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 APPENDIX
VOLUME 7 OF 8
(APPN 1264 – APPN 1502)

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INDEX TO APPELLANT'S APPENDIX IN CHRONOLOGICAL ORDER

Date	Document	Vol. No.	Page Nos.
04/12/1972	Trial Transcript Part 1, Case No. 271359	1	APPN 0001 – APPN 0131
04/12/1972	Trial Transcript Part 2, Case No. 271359	1 2	APPN 0132 – APPN 0190 APPN 0191 – APPN 0379
04/12/1972	Trial Transcript Part 3, Case No. 271359	3	APPN 0380 – APPN 0591
04/12/1972	Trial Transcript Part 4, Case No. 271359	4	APPN 0592 – APPN 0780
04/12/1972	Trial Transcript Part 5, Case No. 271359	5	APPN 0781 – APPN 0936
10/31/2018	Post-Conviction Petition Requesting Genetic Marker Analysis of Evidence	5	APPN 0937 – APPN 0945
11/02/2018	Post-Conviction Petition - refiled	5	APPN 0946 – APPN 0954
03/11/2019	Notice of Entry of Order Granting, in Part, Post-Conviction Petition Requesting Genetic Marker Analysis of Evidence; Order to Set Hearing; and, Order Directing Preservation and Inventory of Evidence	5	APPN 0955 – APPN 0965
04/19/2019	Transcript of Proceedings - Hearing Re: Evidence	5	APPN 0966 – APPN 0992
05/06/2019	Washoe County Sheriff's Office's Response to Court Order of March 7, 2019	5	APPN 0993 – APPN 1003
06/06/2019	Respondent's Notice of Inventory	5	APPN 1004 – APPN 1009
06/28/2019	Petitioner's Motion for Order to Show Cause	5	APPN 1010 – APPN 1021
07/08/2019	Respondent's Opposition to Motion to Compel	6	APPN 1022 – APPN 1028
07/08/2019	Washoe County Sheriff's Office's Response to the Motion for Order to Show Cause	6	APPN 1029 – APPN 1031

Date	Document	Vol. No.	Page Nos.
08/01/2019	Order Denying Motion for Order to Show Cause; and, Order Denying Motion for Order Shortening Time	6	APPN 1032 – APPN 1039
11/27/2019	Response to Petition for Genetic Marker Analysis	6	APPN 1040 – APPN 1238
12/13/2019	Petitioner's Motion for Leave to File Reply Brief	6	APPN 1239 – APPN 1263
12/19/2019	Respondent's Opposition to Motion for Leave to File Reply	7	APPN 1264 – APPN 1267
12/31/2019	Petitioner's Reply in Support of Motion for Leave to File Reply	7	APPN 1268 – APPN 1271
01/10/2020	Order Granting Motion for Leave to File Reply; Order to Set Hearing	7	APPN 1272 – APPN 1275
01/21/2020	Petitioner's Reply in Support of Petition for Genetic Marker Analysis	7	APPN 1276 – APPN 1284
02/25/2020	Transcript of Proceedings - Petition for Genetic Marker Analysis	7	APPN 1285 – APPN 1336
03/10/2020	Respondent's Post-Hearing Brief	7	APPN 1337 – APPN 1388
03/10/2020	Petitioner's Supplemental Points and Authority in Support of Petition Requesting Genetic Marker Analysis of Evidence Within the Possession or Custody of the State of Nevada	7 8	APPN 1389 – APPN 1502 APPN 1503 – APPN 1644
05/19/2020	Notice of Entry of Order Dismissing Petition for Genetic Marker Analysis	8	APPN 1645 – APPN 1654
06/18/2020	Petitioner's Notice of Appeal	8	APPN 1655 – APPN 1672
06/18/2020	Petitioner's Case Appeal Statement	8	APPN 1673 – APPN 1682

