that night.[226]

B. Similar statutory testing schemes in other states provide persuasive authority for how Nevada's standard should be applied.

Courts in other jurisdictions with similar DNA testing statutes have articulated a low bar for petitioners to satisfy the reasonable possibility or reasonable probability standard, even where the petitioner had confessed to the crime.[227]

For example, the New Jersey DNA testing statute requires petitioners to demonstrate a reasonable probability that favorable DNA results would lead to the

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[226] The DNA testing was completed in Mr. LaPena's case and he moved for a new trial as he was excluded as the source of the DNA on the hairs and other items. *LaPena v. State*, 429 P.3d 292, 2018 WL 5095822 (Nev. 2018). His motion was denied, he appealed and this Court affirmed. *Id.*

[227] Since 1989, 2684 individuals have been exonerated and released from prison after being wrongfully convicted. The National Registry of Exonerations, available at https://www.law.umich.edu/special/exoneration/Pages/about.aspx, last visited November 2, 2020. False confessions or admissions were involved in 328 of those cases. *Id.*, available at https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=FC&FilterValue1=8%5FFC, last visited November 2, 2020. Moreover, 375 individuals have been exonerated and released from prison based upon DNA Testing. Innocence Project, available at https://www.innocenceproject.org/exonerate/, last visited November 2, 2020. False confessions or admissions played a part in 58, or more than 15% of those exonerations. *Id.*, available at https://innocenceproject.org/all-cases/#false-confessions-or-admissions, last visited November 2, 2020.

grant of a motion for new trial based on newly discovered evidence. N.J. Stat. Ann. § 2A:84A-32a. In *State v. Peterson*, the petitioner was convicted of felony murder and aggravated sexual assault and petitioned for DNA testing. 836 A.2d 821, 823 (N.J. 2003). Specifically, he sought testing of "blood under the victim's fingernails, semen on the outside of her pants and various hair samples on her body." *Id.* at 824. The New Jersey court noted that the statute does not require petitioners to show there is a reasonable probability DNA testing will produce favorable results—the statute requires only that if the results are favorable, there is a reasonable probability a new trial would have been granted. *Id.* at 827.

In *Peterson*, the State presented evidence at trial from several witnesses who claimed the petitioner confessed to the crimes in detail. *Id.* at 824. The State also presented evidence that petitioner had fresh scratch marks on him, that he asked several people for money to travel to Germany, that he threatened potential witnesses. *Id.* Finally, the State presented the testimony of a forensic scientist who claimed that hairs found at the crime scene "had the same characteristics as the victim's hair." *Id.* However, because none of the physical evidence had been tested at the time of trial, the court found that the petitioner established the DNA testing raised a reasonable probability of a grant of a new trial where the DNA could point to another perpetrator and directly contradict the State's evidence against the petitioner. *Id.* at 827–28.

Similarly, the Georgia DNA testing statute requires petitioners to demonstrate that the "requested DNA testing would raise a reasonable probability that the petitioner would have been acquitted if the results of DNA testing had been available at the time of conviction, in light of all the evidence in the case." Ga. Code Ann. § 5-5-41(c)(3)(D). In *State v. Gates*, the petitioner had been convicted of murder, rape, and armed robbery, and petitioned for DNA testing. 840 S.E.2d 437, 440 (Ga. 2020). One of the victim's neighbors testified that on the day the victim was killed, a black male came to his door and told him he was from the gas company. *Id.* The neighbor identified the petitioner in a lineup, and the petitioner confessed to police that he told the neighbor that he was from the gas company. *Id.* at 441. The petitioner later gave a full confession to police, went to the victim's apartment with police, and gave police a description of what happened in the victim's apartment. *Id.* at 442. He told police that he tied the victim's hands behind her back with the belt from her robe and that he tied two black neckties around her face. *Id.* Two fingerprints were found on the heater in the victim's apartment, and police determined that they matched the petitioner's fingerprints. *Id.*

Many years later, the petitioner discovered that the district attorney's office had a belt and four neckties, which had been introduced at the trial. *Id.* at 449. The court held that "although the State presented strong evidence of [petitioner's] guilt,

[petitioner] could have much more effectively countered such evidence had he also been able to present the newly discovered DNA evidence." *Id.* at 456.

The Kentucky DNA testing statute requires petitioners to demonstrate that a "reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis." Ky. Rev. Stat. Ann. § 422.285. In *Moore v. Commonwealth*, the petitioner had been convicted of murder, robbery, and kidnapping, and petitioned for DNA testing. 357 S.W.3d 470, 473 (Ky. 2011). The victim was abducted at gunpoint while driving his maroon Buick, and a witness saw someone matching the petitioner's description pointing a gun at the driver of a maroon car. *Id.* at 474. The petitioner was later seen driving a maroon car. *Id.* When police found petitioner, "he had [the victim's] car keys and wristwatch, and the likely murder weapon." *Id.* He had previously confessed to his friend and girlfriend, later confessed to three police officers, and made incriminating statements in front of a corrections officer. *Id.* Additional evidence against the petitioner included gunshot residue on his hands when arrested, his fingerprints on the victim's car and rolls of coins, testimony that he was driving the victim's car, some of the victim's documents in the petitioner's car, ammunition similar to that used in the crime found in the place where the petitioner lived at the time, the petitioner had the

victim's watch and gave proceeds from the robbery to other people, and testimony from the petitioner's friend that the petitioner had committed the crime. *Id.* at 477.

The petitioner argued that his friend was the actual perpetrator, providing testimony of seven witnesses who claimed the friend had confessed to committing the crimes and framing petitioner. *Id.* at 475. He sought DNA testing of clothing that the friend claimed the petitioner wore on the day of the murder. *Id.* at 477. The court held that the petitioner had demonstrated that there was a "reasonable probability that he may not have been prosecuted or convicted if DNA exculpatory evidence is present." *Id.* The court concluded that the evidence of the petitioner's "guilt was 'equally consistent with [his] assertion that he was set up by [his friend] and his girlfriend.'" *Id.* at 478 (first alteration in original).

Finally, the Illinois DNA Testing Statute uses the reasonable probability standard to judge the propriety of DNA testing when a defendant has pled guilty. 725 Ill. Comp. Stat. Ann. 5/116-3. In *People v. LaPointe*, the defendant was accused of murdering a cab driver, pled guilty in 1978 and was sentenced to life in prison. 129 N.E.3d 24, 24 (Ill. App. 2018). On the day of the murder, the defendant told an acquaintance that he planned to kill a cab driver with a friend, and after the murder confessed to police, a cellmate, and a psychiatrist. *Id.* at 24, 38. Nineteen years later, in 1997, the defendant again confessed to his psychiatrist. *Id.* at 39. In 2016, the defendant submitted a motion for DNA testing of fingerprints, hairs, and

a pack of cigarettes, all found in the deceased driver's cab. *Id.* at 29. Although the defendant had repeatedly confessed, the court held that DNA testing was appropriate because with "the results of the requested testing, defendant could plausibly have contested that case." *Id.* at 40. In so doing, the Illinois Appellate Court emphasized that the DNA testing statute should be construed "liberally to favor its purpose of making the criminal justice process more reliable by allowing, where there is a reasonable basis, the acquisition of sound scientific evidence that is probative on the issue of identity." *Id.* Further, the court stated "[w]hether the evidence eventually favors the defendant or the State, its acquisition will contribute to the reliability of the criminal process and confidence in the ultimate result." *Id.* *See also Weeks v. State*, 140 S.W.3d 39, 51 (Mo. 2004) (holding that, despite a guilty plea, petitioner was entitled to DNA testing emphasizing that that "reasonable probability" does not require the defendant to "conclusively prove his innocence").

C. Michael met the applicable standard and is entitled to the opportunity to prove his innocence with DNA testing of the physical evidence.