INDEX TO APPELLANT'S APPENDIX IN ALPHABETICAL ORDER

Date	Document	Vol. No.	Page Nos.
05/19/2020	Notice of Entry of Order Dismissing Petition for Genetic Marker Analysis	8	APPN 1645 – APPN 1654
03/11/2019	Notice of Entry of Order Granting, in Part, Post-Conviction Petition Requesting Genetic Marker Analysis of Evidence; Order to Set Hearing; and, Order Directing Preservation and Inventory of Evidence	5	APPN 0955 – APPN 0965
08/01/2019	Order Denying Motion for Order to Show Cause; and, Order Denying Motion for Order Shortening Time	6	APPN 1032 – APPN 1039
01/10/2020	Order Granting Motion for Leave to File Reply; Order to Set Hearing	7	APPN 1272 – APPN 1275
01/21/2020	Petitioner's Reply in Support of Petition for Genetic Marker Analysis	7	APPN 1276 – APPN 1284
06/18/2020	Petitioner's Case Appeal Statement	8	APPN 1673 – APPN 1682
12/13/2019	Petitioner's Motion for Leave to File Reply Brief	6	APPN 1239 – APPN 1263
06/28/2019	Petitioner's Motion for Order to Show Cause	5	APPN 1010 – APPN 1021
06/18/2020	Petitioner's Notice of Appeal	8	APPN 1655 – APPN 1672
12/31/2019	Petitioner's Reply in Support of Motion for Leave to File Reply	7	APPN 1268 – APPN 1271
03/10/2020	Petitioner's Supplemental Points and Authority in Support of Petition Requesting Genetic Marker Analysis of Evidence Within the Possession or Custody of the State of Nevada	7 8	APPN 1389 – APPN 1502 APPN 1503 – APPN 1644
11/02/2018	Post-Conviction Petition - refiled	5	APPN 0946 – APPN 0954
10/31/2018	Post-Conviction Petition Requesting Genetic Marker Analysis of Evidence	5	APPN 0937 – APPN 0945
06/06/2019	Respondent's Notice of Inventory	5	APPN 1004 – APPN 1009

Date	Document	Vol. No.	Page Nos.
12/19/2019	Respondent's Opposition to Motion for Leave to File Reply	7	APPN 1264 – APPN 1267
07/08/2019	Respondent's Opposition to Motion to Compel	6	APPN 1022 – APPN 1028
03/10/2020	Respondent's Post-Hearing Brief	7	APPN 1337 – APPN 1388
11/27/2019	Response to Petition for Genetic Marker Analysis	6	APPN 1040 – APPN 1238
04/19/2019	Transcript of Proceedings - Hearing Re: Evidence	5	APPN 0966 – APPN 0992
02/25/2020	Transcript of Proceedings - Petition for Genetic Marker Analysis	7	APPN 1285 – APPN 1336
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04/12/1972	Trial Transcript Part 2, Case No. 271359	1 2	APPN 0132 – APPN 0190 APPN 0191 – APPN 0379
04/12/1972	Trial Transcript Part 3, Case No. 271359	3	APPN 0380 – APPN 0591
04/12/1972	Trial Transcript Part 4, Case No. 271359	4	APPN 0592 – APPN 0780
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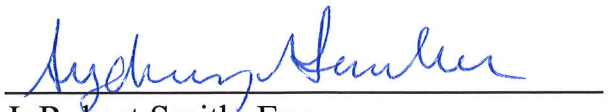
05/06/2019	Washoe County Sheriff's Office's Response to Court Order of March 7, 2019	5	APPN 0993 – APPN 1003
07/08/2019	Washoe County Sheriff's Office's Response to the Motion for Order to Show Cause	6	APPN 1029 – APPN 1031

DATED this 6th day of November 2020.



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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I electronically filed the foregoing **APPELLANT'S APPENDIX – VOLUME 7 OF 8 (APPN 1264 – APPN 1502)** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's e-filing system on November 6, 2020.

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

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

MICHAEL PHILLIP ANSELMO,

Petitioner,

v. Case No. 271359

THE STATE OF NEVADA, Dept. No. 6

Respondent.
_____/

OPPOSITION TO MOTION FOR LEAVE TO FILE REPLY

COMES NOW, the State of Nevada, by and through Marilee Cate, Appellate Deputy, and opposes the Motion for Leave to File Reply filed by Petitioner. This Opposition is based on the pleadings and papers on file with this Court, and the following points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner Michael Anselmo (hereinafter, "Petitioner") seeks leave to file a Reply brief in support of his Petition for Genetic Marker Analysis without any supporting authority. This alone is cause for a denial of his motion. *See* WDCR 12(1); DCR 13(2) (providing that the absence of a memorandum of points *and authorities* in support of

each ground raised in a motion "may be construed as an admission that the motion is not meritorious and cause for its denial or as a waiver of all grounds not so supported."). In addition, petitions for genetic marker analysis are creatures of statute. The relevant provisions of Chapter 176 do not permit reply briefs. The statutory scheme makes it clear that a petition must satisfy the statutory requirements on its face, and can be dismissed prior to the State filing a response if it does not conform to the statutory requirements. *See* NRS 176.0918(4); NRS 176.09183. NRS 176.0918(5) contemplates circumstances where the State may respond to a petition, but does not provide for a reply from a petitioner when the State files a response.

Petitioner asserts that a reply is necessary because the State accuses him of mischaracterizing the record. Petitioner already had a chance to supplement his Petition (which, again is not contemplated by the statutes), but chose not to do so. Prior to Petitioner's deadline to supplement, the State raised issues with Petitioner's characterization of the record. *See* State's Opposition to Motion to Compel, filed July 8, 2019, p. 2-3, n. 1. The State's concerns regarding Petitioner's characterizations of the record were raised over a month and a half prior to his deadline to supplement his Petition. Yet, on August 29, 2019, Petitioner chose not to supplement or clarify issues that are apparent from the face of his Petition. *See* Notice of Non-Submission of Supplemental Petition, filed August 29, 2019. Petitioner's assertions are repeatedly belied by the record in this case. Petitioner chose not to provide a single citation to the record in his Petition and now attempts to supplement the record with hearsay in the form of a police report. Petitioner has already been given more opportunities than permitted by statute to satisfy his pleading obligations and has failed to do so. This

/ / /

Court should decide his Petition based on the record before it and the pleadings permitted by statute. As such, Petitioner's motion should be denied.

AFFIRMATION PURSUANT TO NRS 239B.030

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

DATED: December 19, 2019.

CHRISTOPHER J. HICKS
District Attorney

By /s/ MARILEE CATE
MARILEE CATE
Appellate Deputy

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on December 19, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

MICHAEL PHILLIP ANSELMO,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 271359
Dept. No. 6

REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE REPLY

Petitioner Michael Anselmo hereby respectfully submits this Reply in support of his Motion for Leave to File Reply.

The State opposes Mr. Anselmo's Motion for Leave to File Reply ("Motion") on two grounds. First, the State asserts there is no support for Mr. Anselmo's request to file a reply

brief to the State's Response to his Petition.[1] Second, the State claims that Mr. Anselmo already had a chance to supplement his Petition but did not do so, and Mr. Anselmo should therefore not be allowed to file a reply. The State is wrong on both.

First, the Nevada Rules of Civil Procedure and the Rules of Practice for the Second Judicial District Court provide the basis for Mr. Anselmo's request to file a reply. While NRS 176.0918 does not explicitly provide for replies, it allows the State a "response". NRS 176.0918(5). There is no case law on point in Nevada regarding this provision, but case law from other states regarding similar statutory schemes provides insight here. In *Gordon v. State*, the Utah Supreme Court interpreted a similar statutory provision apparently allowing only a "response" from the State to a petition for DNA testing. 369 P.3d 1255, 1258 (Ut. 2016). The Utah statute allows the attorney general to "answer or otherwise respond" to a petition for DNA testing, and the Utah Supreme Court has read the statute in harmony with its rules of civil procedure. *Id.* Where the State filed simply an answer, no response from the petitioner would be warranted. *Id.* But where the State filed the equivalent to a motion to dismiss and "sought immediate disposition," the petitioner would be entitled to an opposition. *Id.*

Here, the State filed a response on November 27, 2019 seeking immediate disposition of the Petition. Because no reply was provided in the Court's modified briefing schedule at the April 19, 2019 hearing, Mr. Anselmo filed this Motion asking for leave to file a reply out of an abundance of caution. But Mr. Anselmo is entitled under NRCP 12, WDCR 12, and DCR 13 to file a response to what is effectively the State's motion to dismiss.

Second, Mr. Anselmo did not waive his right to oppose the State's response by not filing a supplement ***before*** the State filed its response to Petition. The purpose of the supplemental brief granted by this Court was to identify additional evidence that Mr. Anselmo may want tested after having a chance to review the evidence inventories filed by the State. Mr. Anselmo was not required to anticipate the State's arguments in response to his Petition before it was filed and address those arguments in the supplement. Mr. Anselmo did not file a supplement

[1] Capitalized terms not otherwise defined herein shall have the same meaning as in the Motion.

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because he did not identify any additional evidence to be tested.[2] Mr. Anselmo is entitled to oppose the State's response after it is filed and served.

Therefore, Mr. Anselmo respectfully requests that the Court grant him leave to file the Reply attached as Exhibit 1 to the Motion.

The undersigned affirms pursuant to NRS 239B.030 that the preceding document does not contain the social security number of any person.

DATED this 31st day of December, 2019.

HOLLAND & HART, LLP

/s/ J. Robert Smith
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Jessica E. Whelan (NSB #14781)
Sydney R. Gambee (NSB #14201)

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[2] Moreover, the State's accusation that Mr. Anselmo did not provide citations to the record in his Petition is red herring. The statute does not require citations to the record. It requires "a declaration under penalty of perjury attesting that the information contained in the petition does not contain any material misrepresentation of fact and that the petitioner has a good faith basis relying on particular facts for the request," including certain information specified in the statute. NRS 176.0918(3).