Here, DNA testing is wholly appropriate. The identity of the perpetrator is in question—Michael claims that he was not the perpetrator and he does not match the description given by one of the victim's roommates. Further, Michael presented

an alternative suspect at trial—John Soares.[228] On the night of the murder, Michael saw John coming out of the bushes.[229] John asked Michael how long he had been standing there, and told Michael to keep his mouth shut.[230] John then showed Michael the victim's body and told him to keep his mouth shut or Michael would "end up like that."[231] John picked up the victim's clothes, gave Michael a coat, and told him to throw it in the lake.[232] Michael obeyed John's orders because he was afraid of John.[233] While Michael was taking the clothes to the water, a set of keys fell out of the coat, and Michael threw the keys and the coat in the water.[234] Michael never touched the victim's other clothes or her shoes.[235]

The only evidence presented against Michael was his knowledge of the location of the body and some of the evidence, and his "confession." However, he knew where the coat and keys were because John had instructed him to throw them in the lake.[236] Further, Michael's "confession" came after four days of intense interrogations, and on a day when he had been questioned all-day and had been repeatedly told by police that he was guilty. Before he confessed and during the

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[228] App.Vol.3 471, 488.
[229] App.Vol.4 630.
[230] App.Vol.4 630.
[231] App.Vol.4 631.
[232] App.Vol.4 631.
[233] App.Vol.4 631.
[234] App.Vol.4 631, 742.
[235] App.Vol.4 742-43.
[236] App.Vol.4 631.

four days of interrogations and the day before he was taken into custody, Michael did not eat or sleep.[237] Michael repeatedly told police that John had committed the crime, but the police insisted that Michael was the killer.[238] On the fourth day of questioning, Michael was rushed to the hospital after losing consciousness and was revived with nikethamide, a respiratory and circulatory stimulant.[239] The doctor who revived Michael testified that his condition was caused by an extreme "shock or fear or anxiety."[240] Nonetheless, when Michael was released from the hospital, the police continued their interrogation.[241]

The next day, Michael finally relented to the police pressure and gave a "confession" -- a story that simply did not match the evidence.[242] He told police that Trudy had tried to kill him with a knife she had in her purse, so he had stabbed Trudy with her own knife.[243] He said he then wrapped her "nylon shirt" around her neck and stabbed her "three or four" times.[244] He could not remember where he stabbed her, but initially said that it was "in her torso."[245] In fact, the evidence

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[237] App.Vol.4 634, 648–650, 653.
[238] App.Vol.4 653–54, 754.
[239] App.Vol.3 530, National Center for Advancing Translational Sciences, https://drugs.ncats.io/substance/368IVD6M32, last visited September 24, 2020.
[240] App.Vol.3 530, 540.
[241] App.Vol.3 530, National Center for Advancing Translational Sciences, https://drugs.ncats.io/substance/368IVD6M32, last visited September 24, 2020.
[242] App.Vol.4 655, 726.
[243] App.Vol.3 435–36.
[244] App.Vol.3 436.
[245] App.Vol.3 428, 436.

showed that Trudy had been strangled by a right hand not with a nylon shirt.[246] Further, she was not known to carry any type of knife and she had been stabbed 15 times in her neck, chest, and sternum.[247]

At trial, the State introduced testimony from Dr. Frederick Laubscher, the pathologist who performed Trudy's autopsy.[248] Dr. Laubscher testified that he found seminal fluid in Trudy's vagina, but no sperm were present.[249] This meant either that there were never sperm present in the seminal fluid of the person who had sex with her, or that the sperm had degenerated.[250] Michael's seminal fluid contained sperm.[251]

The State also introduced photos of items found near Trudy's body, including her purse, from which her clothing was protruding— her blouse, a slip, a pair of shorts, a bra, underwear, and black stockings.[252] Her shoes were also found nearby.[253]

Michael seeks DNA testing of the victim's fingernails, hairs found in her car, her pantyhose, her leather purse, and her rape kit.[254] If Michael's DNA is not

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[246] App.Vol.3 397.
[247] App.Vol.3 383, 386.
[248] App.Vol.3 385.
[249] App.Vol.3 405, 392.
[250] App.Vol.3 391–92, 403.
[251] App.Vol.3 407.
[252] App.Vol.1 117; App.Vol.2 350, 353.
[253] App.Vol.2 297.
[254] App.Vol.5 950-51.

on any of the evidence, that will corroborate his version of events and undermine the State's version of events. If the evidence contains John's DNA, that not only corroborates Michael's testimony, it directly contradicts John's testimony. John claimed he was not in town at the time of the murder, or at any time during the summer of 1971.[255] If DNA testing demonstrates that John's DNA is on the victim's body, the jury would have had reason to believe Michael's version of events, even if they did not believe it otherwise. Further, the jury would have had reason to disbelieve John's testimony. Michael has demonstrated much more than a reasonable possibility that he would not have been prosecuted or convicted if a prosecutor or a jury heard favorable DNA results. Finally, even if the DNA on the physical evidence does not match John's, the presence of third-party DNA is equally probative of Michael's innocence.

Thus, the district court erred when it denied Michael's Petition because he has more than shown that there is a "reasonable possibility" that had the exculpatory DNA evidence been available in 1972, he would not have been prosecuted or convicted, and would not have spent the last 48 years in prison.

II. An Inventory Must Specify the Evidence, Not the Containers Holding It

While there is no Nevada caselaw describing what constitutes an adequate inventory for the purpose of NRS 176.0918(4)(c)(2), common sense dictates that

[255] App.Vol.4 774, 779.

the inventory needs to be reasonably specific such that a defendant could identify what each of the pieces of evidence are, both so the defendant can request such specific pieces of evidence be tested and so the court and the parties are aware of exactly what evidence remains in the State's possession or custody and may be tested. Other courts have recognized in the context of DNA testing that "the DNA testing process cannot move forward until the essential first step of identifying what evidence should be tested is accomplished." *Cherrix v. True*, 177 F. Supp. 2d 485, 494 (E.D. Va. 2001). Indeed, in at least one other case in the Eighth Judicial District, the district court was able to describe evidence subjected to testing with a level of specificity that is simply impossible from the inventories provided here.

In *Nev. v. Lapena*, for example, the district court was able to identify with specificity items of evidence such as "right shoe," "left show," "two small pieces of broken material from a right rear floorboard," "burrs and hair from the front left floorboards," a "gauze strip removed from the neck of [the victim]," "hairs found in [the victim's] hands," "one small chip of composite wood recovered from the right side of the body," and more. *Nev. v. Lapena*, Case No. C059791, 2017 Nev. Dist. LEXIS 949 at *23-*28 (Nev. Dist. Aug. 4, 2017).[256] These pieces of evidence

[256] Included within the Addendum at the end of this Opening Brief.

were further broken down into categories by location of where the evidence was found. *Id.*

By contrast, the inventory here lacks even half this amount of detail, listing only items such as "small paper canister," "glass slide," "hair strand," "fingernails" and the like, without even including where the evidence was originally found or any other identifying information to determine what the evidence is.[257] Even the more descriptive typed document provided by the evidence custodian provided no more useful detail. For example, this inventory listed "film canister," "one cardboard 'FONDA ONE PINT U.S. LIQUID MEASURE' canister," "small paper canister," and "folded up piece of white butcher paper sealed with evidence tape."[258] It is impossible from these descriptions for Michael, or the district court, to know what evidence remains in the possession of the State to be tested. These descriptions are of merely the holding containers of the evidence, not the evidence themselves. Such is a far cry from the level of detail courts in Nevada appear to usually possess from evidence inventories such as those in *Lapena*.

Indeed, the evidence inventory is particularly crucial to this case. Here, Michael repeatedly requested that the "rape kit" taken from the victim be tested, of

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[257] App.Vol.5 998.

[258] App.Vol.5 998, 1000-01.

which the State appeared to dispute the existence.[259] It is necessary here for the evidence in the possession or custody of the State to be adequately described such that the district court may specifically order the testing of the proper evidence. For instance, Michael requested that the "rape kit" be DNA tested, but with certain evidence being described only by its containers, and not by the contents (the actual evidence), Michael cannot identify which containers would contain the vaginal swabs originally collected and examined pre-trial.[260] The district court's failure to address this issue is plain error.[261]

It is quintessential to the DNA testing scheme in Nevada that the defendant/petitioner, and that the district court, must be able to determine what evidence remains in the possession or custody of the State to be tested. To make this determination, the evidence inventories provided pursuant to NRS

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[259] App.Vol.5 971 (noting it is unclear which state agency has custody of the "rape kit"), 975 (the State questioning whether there "was a specific procedure to do a rape kit or collection related to rape kits" in the 1980's, and acknowledging that the State was unable to provide further detail with respect to vaguely identified glass slides), 976 (the district court acknowledging the State's position that it is "unsure if the glass slides really are the equivalent of the rape kit").

[260] App.Vol.5 1012-13.

[261] *See generally* App.Vol.6 1032-38 (failing to address the inability to determine which containers of evidence may contain vaginal swabs from the victim, the "rape kit" from the inadequate evidence inventories).

176.0918(4)(c)(2) must adequately describe the *evidence* in the possession or custody of the State, not just the evidence *containers* in the possession or custody of the State. Otherwise, the inventory of evidence is worth no more than that of the paper on which it is written.