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(a), I hereby certify that on the 31st day of December, 2019, I served a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE REPLY** by the following method(s):

☑ Electronic: by submitting electronically for filing and/or service with the Second Judicial District 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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☑ U.S. Registered Mail: by depositing same in the United States mail, first class registered mail postage fully prepaid to the persons and addresses listed below:

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/s/ *Amanda De La Rosa*
An Employee of Holland & Hart LLP

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MICHAEL PHILLIP ANSELMO,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

/

Case No. 271359

Dept. No. 6

ORDER GRANTING MOTION FOR LEAVE TO FILE REPLY; ORDER TO SET HEARING

Previously, on November 2, 2018. Petitioner MICHAEL PHILLIP ANSELMO ("Mr. Anselmo) filed his *Post-Conviction Petition Requesting Genetic Marker Analysis Evidence Within the Possession or Custody of the State of Nevada* ("*Petition*"), by and through his attorneys of record, Holland & Hart LLP and the Rocky Mountain Innocence Center.

On March 7, 2019, the Court entered its *Order Granting, in Part, Post-Conviction Petition Requesting Genetic Marker Analysis of Evidence; Order to Set Hearing; and, Order Directing Preservation and Inventory of Evidence*.

On May 6, 2019, Petitioner, THE STATE OF NEVADA, ("State"), by and through its attorney of record, Keith G. Munro, filed their *Response to This Court's Order of March 7, 2019*.

On June 5, 2019, Mr. Anselmo filed *Petitioner's Status Report of Evidence Inventory and Remaining Briefing.*

On June 6, 2019, the State, by and through its attorney of record, Marilee Cate, filed its *Notice of Inventory.*

Mr. Anselmo filed his *Notice of Non-Submission of Supplemental Petition* on August 29, 2019, and restated and reaffirmed his original request for DNA testing. Mr. Anselmo also specified which items for which he requested genetic marker testing and specified which test was to be performed on each item.

On November 27, 2019, the State filed its *Response to Petition for Genetic Marker Analysis* and submitted the *Petition* for decision December 2, 2019.

On December 13, 2019, Mr. Anselmo filed his *Motion for Leave to File Reply.*

On December 19, 2019, the State filed its *Opposition to Motion for Leave to File Reply.*

On December 31, 2019, Mr. Anselmo filed his *Reply in Support of Motion for Leave to File Reply.* No request for submission was filed, however, the Court deems it appropriate to enter its Order at this time.

The Court has reviewed the moving papers together with the entire court file.

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED:

1. Mr. Anselmo's *Motion for Leave to File Reply* is GRANTED.

2. Mr. Anselmo shall have ten (10) days from the entry of this Order to file any reply papers.

3. Counsel are ordered to contact the Judicial Assistant of this Department within fifteen (15) days of the date of this Order to set this matter for hearing.

4. At the hearing, in addition to any argument counsel chooses to present, counsel should be prepared to address whether or not any change in Mr. Anselmo's custodial status affects jurisdiction of this Court to decide the *Petition.*

DATED this 10th day of January, 2020.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 10th day of January, 2020, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

MERILEE CATE, ESQ.

JOSHUA HALEN, ESQ.

JENNIFER NOBLE, ESQ.

J. SMITH, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

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MICHAEL PHILLIP ANSELMO,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 271359
Dept. No. 6

REPLY IN SUPPORT OF PETITION FOR GENETIC MARKER ANALYSIS

Petitioner Michael Anselmo hereby submits this Reply in support of his Petition Requesting Genetic Marker Analysis of Evidence Within the Possession or Custody of the State of Nevada. This Reply is based on the following points and authorities, the pleadings and papers on file in this case, and any argument the Court may entertain.

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I. DISCUSSION

A. Mr. Anselmo's Petition Requesting Genetic Marker Analysis of Evidence Satisfies NRS 176.0918

Respondent argues the facts asserted by Mr. Anselmo in the Petition Requesting Genetic Marker Analysis of Evidence ("Petition") do not comport with the record. Respondent's arguments are incorrect.

First, Respondent states Mr. Anselmo "suggests police engaged in nefarious tactics and mistreated him in order to obtain a confession" and "Detective Jenkins [] question[ed] Petitioner on end for over two days." Respondent erroneously claims these assertions are not supported by the record. In the original Petition, Mr. Anselmo contends he was without sleep for approximately 36 hours and had not eaten by the time he was taken into police custody. *William J. Whitmire Police Report*, p.8-9, July 17, 1971; *Trial Tr.* 415, 516, 621-628, 631-638.[1] He was then subjected to polygraph tests and intense interrogations for the next three days. *See id.*; *Trial Tr.* 435-437, 439-440. After Mr. Anselmo was awake for 48 hours he was injected with Coramine. *Trial Tr.* 515, 636. Mr. Anselmo submitted to another polygraph test the following day. At that time Mr. Anselmo confessed to the murder. *Trial Tr.* 638-640. Although Mr. Anselmo may have confessed in response to three days of intense questioning by police, at no point does Mr. Anselmo suggest police "engaged in nefarious tactics"; that is the State's characterization. Mr. Anselmo is simply informing the Court of the circumstances surrounding his false confession, which call into question its reliability.