CONCLUSION

For the reasons discussed above, this Court should reverse the denial of Michael's Petition and direct the district court to grant the Petition for DNA testing because Michael has demonstrated a reasonable possibility that he would not have been prosecuted or convicted if exculpatory results had been obtained. This Court also should reverse the denial of Michael's motion for order to show cause because the inventory filed by the Washoe County Sheriff's Office was insufficient under NRS 176.0918(c). Upon granting the Petition, the district court should be directed to also require an adequate inventory of the *evidence* in the possession or custody of the State, rather than just the evidence *containers*.

DATED this 6th day of November, 2020.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby 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 in 14 point Times New Roman type style.

2. I further certify that 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 proportionately spaced, has a typeface of 14 points or more, and contains **11,677 words**.

3. Finally, 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, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be 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.

DATED this 6th day of November 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(a)(b) and 25(1)(d), I, the undersigned, hereby certify that I electronically filed the foregoing **APPELLANT'S OPENING BRIEF** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system on the 11th day of November 2020.

I further certify that service of the foregoing has been accomplished to the following individuals by the methods indicated below:

☑ Electronic: by submitting electronically for filing and/or service with the Nevada Supreme Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following listed below:

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ADDENDUM TO APPELLANT'S OPENING BRIEF PURSUANT TO NRAP 28(f)

1. *State v. LaPena*, Case No. 059791, Order Granting DNA Testing (dated October 25, 2011) (51 pages).

2. *Nev. v. Lapena*, Case No. C059791, Decision and Order (dated Aug. 4, 2017) (29 pages), also cited as 2017 Nev. Dist. LEXIS 949 (Nev. Dist. Aug. 4, 2017).

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ORDR

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,	)	CASE NO. C059791
	)	
Plaintiff(s),	)	DEPT NO. XV
	)	
v.	)	
	)	
FRANK LAPENA	)	
	)	
Defendant(s)	)	
	)	
	)	
	)	

DECISION AND ORDER

THIS matter having come on for hearing on February 20, 2016, and January 30, 2017, for evidentiary hearings on the Defendant's Motion for New Trial based on favorable DNA results pursuant to N.R.S. 176.09187(1) and N.R.S. 176.515, the State being represented by Marc DiGiacomo, Pamela Weckerly, and Coleen Bavarav, Deputy District Attorneys, and the Defendant being represented by Christopher Oram and Gary Guymon, and after reviewing the moving papers and supplements on file herein, this Court makes the following Decision and Order.

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INTRODUCTION

This case involves novel issues of what constitutes "favorable evidence" in the context of NRS 176.09187(1). More specifically, the question before this court is whether a district court can overturn a criminal conviction based on a convicted perjurer's testimony when newly discovered DNA evidence further impeaches that testimony. And, where DNA results contradict testimony of a convicted murderer regarding how the victim was murdered, can this be considered "testimony regarding a vital issue" so important that the conviction should be overturned? Nevada law is silent on these points.

Frank LaPena has served 25 years in Nevada State Prison, was paroled in 2005, and has been free for 12 years. Previously, LaPena was twice convicted by a jury for the murder of Hilda Krause. Both times, the State's case rested primarily on the testimony of hitman Gerald Weakland. Weakland admitted to murdering Hilda by slitting her throat; he did not, however, testify he used any other method during the murder or that Hilda put up a struggle during the attack. Weakland and the State entered into a plea bargain wherein Weakland could plead guilty to lesser charges and receive a much lighter sentence in exchange for testifying against LaPena. Accordingly, Weakland initially testified that LaPena hired him to kill Hilda as part of a conspiracy to eventually obtain access to the Krauses' money. Weakland later recanted that testimony at LaPena's first jury trial.

For 43 years, LaPena, however, has consistently asserted his innocence, and theorized that Hilda's husband, Marvin, had in fact hired Weakland to dispose of Hilda for financial reasons and to avoid divorce. Marvin, who was physically present during the crime, claimed he was knocked unconscious by the intruders and remained unconscious throughout the crime. No physical evidence tied LaPena to the crime.

LaPena's jury trials occurred before the availability of DNA testing. In 2011, this court ordered evidence in the case to undergo DNA testing. Because of the extreme age of the case, the fact that LaPena was not in custody, and various piecemeal DNA testing by two different law enforcement agencies, this has been a long and arduous process, taking years to complete.

Among the tested evidence were cords found both near where Marvin was attacked and near Hilda's body, along with hairs that Hilda had in her hands when she died. Initially, this Court believed that if DNA evidence proved "unknown male" DNA was on the cord near Hilda's body or the hairs in Hilda's hands, the newly discovered evidence would tend to support LaPena's theory that Marvin assisted Weakland in the murder.

Instead, DNA testing of the hairs revealed the hairs belonged to Hilda. LaPena moved for a new trial based upon the DNA results and also moved for clarification of the DNA testing on the cords found by Hilda's body. But, after additional DNA testing was performed and an additional evidentiary hearing, this court concludes that the DNA results regarding the physical evidence is insufficient to warrant a new trial. Weakland, who wore gloves during the crime, was excluded as a contributor of the DNA on the cord used to strangle Hilda. Likewise, the DNA results from the hair are not favorable to LaPena under the present law.

At trial, the jury heard testimony from a forensic pathologist that Hilda was strangled before she was stabbed, directly contradicting Weakland's testimony. Therefore, based on existing law, this court is constrained to hold that the results of the DNA evidence, suggesting Hilda may have torn out some of her hair from strangulation prior to

being stabbed, are cumulative. And, because the DNA results do not exonerate LaPena, this court denies La Pena's motion for a new trial based on newly discovered evidence.

FACTUAL HISTORY

Over 43 years ago, in January of 1974, Hilda (71-years-old) and Marvin Krause (64-years-old), a married couple, resided inside the Las Vegas Country Club, a walled-community in Las Vegas. Marvin was a slot manager at Caesar's Palace Hotel and Casino. Marvin, despite being married to Hilda, was also dating a cocktail waitress at Caesar's named Rosalie Maxwell. Rosalie was a married 42-year-old and was also dating Frank LaPena. LaPena was a bell captain at the Hacienda Hotel and Casino.

On January 14, 1974, at 5:00 a.m., Marvin opened his garage door to leave for work.[1] At that time, two men accosted him. Both men wore gloves on their hands and "dark stockings over their heads" to prevent identification. One of the men had a gun and said, "Let's go inside . . . go up the stairs . . . wake up your wife . . . go in and get your wife." (Testimony of Marvin Krause, Trial Tr. Vol. VI, 34:1-4, 54:12-20.[2])

Marvin then went to the southwest bedroom on the second floor where his wife, Hilda, was sleeping and called out her name to wake her up. (*Id.*) Marvin testified that both he and Hilda were forced to lie down on the floor and both were tied up. Then, one man took Hilda into the next bedroom, the north bedroom, while the other man robbed

[1]Marvin died in 1975, and his prior preliminary hearing testimony was used at both trials.

[2]Attached as Exhibit 1. This exhibit contains Marvin Krause's testimony from the 1974 Preliminary Hearing, as read to the jury on May 15, 1989. Due to the age of the case, most documents can only be accessed by microfiche at the Clark County Clerk's Office. So, as a courtesy, this court took the liberty to attach various documents as exhibits to this order.

Marvin of his jewelry. That robber then hit Marvin in the back of the head, and Marvin lost consciousness. (*Id.* at 34 and 39.)

When he awoke, Marvin was in a daze. He staggered across the room, freed himself, and then went to use the phone in the north bedroom. As Marvin entered the north bedroom, he saw Hilda lying face down. (*Id.* at 39-40.) Marvin did not say anything to Hilda; he just plugged in the phone and called the police. (*Id.* at 65:11-22.) Marvin denied that he ever touched, bent over, or stood over Hilda's body. (*Id.* at 66:9-22.) After calling the police, Marvin went immediately downstairs, stood in front of the garage, and waited for the police. (*Id.* at 67:3-6.)

When police arrived, they found Hilda deceased. She was gagged with a scarf tied loosely around her neck, a butcher knife was imbedded in her back, and her throat was slit. There were two brown electrical cords lying by her body, and she was positioned face down on the ground. (Photograph of the Crime Scene.[3])

Jerry Keller, a Las Vegas Metropolitan Police Department (LVMPD) supervisor with the field identification section of the criminalistics bureau, later testified he was in charge of the Krause residence crime scene. Criminalist Keller met with other officers and homicide detectives, and then instructed others in processing the crime scene. (Testimony of Jerry Keller, Trial Tr. Vol. III, at 60.[4]) Criminalist Keller described protocol involving examining, photographing, and collecting/recovering evidence from the crime scene. The criminalist unit photographed the crime scene before any evidence was moved or handled. (*Id.* at 92-93.)

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[3]Attached as exhibit 2. The photograph shows Hilda's body.

[4]Attached as exhibit 3.

Criminalist Keller testified that he recovered hairs from both hands of the victim, and impounded them into evidence. He also conceded that hair found clutched in Hilda's hands may have indicated a struggle and might be critically important. Finally, Criminalist Keller testified he was unaware of whether the hair recovered from Hilda's hands was ever analyzed or compared to Marvin, Gerald Weakland, or Tommy Boutwell. (*Id.* at 124-26.)

Dr. James Clark, a forensic pathologist from the Clark County Coroner's Office, conducted the autopsy on Hilda on the same day she was killed, January 14, 1974. At trial, Dr. Clark testified the cause of death was massive external hemorrhage due to lacerations of the carotid artery and the vertebral artery due to incised stabbing and cutting wounds in Hilda's neck. But, Dr. Clark also testified he discovered a "ligature groove mark extending completely around the neck above the cutting wound to the neck. This appeared to have been inflicted by a cord or rope being tightly applied to the neck." (Testimony of Dr. Clark, Trial Tr., Vol. VI, at 135:6-9.[5]) Further, Dr. Clark noted the strangulation mark on Hilda's neck was located above the stabbing wound. He opined that:

> [T]he strangulation attempt had occurred *prior* to the throat being cut. These were because there was evidence of bruising or hemorrhage beneath the skin and into the neck muscles associated with the ligature pressure. This would not have occurred subsequent to the severance of the large arteries. Because there would have been a complete loss of blood pressure.

(*Id.* at 137-38.) (Emphasis added).

Several days after Hilda's murder, confidential informant Joey Costanza contacted LVMPD Detective Mike Whitney. Costanza told Detective Whitney that

[5]Attached as exhibit 4. This is the trial transcript of Dr. Clark's testimony from the first trial, in 1977, as read to the jury on May 15, 1989.

approximately six weeks before the Krause robbery/murder, Gerald Weakland, a Caesar's Palace pool attendant, had approached him about assisting in a robbery/murder which was scheduled to occur in the early morning hours of a Monday or Friday before one of the victims went to work, and would involve scaling a wall of some sort. Costanza knew the exact location of the Krause's residence. Costanza also mentioned two other individuals might have been solicited or involved in the crime: Thomas Boutwell and Bobby Webb.

Detective Whitney gave this information to several police officers, including Lieutenant Beecher Avants and Detective Chuck Lee, who subsequently questioned Boutwell, Webb, and Weakland. In February of 1974, Costanza advised detectives that Weakland never mentioned LaPena or Rosalie in discussing the crimes. By March 1974, LVMPD arrested Weakland for the Krause murder/robbery.

During a preliminary hearing, Weakland admitted to the crimes, and, thereafter, entered into negotiations with the State, and agreed to testify that LaPena and his girlfriend Rosalie hired him to murder Hilda. In exchange for this testimony, the State allowed Weakland to plead guilty to an amended charge of second-degree murder (carrying a life sentence with parole eligibility beginning after five years), and agreed to dismiss all other charges against him (some of which were unrelated to the Krause crimes).

In his March 29, 1974, statement, Weakland told authorities that while his accomplice Boutwell burglarized the Krause home, Weakland secretly went upstairs and murdered Hilda by slitting her throat with a single cut. (Weakland's Statement to Clark County District Attorney's Office, 7:13-19 (March 29, 1974).[6]) Additionally, Weakland advised the police he stuck the knife used to slit Hilda's throat into her back. But, Weakland never mentioned that he engaged in a struggle with Hilda, nor did he admit to

[6]Attached as exhibit 5.

strangling her prior to slitting her throat. (*Id.* at 7:16-19.) Weakland maintained that Boutwell did not know he was going to murder Hilda at all, as Boutwell only agreed to be a lookout for a robbery. And, while Weakland murdered Hilda, Boutwell was in the garage in the getaway car. (*Id.* at 5:20-22, 10:4-8.) Weakland told the police that he and Boutwell wore stockings over their heads and gloves on their hands. (*Id.* at 2:27-32.)

Weakland maintained that he owed an acquaintance named Frank LaPena money. Weakland also indicated that LaPena solicited him to kill Hilda because a wealthy slot manager at Caesar's Palace named Marvin was dating his girlfriend Rosalie. According to Weakland, LaPena and Rosalie wanted to kill Hilda so that Rosalie could marry Marvin. The two believed they would benefit by ultimately inheriting Marvin's fortune. (*Id.* at 4.)

Weakland explained to detectives that LaPena offered to forgive Weakland's debts while paying him a large sum of money if he murdered Hilda. Weakland further stated that ten days before the murder he went to Rosalie's apartment and he received $1,000 from both Rosalie and LaPena as a down payment for the murder. LaPena told Weakland that he would receive another $10,000 after Rosalie married Marvin, and detailed the "plan" for robbing the Krauses and murdering Hilda. During this meeting, Rosalie gave Weakland a map of the Krause residence. Weakland stated Boutwell agreed to assist, believing he was only a lookout for a robbery. Despite the fact that both Marvin and Weakland worked together at Caesar's Palace, Weakland advised the police that he had never spoken with, nor had he ever had contact with, Marvin prior to the day Hilda was murdered. Based upon Weakland's statement to the police, LaPena and Rosalie were arrested.

PROCEDURAL HISTORY

The Clark County District Attorney's Office charged LaPena and Rosalie with first-degree murder and robbery with the use of a deadly weapon. The criminal complaint alleged that LaPena and Rosalie had entered into a contract with Weakland "whereby . . . Weakland was to kill [Mrs. Krause]."

At a 1974 preliminary hearing, Weakland testified against LaPena. But, during LaPena and Rosalie's separate jury trials in 1977, Weakland testified that his prior testimony and statements implicating LaPena and Rosalie in the murder were false. *LaPena v. State*, 98 Nev. 135, 136, 643 P.2d 244, 244 (1982). The jury acquitted Rosalie of the charges; however, LaPena was convicted of one count of first-degree murder and one count of robbery with use of a deadly weapon.

After Weakland testified that LaPena was *not* involved in Hilda's murder at LaPena's first trial, the State indicted, tried, and convicted Weakland of two counts of perjury. (Indictment (1977); Jury Verdict (1978); and Judgment of Conviction (1978).[7])

On direct appeal, the Nevada Supreme Court reversed LaPena's 1977 convictions involving Hilda, and remanded the case for a new trial on the ground that the admission of Weakland's statements incriminating LaPena constituted reversible error. The Court concluded the State improperly withheld "the benefits of a plea bargain or promise of leniency until after a purported accomplice [(i.e., Weakland)] had testified in a particular manner." *LaPena*, 98 Nev. at 136-37, 643 P.2d at 244-45.

Later, on September 29, 1982, Weakland changed his testimony *again* before a Clark County Grand Jury. There, Weakland reiterated his negotiated statement to police and his testimony given during LaPena's preliminary hearing that implicated

[7]Attached as exhibit 6.

LaPena. Weakland testified he had reached a new agreement with the State whereby the prosecution team would cease writing negative letters to the State parole board about him. At the conclusion of the presentation, the grand jury returned an indictment against LaPena.

Once LaPena was indicted, Gary Gowen, Esq. assumed LaPena's representation. In anticipation of retrial, LaPena filed a Motion for Disclosure of the Identity of Confidential Informant Joey Costanza. After the district court denied his motion, LaPena filed a petition for a writ of mandamus, which the Nevada Supreme Court granted. *LaPena v. District Court*, No. 14640 (Order Granting Petition for Writ of Mandamus, August 31, 1983).

After the Nevada Supreme Court ordered Costanza's name divulged, Detective Lee traveled to New Jersey to encourage Costanza to return to Nevada. Costanza refused to travel back to Nevada. Costanza then telephoned Lieutenant Avants after their meeting, and advised Lieutenant Avants that he had no additional information to provide with regard to the Krause robbery/murder. Upon obtaining Costanza's New Jersey address, Mr. Gowen sent Costanza a letter. But, Costanza telephoned Mr. Gowen, advising him that he had no additional information beyond that which he had already given to Detective Whitney immediately after the Krause robbery/murder.

Mr. Gowen then attempted to compel Costanza's attendance through utilization of Interstate Compact, eventually enlisting the assistance of the LVMPD in filing a material witness warrant. According to Mr. Gowen, the district attorney's office refused to assist LaPena. Prosecutors maintained that they advised Mr. Gowen as to the procedure to compel Costanza's attendance, but Mr. Gowen chose to take an ineffective "short cut."