Second, Respondent implies the testimony of Dr. Laubscher is consistent with the information Mr. Anselmo provided during his false confession. The State's implication is without merit. Dr. Laubscher testified Trudy was stabbed fifteen times and died from manual

[1] All facts asserted in Mr. Anselmo's Petition are facts derived from the record - specifically the Trial Transcript (already part of the Court record) and Police Report, attached hereto as **Exhibit 1**.

strangulation. *Trial Tr.* 374,378,389. He also observed over 100 bruises on Trudy's body. *Trial Tr.* 376. Mr. Anselmo's false confession consists of him admitting to strangling Trudy with an article of clothing and then stabbing her body three or four times. *Trial Tr.* 425. Thus, Dr. Laubscher's testimony is directly inconsistent with Mr. Anselmo's statement.

Third, Respondent attempts to confuse the issue of whether semen was found in the victim's vaginal cavity by suggesting that Mr. Anselmo mispresented Dr. Laubscher's trial testimony. Specifically, Respondent asserts that the Petition conclusively stated "Dr. Laubscher concluded that the contributor of semen was either sterile or had received a vasectomy." But that is not what was stated in the Petition. Instead, in the original Petition Mr. Anselmo states "Dr. Laubscher opined that the contributor of the semen was either sterile or had received a vasectomy based on the lack of sperm in the semen sample," which is a fact on record. *Trial Tr. 392-393*. Respondent merely offers further context in their response, stating Dr. Laubscher also testified it was possible semen were not found in the sample of seminal fluid because of their degenerative nature. *Id.* This is also accurate. Mr. Anselmo is required by statute to submit a statement of facts that clearly describes the rationale behind testing. *See* NRS 176.0918(3). Mr. Anselmo is not required to include every opinion submitted by Dr. Laubscher in the statement of facts, especially when such opinions are unnecessary for describing the rationale behind the testing.

Ultimately, Mr. Anselmo included Dr. Laubscher's testimony in the statement of facts to show a factual scenario that meets the standard of testing. Dr. Laubscher testified seminal fluid was discovered and examined. This DNA evidence is still available and should be tested regardless of Dr. Laubscher's opinions from 1972. The evidence in this case was not "gross[ly] mischaracterize[ed]" by Mr. Anselmo in his Petition as Respondent so asserts. All elements of NRS 176.0918 are satisfied.

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B. This Petition is Timely

Importantly, the Nevada law allowing for Post-Conviction Genetic Marker Analysis does not include a Statute of Limitations. Rather, it recognizes that with the almost daily scientific advancement of DNA testing, individuals with cognizable claims of innocence should be able to petition a court at any time to have evidenced tested.[2] The State's claim that Anselmo's Petition should be denied for failure to meet some imaginary timeliness standard must be rejected.

Nevertheless, even if this Court were to consider the Doctrine of Laches, as the Respondent suggests, it cannot be applied in this instance. Respondent argues there is "significant prejudice to the State" if this Court should grant Mr. Anselmo's Petition. Respondent, however, fails to identify any such prejudice.[3] The alleged delay in filing Mr. Anselmo's Petition does not "disadvantage" Respondent. *See State v. Eighth Judicial Dist. Court (Hedland)*, 116 Nev. 127, 994 P.2d 692 (2000).

The Doctrine of Laches is a remedy most commonly seen in cases involving a writ of mandamus or other like petitions. *See id.* at 135, 994 P.2d at 698; *see also Buckholt v. District Court,* 94 Nev. 631, 633, 584 P.2d 672, 673 (1978). In *State v. Rosenthal*, the question of "whether the doctrine of laches applies to the government" was before the Nevada Supreme Court. 107 Nev. 772, 777, 819 P.2d 1296, 1301 (1991). The Court found it "unnecessary to decide this issue" because "even if the laches doctrine applie[d], [defendant] failed to show all of the necessary elements." *Id.* at 777-778, 819 P.2d at 1301. The Court emphasized that

[2] NRS 176.0918 purposefully does not place a statute of limitations on petitioners who seek post-conviction DNA testing. Other states have imposed a statute of limitations initially, only to later amend the statute to reject the time limitation on testing. *See* The Justice Project, *Improving Access to Post-conviction DNA Testing A Policy Review*, 2008, at 13, https://www.prisonlegalnews.org/media/publications/justice_project_improving_access_to_post_conviction_dna_testing.pdf (last visited Dec. 9, 2019).

[3] In *Harris v. State* the court focuses on "whether there are circumstances that prejudice the State" when applying the Doctrine of Laches. 130 Nev. 435, 440, 329 P.3d 619, 623 (2014). The court concludes that "the State, not the defendant, is in the best position to address that factor." *Id.*

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"Laches is more than a party delaying the enforcement of his rights; it is a delay that works a disadvantage to another." *Id.* at 778, 819 P.2d at 1301 (internal citations omitted). "As a result of such delay, the condition of the party asserting laches becomes drastically altered, whereby he cannot be restored to his former state" and "[t]he delay must cause actual prejudice." *Id.* The Respondent does not state any specific prejudice because the determination of whether an individual was wrongfully convicted through DNA testing prejudices no one. To the contrary, it corrects grievous mistakes that strengthen the criminal justice system and all of its stakeholders.