Costanza contacted the police and district attorney on several occasions emphasizing that he knew nothing more than the information previously provided in his police statement. Nonetheless, in 1984, LaPena still sought Costanza's attendance in Nevada and filed a motion to depose Costanza. The Nevada Supreme Court reversed the district court's denial of LaPena's motion. *LaPena v. Moran*, No. 16196, 101 Nev. 957, 808 P.2d 578 (Order Granting Writ, October 22, 1985).

On January 15, 1985, Costanza was arrested in Florida. Detective Lee and an individual from the Clark County district attorney's office were dispatched to Florida to attempt to secure Costanza's testimony in Nevada. Defense investigator Michael Wysocki flew to Florida the following day. But, authorities released Costanza from custody at the conclusion of the hearing to compel his attendance in Nevada because proper documents were not provided to the Florida court.

LaPena subsequently filed a motion with the district court for an evidentiary hearing to determine if the State had complied with certain discovery requests, including those seeking further information with regard to Costanza. The district court denied the motion, but the Nevada Supreme Court issued an order that an evidentiary hearing be conducted concerning whether the State had disclosed all of its information regarding Costanza. *LaPena v. District Court*, No. 18963, 104 Nev. 862, 809 P.2d 609 (Order Granting Petition for Writ of Mandamus, August 26, 1988).

The district court subsequently conducted an evidentiary hearing on October 26-27, 1988. At the beginning of the evidentiary hearing, George Carter and Lamond Mills were appointed to represent LaPena for his second trial, relieving Mr. Gowen of his representation of LaPena. Following the evidentiary hearing, the district court concluded that the State had provided all of the information in its possession

regarding Costanza and denied LaPena's motion seeking further funds "for the Costanza matter."

Although Mr. Gowen had been removed from LaPena's case, he continued to work on the matter and helped Mr. Mills file a pretrial motion to dismiss the indictment on behalf of LaPena.

In May of 1989, LaPena was convicted again of first-degree murder and robbery with the use of a deadly weapon. LaPena did not testify on his own behalf. The trial court sentenced LaPena to life imprisonment without the possibility of parole for the murder of Hilda, and a concurrent thirty-year sentence for the robbery with use of a deadly weapon. Carmine Colucci was appointed as LaPena's appellate counsel, and thereafter, the Nevada Supreme Court affirmed LaPena's conviction and sentence. *LaPena v. State*, No. 20436, 107 Nev. 1126, 838 P.2d 947 (Order Dismissing Appeal, June 27, 1991).

On June 3, 1992, LaPena filed a Petition for Post-Conviction Relief. The district court denied LaPena's petition without conducting an evidentiary hearing. On appeal, the Nevada Supreme Court remanded the matter for an evidentiary hearing. *LaPena v. State*, No. 23839, 109 Nev. 1404, 875 P.2d 1066 (Order of Remand, November 24, 1993). On December 3, 1993, LaPena filed a Motion to Dismiss the Indictment based upon lack of evidence and a colorable claim of factual innocence. LaPena's Motion to Dismiss was subsequently consolidated with his petition.

District Court Judge Gene Porter conducted a four-day evidentiary hearing during October of 1995. The district court granted LaPena's petition for post-conviction relief and vacated his conviction and sentence, finding LaPena had not received effective assistance of trial counsel. However, the district court denied LaPena's motion to dismiss the indictment. The State appealed the district court's granting of LaPena's petition for

post-conviction relief and LaPena cross-appealed the district court's denial of his motion to dismiss the indictment.

In 1998, the Nevada Supreme Court reversed the district court's granting of LaPena's petition for post-conviction relief and granting of a new trial stating that the Defendant *"failed to show that counsel was deficient in pursuing the alleged Krause-Weakland connection*; even if counsel was deficient, LaPena failed to show prejudice under Strickland." *State v. LaPena*, 114 Nev. 1159, 1174, 968 P.2d 750, 760 (1998) (emphasis added). The Court affirmed the district court's denial of LaPena's motion to dismiss.[8]

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[8]Justice Springer dissenting stated:

> I would affirm the district court's judgment.
>
> The murder was committed in January of *1974*. LaPena was convicted in 1977, almost twenty-two years ago. As stated in the majority opinion, the murder was actually committed by a man named Weakland, who "struck a deal with the State wherein he agreed to testify that. . . LaPena had hired him" to commit the murder.
>
> LaPena's conviction was reversed because the State improperly concealed information about a leniency deal that it had offered Weakland, who, to say the least, is a notorious perjurer and murderer, well known to this court and to prosecuting officials.
>
> LaPena's 1977 conviction, in addition to being grounded on the testimony of a perjurer, is subject to so many questions and weaknesses that it would be burdensome to recount them in this dissenting opinion. If this were a relatively clear case, involving a murderer who had killed someone twenty-five years ago, I might look differently at what effect such a long delay has in judging whether it would be just and proper to go ahead now with such a prosecution. The present case is certainly not a clear or straightforward case. A reading of the majority opinion should convince most readers that the district court was right in dismissing this case and not permitting it to go on for a number of additional agonizing years.
>
> The district court conducted hearings on LaPena's post-conviction proceedings and hearings. The district court took evidence and made certain findings of fact that I do not think should be violated by this court. I

As previously stated, LaPena served over 25 years in Nevada State Prison, and was eventually paroled in 2005. (Transcript of Evidentiary Hearing on DNA, at 127-29 (Feb. 20, 2014).[9])

On October 25, 2011, this Court granted LaPena's post-conviction petition requesting a genetic marker analysis of evidence within the possession or custody of the state of Nevada pursuant to NRS 176.0918. (Decision and Order dated October 25, 2011.[10])

In granting LaPena's motion, this court noted that LaPena's conviction hinged almost exclusively on Weakland's testimony. The substance of Weakland's testimony was that LaPena masterminded Hilda's murder. The State argued to the jury that LaPena desired to kill Hilda so Marvin would inherit the Krause fortune, and thereafter, LaPena's girlfriend could marry Marvin, which would benefit LaPena.

LaPena's defense rested upon allegations that it was Weakland and Marvin who conspired to murder Hilda. LaPena's defense insisted Hilda was planning to divorce Marvin because he had Rosalie and other young, blonde girlfriends. And, if Hilda was murdered, Marvin stood to inherit a quarter of a million dollars, as opposed to losing a great deal of money if divorced. Thus, LaPena claimed Marvin paid Weakland, a fellow Caesar's Palace employee, to implicate LaPena in the crime. By murdering his wife Hilda and implicating LaPena, Marvin could continue his romantic affair with Rosalie, effectively killing "two birds with one stone."

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see no reason to intrude into the district court's discretion or to set aside the district court's dismissing the charges against LaPena. I dissent from this court's overruling of the district court's proper ruling in this case.

[9]Attached as exhibit 7.

[10]Attached as exhibit 8.

DNA testing had never been conducted prior to 2011. Between 2011 and 2015, this court ordered all blood and hair evidence impounded in this case be tested for DNA and comparison, and held two evidentiary hearings along with numerous status checks.

LVMPD criminalists sent DNA results to this Court in four (4) separate reports. (LVMPD Reports dated April 13, 2012, April 24, 2013, October 29, 2013, and December 6, 2013.[11]) These reports reflect all DNA extractions and comparisons regarding blood or substances impounded into evidence from the autopsy, crime scene, and the get-a-way vehicle. (Evidence Impound Reports.[12]) To the Court's knowledge, these reports reflect all evidence that was impounded in this case. There was no other untested impounded evidence in this case. (Transcript of 2014 Evidentiary Hearing on DNA, at 8.) Significantly, all evidence from both LVMPD's evidence vault packages (impounded evidence from the 1974 crime scene not used at any legal proceeding) and the District Court's evidence vault exhibits (impounded evidence from the crime scene introduced to the juries at either of LaPena's trials or court proceedings, *see* District Court Clerk Exhibit List, 1989[13]) were all tested pursuant to this court's orders.

On February 20, 2014, this Court conducted the first evidentiary hearing with LVMPD DNA Criminalist Craig King. King testified to the significance of DNA testing with respect to most of the evidence collected in this case in 1974. (Transcript of 2014 Evidentiary Hearing on DNA.) Criminalist King's LVMPD DNA testing results were admitted into evidence at that hearing as Court Exhibit 10. (LVMPD DNA testing

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[11]Attached as exhibit 9.

[12]Attached as exhibits 10, 11, and 12.