Further, the DNA evidence Mr. Anselmo seeks to test is not stale. "[T]he passage of time erodes the reliability of factual determinations, as evidence can become stale and witnesses may become unavailable." *Stockmeier v. State*, 127 Nev. 243, 251, 255 P.3d 209, 214 (2011). Hypothetically, if Mr. Anselmo was seeking to revisit his case based only upon witness accounts, the Respondent may be able to claim prejudice as this crime occurred 48 years ago. However, Mr. Anselmo's potential new evidence of innocence has nothing to do with witness accounts that might be stale. Instead, Mr. Anselmo is requesting that probative DNA evidence collected from the crime scene and still in a condition that allows for DNA testing be tested. DNA testing was not available at the time of Mr. Anselmo's trial and it is the most reliable evidence available that can conclusively prove Mr. Anselmo's innocence. Therefore, as the Respondent cannot show actual prejudice resulting from Mr. Anselmo's alleged delay in filing this Petition, the Doctrine of Laches does not apply, and this Petition is timely.

C. Mr. Anselmo's Admission to the Parole Board is Irrelevant

Mr. Anselmo expressed remorse for taking Trudy's life during his parole hearing. After expressing this remorse, Mr. Anselmo received a reduced sentence which allowed him the possibility of parole. Mr. Anselmo was released on parole on October 31, 2019, after spending 48 years in prison for a crime he did not commit. It is widely accepted that some individuals

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falsely confess to crimes they did not commit at every stage of their case from initial interrogations by police to guilty pleas and in the post-conviction context. Some of these false confession cases resulted in the exoneration of the wrongfully convicted individuals.[4] A few of these exonerated individuals even "confessed" to the parole board, were released, and then were later found innocent.[5] Therefore this court should not estop Mr. Anselmo's Petition from going forward.

[4] The following is an incomplete list of cases involving false confessions by defendant that resulted in an exoneration of the defendant(s): *People v. Wise*, 194 Misc. 2d 481 (2002) (false confessions during police interrogation); *Also see* The National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Dec. 9, 2019): Darryl Bailey (false confession during police interrogation); James Blackmon (false confession during interrogation and pleaded guilty); Lambert Charles (guilty plea); Dayna Christoph (false confession during interrogation and pleaded guilty); Henry Cunningham (signed guilty confession); Peter Dallas (guilty plea); Robert Davis (false confession during police interrogation. Notably, Davis had been awake for 24 hours when he confessed to the crime); James Dean (pleaded guilty and gave false testimony); Joseph Dick Jr. (false confession during police interrogation and pleaded guilty); Harold and Idella Everett (guilty pleas); James Frazier (false confession during police interrogation); Ralph Frye (false confession during police interrogation); Ronnie Mark Gariepy (false confession during police interrogation); Anthony Gray (false confession during police interrogation and pleaded guilty); Sammy Hadaway (false confession during police interrogation, gave false testimony, and pleaded guilty); Zachary Handley (false confession during police interrogation); Rodney Harris (signed guilty confession); Johnny Hincapie (false confession during police interrogation); John Horton (false confession during police interrogation); Ralph A. Jacobs Jr. (false confession during police interrogation and pleaded guilty); Latisha Johnson (false confession during police interrogation); Kenneth Kagonyera (false confession during interview with DA, and pleaded guilty); Eric Kelley (false confession during police interrogation); William M. Kelly Jr. (false confession during police interrogation and pleaded guilty); Beth LaBatte (false confession during police interrogation); Ralph Lee (false confession during police interrogation); Eddie Joe Lloyd (written false confession); Troy Mansfield (failed polygraph test and pleaded guilty); Jose Maysonet (false confession during police interrogation); David McCallum (false confession during police interrogation); Damian Mills (false confession during police interrogation and pleaded guilty); Lorenzo Montoya (false confession during police interrogation); Rickey Newman (false confession during police interrogation and pleaded guilty); Leroy Orange (false confession during police interrogation); Josue Ortiz (false confession to police and pleaded guilty); James Pitts Jr. (false confession during police interrogation and pleaded guilty); Davontae Sanford (false written confession and pleaded guilty); David Caraceno (false confession during police interrogation); Alstory Simon (pleaded guilty); Christopher C. Smith (false confession during police interrogation and pleaded guilty); Fred Steese (false confession during police interrogation); Willie Stuckey (false confession during police interrogation); Michael Sturgeon (false confession during police interrogation and pleaded guilty); Christopher Tapp (false confession during police interrogation); Jathan Tedtaotao (false confession during police interrogation and pleaded guilty); Derek Tice (false confession during police interrogation); Glenn Tinney (false confession during police interrogation and pleaded guilty); Jerry Townsend (false confession during police interrogation); David Vasquez (false confession during police interrogation and pleaded guilty); Willie Veasy (false signed confession); Daniel Villegas (false confession during police interrogation); Earl Washington (false confession during police interrogation); Wayne Washington (false confession during police interrogation and pleaded guilty); Shawn Whirl (false confession during police interrogation and pleaded guilty); Danial Williams (false confession during police interrogation); Larry Williams Jr. (false confession during police interrogation and pleaded guilty); Eric Wilson (false confession during police interrogation); John Duval (false confession during police interrogation and false confession to parole board).

[5] Notably, John Duval admitted guilt twice to the parole board before being exonerated in 2000. *See* The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3195 (last

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D. Testing Can Conclusively Establish Mr. Anselmo's Claims of Innocence Have Merit

Significant advances in forensic science allow genetic marker testing of the physical evidence that was not possible or even contemplated at the time of Mr. Anselmo's conviction. If genetic marker testing had been available prior to Mr. Anselmo's conviction, it could have excluded Mr. Anselmo as a suspect and the presence of the exculpatory evidence would have created a reasonable possibility that he would not have been prosecuted or convicted. Mr. Anselmo respectfully requests that this Court, pursuant to NRS 176.0918, grant his Petition.

The undersigned affirms pursuant to NRS 239B.030 that the preceding document does not contain the social security number of any person.

DATED January 21, 2020.

HOLLAND & HART, LLP

/s/ J. Robert Smith
J. Robert Smith (NSB #10992)
Jessica E. Whelan (NSB #14781)
Sydney R. Gambee (NSB #14201)

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visited Dec. 9, 2019). Several others have been paroled for various reasons before they were ultimately found innocent (this is not an exhaustive list): Cheryl Beridon (paroled in 2000; pardoned in 2003); Sonia Cacy (paroled in 1998; conviction vacated in 2016); Joel Covender (paroled in 2007; exonerated in 2014); Luis Diaz (paroled in 1993; exonerated based on DNA evidence in 2012); Willie Gavin (paroled in 2002; exonerated in 2014); Reginald Hayes (paroled in 1998; pardoned in 1999); Alvena Jennette (paroled 2007; exonerated 2014); Herbert Landry (paroled in 2014; exonerated in 2017); Yun Hseng Liao (paroled in 2015; exonerated in 2016); John Manfredi (paroled in 1993; exonerated in 1994); Sundhe Moses (paroled in 2013; exonerated in 2018); Darrel Parker (paroled in 1969; exonerated in 1991); Davey Reedy (paroled in 2009; pardoned in 2015); Anthony Robinson (paroled in 1997; exonerated in 2000); Shaun Rodrigues (paroled in 2011; pardoned in 2014); Anthony Shaw (paroled March 2015; exonerated September, 2015); William Vasquez (paroled in 2012; exonerated in 2015); Amaury Vollalobos (paroled in 2012; exonerated in 2015); Michael Vonallmen (paroled in 1994; exonerated in 2010); Terry Lee Wanzer (paroled in 1981; pardoned in 1991); Harold Weatherly (paroled in 1998; pardoned in 2007); Christopher Wickham (paroled in 2011; exonerated in 2019). The National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Dec. 9, 2019).

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(a), I hereby certify that on the 13th day of January, 2020, I served a true and correct copy of the foregoing **REPLY IN SUPPORT OF PETITION FOR GENETIC MARKER ANALYSIS** by the following method(s):

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

Division of Probation & Parole

Jennifer Noble, Esq.
Marilee Cate, Esq.
Appellate Division
Washoe County District Attorney
1 S. Sierra Street, South Tower, 4th Floor
Reno, NV 89501

☑ U.S. Registered Mail: by depositing same in the United States mail, first class registered mail postage fully prepaid to the persons and addresses listed below:

Office of the Attorney General
State of Nevada
100 N. Carson Street
Carson City, NV 89701

☑ U.S. Mail: a true copy was placed in Holland & Hart LLP's outgoing mail in a sealed envelope addressed as follows:

Keith G. Munro, Esq.
Washoe County District Attorney's Office
1 S. Sierra Street, South Tower, 4th Floor
Reno, NV 89501

/s/ Amanda De La Rosa
An Employee of Holland & Hart LLP

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LIST OF EXHIBITS

1. Police Report

13944835_v2

Code No. 4185

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BEFORE THE HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE

THE STATE OF NEVADA, Plaintiff, -vs- MICHAEL PHILIP ANSELMO, Defendant.	Case No. 271359 Dept. No. 6

PETITION ON GENETIC MARKER ANALYSIS

February 25, 2020

Reno, Nevada

Reported by: Lesley A. Clarkson, CCR #182

A_P_P_E_A_R_A_N_C_E_S

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RENO, NEVADA, TUESDAY, FEBRUARY 25, 2020, 1:45 P.M.