[13]Attached as exhibit 13.

results.[14]) Prior to the evidentiary hearing, LVMPD had issued three DNA reports regarding DNA testing conducted in this case. (LVMPD reports dated April 24, 2012, October 29, 2013, and December 5, 2013.) At the February 20, 2014 evidentiary hearing, all parties agreed that additional "touch" DNA testing should be done on the cords that were found next to Hilda's body. Further, based on King's testimony that LVMPD's laboratory did not have the capabilities to conduct DNA testing on the hairs impounded from Hilda's hands at the crime scene, this Court ordered further testing by the Federal Bureau of Investigation (FBI).

On April 10, 2014, LVMPD forwarded to the Court its report regarding the conclusions of the touch DNA testing on the cords found next to Hilda's body. (LVMPD report dated March 25, 2014.[15]) Thereafter, the FBI conducted DNA testing on the remaining evidence impounded in the case, and sent its report results to the Court. (FBI reports dated February 10, 2014; February 11, 2014; May 2, 2014; July 7, 2014; and November 14, 2014.[16])

After DNA testing concluded, on May 5, 2015, LaPena filed his Endorsement of Defendant's Supplemental Motion for New Trial Based Upon Newly Discovered DNA Physical Evidence and Motion for Clarification of DNA Testing. On July 2015, the State filed its Response to Defendant's Motion for Clarification of DNA Testing and Motion for New Trial Based Upon Newly Discovered DNA Physical Evidence.

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[14]Attached as exhibit 14.

[15]Attached as exhibit 15.

[16]Attached as exhibit 16.

Thereafter, this Court ordered a second evidentiary hearing to clarify testimony related to LVMPD's touch DNA results and the FBI's DNA testing results. Prior to the hearing, this court received LVMPD's DNA Report dated November 4, 2016, and a November 2, 2016, Latent Print Report.[17] Finally, on January 30, 2017, this Court presided over the second evidentiary hearing related to LaPena's motion for a new trial. (Transcript of 2017 Evidentiary Hearing.[18]) The parties thereafter filed supplements to their moving papers, and this order follows.

FINDINGS OF FACT

Craig King, LVMPD Criminalist and a qualified expert in DNA extractions and comparisons testified at evidentiary hearings on February 20, 2014 and January 30, 2017. (Transcript of 2014 Evidentiary Hearing on DNA, at 5-7; Transcript of 2017 Evidentiary Hearing on DNA, at 4-5.) King testified that he performed DNA extractions and comparisons on all evidence in LaPena's case recovered from 1974 in DR-74-1881 that could be tested. (Transcript of 2014 Evidentiary Hearing on DNA, at 8; Transcript of 2017 Evidentiary Hearing on DNA, at 24.) Both LaPena and the State agreed that all evidence in this case had been tested pursuant to this Court's order. (Transcript of 2014 Evidentiary Hearing on DNA, at 9; Transcript of 2017 Evidentiary Hearing on DNA, at 24.)

At the February 20, 2014 and January 30, 2017 evidentiary hearings, Criminalist King testified that he authored five separate reports dated April 13, 2012, April 24, 2013, October 29, 2013, December 6, 2013, and November 4, 2016, respectively.

[17]Attached as exhibit 17.

[18]Attached as exhibit 18.

(Transcript of 2014 Evidentiary Hearing on DNA, at 11-12; Transcript of 2017 Evidentiary Hearing on DNA, at 7-24.) Utilizing his reports, Criminalist King opined on the DNA results. (Transcript of 2017 Evidentiary Hearing on DNA, at 7-24.) Accordingly, this Court makes the following findings of fact regarding DNA results for purposes of LaPena's motion for a new trial:

From the evidence recovered from Hilda Krause's autopsy:

- The DNA results of the pajama housecoat are consistent with Hilda Krause's DNA. (*See* Transcript of 2014 Evidentiary Hearing on DNA, at 24). Further, Gerald Weakland and "unknown male number one"[19] were excluded as the source of the DNA. (*See* Transcript of 2017 Evidentiary Hearing on DNA, at 13-15, 43).
- The DNA results of the pajama top are consistent with Hilda Krause's DNA. (*See* Transcript of 2014 Evidentiary Hearing on DNA, at 25.) Further, Gerald Weakland and "unknown male number one" were excluded as the source of the DNA. (*See* Transcript of 2017 Evidentiary Hearing on DNA, at 15-16, 43.)
- The DNA results of the pajama bottoms are consistent with Hilda Krause's DNA. (*See* Transcript of 2014 Evidentiary Hearing on DNA, at 26.)
- The DNA results of the right shoe were inconclusive. (*See* Transcript of 2014 Evidentiary Hearing on DNA, at 40; Transcript of 2017 Evidentiary Hearing on DNA, at 47.)
- The DNA results of the left shoe are consistent with Hilda Krause's DNA. (*See* Transcript of 2014 Evidentiary Hearing on DNA, at 41; Transcript of 2017 Evidentiary Hearing on DNA, at 47.)

From the evidence recovered from the 1974 Cadillac found near the crime scene:

[19]The "unknown male" or "unknown male number one" testified to throughout the hearing by Criminalist King references a **specific** DNA profile (which is neither Hilda's or Weakland's) revealed by the genetic tests, which the parties have not attempted to match to a particular identity in this case. But King's designation of "unknown male number one" or "unknown male" refer to the DNA found on the items found in the south bedroom where Marvin was tied up and beaten. Further, if the police had another profile to test it against, they could. Because Marvin Krause was found bleeding from his head injury, the State argues that this "unknown male" profile is most likely Marvin. Because Marvin died in 1975, no known DNA profile for him was available for testing for purposes of this petition. (Transcript of 2017 Evidentiary Hearing on DNA, at 28-33, 35, 38-40.) Further, the storing and profiling of DNA by law enforcement through CODIS started around the year 2000, 25 years after Marvin died; thus, it stands to reason that Marvin's profile has never been entered into CODIS. Accordingly, CODIS would never "hit" on Marvin's DNA profile. (*See id.*, at 40-42.)

- No DNA testing was performed on a TV cord taken from the home of both victims due to poor packaging and storage. (*See* Transcript of 2014 Evidentiary Hearing on DNA, at 43-45.)
- No DNA testing was performed on two small pieces of broken material from a right rear floorboard due to poor packaging and storage. (*See id.* at 45-47.)
- No DNA testing was performed on burrs and hair from the front left floorboards. (*See id.* at 47- 48.)

From evidence recovered from the desert after the crime:

- The DNA results on the pearls were inconclusive. (*See id.* at 48-50.)

From the evidence recovered from the crime scene at the Krause residence on January 14, 1974:

From the north bedroom belonging to Hilda and Marvin:

- No DNA testing was performed by LVMPD on the yellow throw rug removed from the door. (*See* Transcript of 2014 Evidentiary Hearing on DNA, at 51-54.) But the FBI did test a hair found in this rug. Hilda Krause was excluded as the contributor of the hair, but Gerald Weakland could not be excluded as the contributor of the hair. (*See* Transcript of 2017 Evidentiary Hearing on DNA, at 7-11, 22.)
- The DNA results on the composite wood handle were inconclusive. (*See* Transcript of 2014 Evidentiary Hearing on DNA, at 72-73.)
- No DNA testing was performed on one small chip of composite wood recovered from the right side of the body. (*See id.* at 74).
- The DNA results of one broken knife blade were consistent with Hilda Krause's DNA. (*See id.* at 74-75.)
- The DNA results of one gauze strip removed from the neck of Hilda are consistent with Hilda Krause's DNA. (*See id.* at 104-105.)
- The DNA results of carpet recovered by Hilda's waist are consistent with Hilda Krause's DNA. (*See id.* at 110.)
- The DNA results of carpet recovered by Hilda's waist are consistent with Hilda Krause's DNA. (*See id.* at 111.)
- The DNA results of the bindle containing substance recovered 6" above floor on the west side of doorway to the bathroom were inconclusive. (*See id.* at 116.)
- The DNA results of the bindle containing substance recovered from the lower drawer handle of the nightstand by the east side of the bed were inconclusive. (*See id.* at 116-117.)
- The DNA results of the plug and reception end of the cord used on Hilda Krause show at least two contributors, one of which was consistent with Hilda Krause and at least one of which was a male contributor, but no other conclusion could be drawn from it. ***Weakland and the "unknown male"***[20] were excluded as contributors. (*See* Transcript of 2017 Evidentiary Hearing on DNA, at 16-21.)

[20]Because Weakland and the unknown male (presumably Marvin) were **excluded** as contributors, this is a truly unknown person.

King tested this plug and cord for the presence of blood and the results were negative. (*See id.*, at 17.)

- The DNA results of the cut ends and length of the cord used on Hilda Krause show at least two contributors, one of which was consistent with Hilda Krause and at least one of which was a male[21], but no other conclusion could be drawn from it. ***Weakland and the "unknown male" were excluded as contributors***, and King testified that the result of the presumptive test for blood was positive. (*See id.*, at 18-21.)
- The DNA results of the hairs found in Hilda's hands are consistent with Hilda Krause's DNA. (*See id.*, at 21-22.)

From the south bedroom where Marvin was tied up and beaten:

- The DNA results of the green cord, with plastic cord recovered from the floor is a partial male profile consistent with an unknown male, but Weakland was excluded as the contributor of the DNA. (*See id.* at 105-106.) Test touch DNA showed a mix of individual contributors, one of which was male, but no further conclusions could be drawn about the identity of the contributors. (*See id.*, at 23-24.)
- No DNA testing was performed on the broken light bulb. (*See* Transcript of 2014 Evidentiary Hearing on DNA, at 107.)
- The DNA results of a piece of blanket with apparent stains were consistent with "unknown male number one." (*See* Transcript of 2017 Evidentiary Hearing on DNA, at 45.)
- No DNA testing was performed on the bindle containing a substance recovered from the lamp basin. (*See* Transcript of 2014 Evidentiary Hearing on DNA, at 119.)
- The DNA results of a piece of bed sheet from the lower portion west side of the bed were inconclusive. (*See id.* at 119.)
- The DNA results of the piece of green blanket recovered from the floor on the west side of bed are a partial male profile consistent with an unknown male, Weakland was excluded as the contributor of the DNA. (*See id.* at 119-20.)

Also of note, LaPena offered testimony from retired Crime Scene Analyst Supervisor Joseph Matvay. (Transcript of 2017 Evidentiary Hearing on DNA, at 51-68.) Not only did Matvay work for LVMPD for 35 years, but he is one of 350 individuals certified as a senior crime scene analyst, one of 1000 individuals world-wide certified as a latent print examiner, and one of around 40 people world-wide certified as a blood stain and pattern analyst. (*Id.*, at 52.)

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[21]Criminalist King cannot compare a DNA sample containing a minor male contributor to a known DNA sample. The protocols are not suitable for comparison purposes. (*See* Transcript of 2017 Evidentiary Hearing on DNA, at 36.)

Matvay testified that numerous pieces of evidence, such as autopsy photographs and latent fingerprints appeared to be missing from the case file. (*Id.*, at 56-65, 71-72.) As a result, Matvay could not ascertain whether some of the evidence was ever even gathered, or what may have happened to other evidence since the crime occurred over 43 years ago. (*Id.*, at 69-71.) There was a distinct lack of documentation. (*See id.*) Because crucial evidence was missing necessary for him to reconstruct the sequencing of the murder, Matvay could not render an opinion in this case. (*Id.*, at 70.)

CONCLUSIONS OF LAW

A motion for a new trial based on newly discovered evidence generally must be brought within 2 years of the verdict or finding of guilt. NRS 176.515(3). A defendant may nevertheless move for a new trial after this date if he petitions for genetic marker analysis of the evidence under NRS 176.0918, 176.09183, and 176.09187, and if the results of that analysis are "favorable to the petitioner." NRS 176.09187(1).[22] If the results are not favorable, the court should deny the motion for a new trial. *Id.*

Significantly, NRS 176.09187(1) does not define the term "favorable." But, the Nevada Supreme Court has determined impeachment evidence may warrant a new trial under NRS 176.515 if the evidence is used to "contradict, impeach, or discredit a former witness," and, critically, "the witness is so important that a different result would be reasonably probable." *Mortensen v. State*, 115 Nev. 273, 286, 986 P.2d 1105, 1114 (1999)

[22]NRS 176.0918(6) provides, in relevant part, that if the court holds a hearing on a petition filed pursuant to this section, the hearing must be presided over by the judge who conducted the trial that resulted in the conviction of the petitioner, unless that judge is unavailable. Any evidence presented at the hearing by affidavit must be served on the opposing party at least 15 days before the hearing. Here, the Honorable Thomas A. Foley, the presiding judge over LaPena's 1989 jury trial, has been dead for over 20 years. As a result, on February 20, 2014, and January 30, 2017, assigned Eighth Judicial District Court Judge Abbi Silver conducted evidentiary hearings on the DNA results in this case.

(quoting *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991)); *see also Callier v. Warden*, 111 Nev. 976, 989, 901 P.2d 619, 627 (1995) (the "probable acquittal" standard applies to cases where the newly discovered evidence demonstrates a witness committed perjury); *Sanborn*, 107 Nev. at 406 n.4, 812 P.2d at 1285 n.4 (holding that the standard is not whether a different verdict *must* result from the new evidence, but whether a different result would be reasonably probable). Because NRS 176.09187(1) permits a petitioner to move for a new trial under NRS 176.515 based on post-conviction genetic marker analysis results, and because Nevada law permits a new trial based on certain newly discovered impeachment evidence, it follows that the term "favorable" as used in 176.09187(1) is not limited to exculpatory evidence. *See, e.g., Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000) (reasoning that in the *Brady* context, favorable evidence includes "[e]vidence [that] provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks.").

If the genetic marker results are favorable and the petitioner is permitted to move for a new trial, the petitioner must then satisfy the requirements of NRS 176.515 by establishing the genetic marker results are:

> [(1)] newly discovered; [(2)] material to the defense; [(3)] such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; [(4)] non-cumulative; [(5)] such as to render a different result probable upon retrial; [(6)] not only an attempt to contradict, impeach, or discredit a former witness, unless the witness is so important that a different result would be reasonably probable; and [(7)] the best evidence the case admits.

Mortensen, 115 Nev. at 286, 986 P.2d at 1114 (quoting *Sanborn*, 107 Nev. at 406, 812 P.2d at 1284-85).

Although the Nevada Supreme Court has not specifically addressed a situation wherein DNA evidence impeached a witness' testimony, the Court had occasion to consider whether newly discovered impeachment evidence warranted a new trial in *Hennie v. State*, 114 Nev. 1285, 968 P.2d 761 (1998). There, the State's case relied largely on two witnesses, Brown and Marineau, who testified regarding the defendant's involvement in a series of burglary, grand larceny, and theft offenses. *Id.* at 1288, 968 P.2d at 763. Following the conviction, the defendant learned Brown and Marineau had been charged with conspiracy to commit murder and that Brown was indebted to Marineau. *Id.* at 1288-89, 968 P.2d at 763. The Nevada Supreme Court concluded the newly discovered impeachment evidence warranted a new trial, reasoning "knowledge of the conspiracy and its impact on Marineau's and Brown's credibility would have been extremely material to [the] defense."[23] *Id.* at 1290, 968 P.2d at 764.

Other jurisdictions have grappled with the question of whether new DNA evidence impeaching a key witness merits a new trial. Some, like early Nevada courts,[24] require that the evidence "probably would have produced a substantially different result." *State v. El-Tabech*, 696 N.W.2d 445, 447 (Neb. 2005). Others have found a new trial is warranted where, had the new evidence been admitted at trial, it "probably would have

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[23]Relatedly, the Nevada Supreme Court has opined that where the conviction relies on perjured testimony regarding a "vital issue," this court will overturn the conviction. *Riley v. State*, 93 Nev. 461, 462, 567 P.2d 475, 476 (1977). In *Riley* the vital issue was whether a shooting was intentional or accidental, and the key witness gave false testimony on this aspect. *Id.* Because this deprived the defendant of a fair trial, the supreme court set aside the conviction. *Id.*

[24]*C.f. Oliver v. State*, 85 Nev. 418, 424, 456 P.2d 431, 435 (1969) (requiring "a different result must follow"), *with Sanborn*, 107 Nev. at 406 n.4, 812 P.2d at 1285 n.4 (holding a different result must only be reasonably probable).

been a 'real factor' in the jury's deliberations."[25] *Commonwealth. v. Sullivan*, 14 N.E.3d 205, 214 (Mass. 2014) (internal citations omitted).

For example, in *Sullivan*, DNA testing provided new evidence that the murdered victim's DNA was not on the defendant's clothes, contrary to the evidence presented at trial. 14 N.E.3d at 212-13. The court concluded the new evidence was not cumulative and related to a central issue-whether the defendant was present at the murder-and granted a new trial. *Id.* at 214.

But, in *El-Tabech*, the Nebraska Supreme Court concluded a new trial was not warranted where DNA evidence merely corroborated testimony already presented at trial. 696 N.W.2d at 452. There, hair found on the victim's clothing was tested and the DNA testing revealed that one of the hairs contained in a knot on the victim's robe could not be identified as either the victim's or the defendant's. *Id.* at 450. At trial, however, the jury heard evidence that another hair from the knot in the victim's robe could not be identified as either the victim's or the defendant's. *Id.* at 452. Because the DNA evidence did not present additional evidence, and similar evidence had been presented at trial, it probably would not have produced a different verdict had it been provided to the jury, and thus a new trial was not warranted. *Id.*

So, in the present case, what do the results of the DNA mean with respect to the facts of this case and how does this court apply current law in determining whether a new trial should be granted? First, this court concludes the testing is complete. Although several pieces of evidence were not analyzed, that was because the evidence was unsuitable for testing. Thus, to the extent the evidence could have been tested, it was

[25]*See also U.S. v. Krasny*, 607 F.2d 840, 843-46 (1979) (disagreeing with the *Larrison* rule, which allows a court to grant a new trial if new evidence shows a government's witness committed perjury in the first trial, and the perjury "might" or "possibly" result in acquittal in the new trial).

tested, and to this court's knowledge there is no further evidence to test that could yield material results, and further clarification is not warranted.[26]

Next, the court will consider the DNA results with respect to the blood and touch DNA evidence. The only significant DNA result with respect to the motion before the court is the result of the cords found by Hilda's body. It's obviously not surprising to find Hilda's DNA on the cords. But what is the significance of truly unknown male DNA? Both Weakland and "unknown male number one" or "unknown male" are ***excluded*** as the contributor to the DNA on the cords. And, because it's likely that this "unknown male number one" or "unknown male" is Marvin's DNA (he was hit in the head with a gun in the south bedroom and sustained injuries involving blood), this court finds that the DNA evidence of a truly unknown male cannot be the basis for the granting of a new trial. As stated by the prosecutor at the evidentiary hearing, this DNA evidence could have been placed on the cords before Weakland ever took the cords to the Marvin's home (even if he used gloves during the time period that the crime occurred), or it could have been left by any number of prosecutors, court personnel, or jurors over the course of 43 years. During the evidentiary hearings, this court observed firsthand numerous bags of evidence which were clearly not kept in a fashion to prevent cross-contamination during two prior jury trials. And, because the result neither supports LaPena's theory that Marvin assisted in killing Hilda (his DNA appears to be ***excluded***) nor impeaches Weakland,[27] this court

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[26]This court notes, however, that the testimony at the evidentiary hearings established a significant amount of evidence was either never gathered or was lost by LVMPD in the intervening 43 years.

[27]LaPena argues this evidence is material because Weakland's testimony suggests Weakland may not have put gloves on until after he had handled the cords. And, because Weakland's DNA should have been on the cords if he touched them with his bare hands, the DNA evidence impeaches Weakland's testimony.

concludes that a new trial should not be granted based on the DNA results involving the cords by Hilda's body.

Next, this court must consider the DNA results of the hair in Hilda's hands, which Criminalist Keller recovered as evidence at the crime scene. This appears to be a much more complex issue for the court to grapple with in light of a motion for a new trial. Here, the DNA results conclude the hair in Hilda's hands was in fact Hilda's. So, why is this significant? Well, this evidence supports the defense theory that while Hilda was being strangled with a cord, she attempted to grab the cord around her neck to stop the strangulation, and as a result, she clutched her own hair trying to prevent strangulation. Thus, this new evidence clearly supports the objective physical evidence offered at trial—i.e. the forensic pathologist James Clark's testimony that Hilda was strangled ***before*** her neck was cut. And, with the *court's finding* that this *is what occurred based on the DNA evidence*, then Weakland's testimony is effectively impeached again by the DNA results of the hair- because he testified that there was ***never*** a struggle between him and Hilda before he cut her throat.

So, why did Weakland lie about *how* the murder occurred? We do not know. But because the DNA proves that he lied about *how the murdered occurred*, is this finding based on new evidence material ***enough*** to overturn a verdict from 1989—because even in 1989 the physical evidence did not jibe with Weakland's rendition of how the murder occurred. Weakland was a key witness in the underlying trials; indeed, the State's case almost entirely hinged on whether the jury believed Weakland's version of events or

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After considering this argument, this court concludes that even if the DNA evidence contradicts Weakland's testimony regarding details of the murder, this evidence is not so favorable as to justify a new trial. Critically, the evidence does not relate to who hired Weakland to commit the crime and, as discussed below, the evidence produced at trial already belied Weakland's rendition of the murder.

LaPena's. Thus, additional objective physical evidence impeaching Weakland's testimony and credibility carries significant weight to this court: if Weakland lied about how the murder occurred, could he be lying about the identity of "who" contracted with him to kill Hilda, i.e. Marvin or LaPena?

This DNA evidence does tend to support LaPena's theory. Here, Weakland is a convicted murderer (the principal killer) who changed his testimony throughout these proceedings, while receiving a substantial benefit from the State for pointing the finger at LaPena in return for a sentence—being eligible for parole after a mere five years in Nevada State Prison—and whom the supreme court has recognized as a "notorious perjurer . . . well known to this court." *See State v. LaPena*, 114 Nev. 1159, 1175, 968 P.2d 750, 760 (1998) (Springer, C.J., dissenting). Even the State of Nevada went to the trouble of trying Weakland again in 1978 for perjury of his testimony in this case with respect to Hilda's murder because he recanted and testified that LaPena was not involved! And the last time Weakland testified that LaPena hired him, Weakland told the jury that he was testifying as a result of a plea bargain whereby the State agreed not to write anymore unfavorable letters to the parole board-presumably so that he could be released from prison. Ironically, even co-defendant Rosalie was acquitted of the same murder in a different trial setting with the exact same evidence.

So, the question here appears to be, when yet another "brick in the wall" has been shown to impeach Weakland's testimony, is this enough to grant a new trial because DNA evidence, the objective physical evidence, so strongly impeaches him? Or, does this court merely throw its hands up and say that the DNA results are cumulative evidence because the jury did hear evidence from the forensic pathologist that Hilda was strangled before her neck was sliced? There is no case law in Nevada directly on point on this

difficult issue of determining whether a new trial should be granted based on ***continued*** impeachment utilizing DNA evidence of the main witness in a case, versus whether a denial is proper because the evidence is merely cumulative. Yet, this is the crux of the decision that this court is tasked with.

Accordingly, this court concludes that *based on Nevada law as it now stands*, the results of the DNA testing are not "favorable" to LaPena to warrant a new trial. Although the DNA results confirm that Weakland lied, because the jury was presented with objective evidence contradicting Weakland's testimony in 1989 and yet chose to believe Weakland instead of the pathologist, the new, DNA evidence can be considered "cumulative." *C.f. El-Tabech*, 696 N.W.2d at 452 (noting the new evidence was cumulative of other evidence already offered at trial). Therefore, although the facts, tortured procedural history, and more recent additional impeachment evidence appear to be extremely strong against Weakland's testimony and consequently the State's case, this court is constrained to find that even had the DNA evidence been available at trial to show Hilda was strangled before she was stabbed, a different result would not have been probable because the jury received similar evidence of the sequencing that impeached Weakland on this same point at trial. *C.f. Sullivan*, 14 N.E.3d at 214-15 (explaining that new evidence in that case was likely to factor into the jury's deliberations).

Of particular note, LaPena's theory of the case has always been that Marvin was the one who hired Weakland and that Marvin helped Weakland murder Hilda. While the DNA results are favorable to LaPena to the extent they further impeach Weakland's depiction of how he murdered Hilda, they do not contradict evidence presented at trial nor impeach Weakland on the material point of Marvin employing Weakland's services or

whether another person committed or assisted with the murder. *C.f. Hennie* 114 Nev. at 1290, 968 P.2d at 764 (holding the new evidence was material to the defense).

Therefore, in light of the foregoing conclusions and current Nevada law, this court is constrained to deny LaPena's motion for a new trial.

CONCLUSION

The DNA results were not "favorable" as necessary to grant LaPena a new trial. To the extent the evidence is relevant, it is cumulative impeachment evidence and does not go to a material point in favor of LaPena's defense. Accordingly, this court ORDERS LaPena's Motion For a New Trial DENIED.

DATED this 3rd day of August, 2017.

Abbi Silver

THE HONORABLE ABBI SILVER
CHIEF JUDGE OF THE COURT OF
APPEALS OF NEVADA,
SPECIALLY DESIGNATED AS EIGHTH
JUDICIAL DISTRICT COURT JUDGE
DEPARTMENT II

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