-o0o-

THE COURT: This is Case No. 271359, the State versus Michael Philip Anselmo. This is the time set for a hearing on Mr. Anselmo's post conviction petition requesting genetic marker analysis of evidence within the possession or custody of the state of Nevada.

Please state your appearances.

MS. CATE: Marilee Cate on behalf of the State.

MS. GAMBEE: Sydney Gambee on behalf of Michael Anselmo. Here with me also is Rob Smith and Jennifer Springer, also counsel for Mr. Anselmo.

THE COURT: I waited until quarter 'til. Is Mr. Anselmo appearing today?

MS. GAMBEE: No, he is not. He's actually at work today.

THE COURT: He's at work. Counsel.

MS. CATE: Your Honor, because Mr. Anselmo is not here, and because a waiver of his appearance hasn't been filed in the record that I'm aware of, the State has concerns about going forward with argument today. As Your Honor is aware, this is a criminal matter. His, this is a statutory right essentially to pursue this petition for genetic marker analysis, but ultimately the end for Mr. Anselmo is potentially a new trial. That's where

that leads if he's successful.

If the State is successful in having his petition dismissed or the State is ultimately successful after the Court orders genetic marker analysis, Mr. Anselmo could be liable, on the hook for costs associated with the process. And so the State's concerned that ultimately down the road if the State in one manner or another becomes successful, Mr. Anselmo could later argue that his counsel was ineffective in the manner in which they chose to pursue a petition, pursue it against his wishes. So I think just like any petition, post-conviction petition in a criminal matter where the petitioner has a right and is present unless they waive it in writing. We need that same thing in this case.

THE COURT: So do you have authority that requires that, that this is a part of the proceeding that would require a written waiver where it's a post-conviction statutory request?

MS. CATE: Right off the top of my head -- I just discovered this when I showed up today, Your Honor. I assumed he would be present. And the reason I assumed he would be present is because prior to the last hearing Mr. Anselmo was still in custody, and so the State did an order to produce prisoner, pursued the normal course that we do in post-conviction matters, and counsel, opposing counsel reached out and asked why I was doing that. I said if he doesn't want to come, if he doesn't want to be there, then file a waiver, and that's fine with me.

But if there's any substantive issues that are decided going forward, I have very real concerns about what he can claim later on about the way the matter is pursued. And he appeared last time for the inventory marking. And so I think this is still a criminal matter where he certainly has a right to be present, and --

THE COURT: But that's his right to be present. Is it the State's right to compel that he be present? No.

MS. CATE: Well, no, but the State can certainly ask for a waiver, because the State is trying to protect the record later on, when doing this again on appeal or a post-conviction matter again he raises some ineffective argument or that he didn't wish to pursue this, and now he's liable for costs under the statute because the State was successful.

And so all I'm asking for, I'm not saying that he has to be, I'm not saying that he has to be present, without a -- if it's a waiver in writing that says he doesn't wish to be present for these proceedings, the State's comfortable with that. But I am very concerned about the Court making substantive rulings on his petition, potentially dismissing a petition, without him being present in court.

THE COURT: So the written waiver requirement is where?

MS. CATE: Your Honor, I think that's a practice.

THE COURT: That's what I think, too.

MS. CATE: It is, but I think that's to protect the

record later on because it is a criminal matter, where an individual has a right to be in court when the Court is making decisions. And this certainly leads to, I mean it is the criminal nature of the Court in deciding whether he can pursue genetic marker analysis so he can overturn a conviction.

So just like a petition for habeas corpus where that is what a petitioner is ultimately trying to do, they are seeking to claim counsel is ineffective or there is some sort of unlawful hold on them. The same reasoning applies why the State would in those cases ask for a waiver, so that later again --

THE COURT: I understand. I'm trying to drill it down if there actually is a requirement. I'm obviously going to let you respond. And I understand that what you are concerned about, because you are in a Catch-22 here. If he doesn't get the relief he requests, it may afford him further relief. If we don't have a waiver from him saying I'm not going to be there, and I understand that my attorneys are representing me, and, you know, I'm waiving, in essence what you are saying is ineffective counsel. That's what you want for the future.

All right. Counsel.

MS. GAMBEE: Your Honor, Mr. Anselmo is aware of the hearing today. He was present in the courtroom last time that we were here back in April 2019, not because he requested to be here, but because, of course, like you heard, the State requested he be here and got an order for transport for Mr. Anselmo.

Mr. Anselmo is aware of this hearing, contacted counsel, was, preferred to go to work if it wasn't required for him to be here. And like Your Honor touched upon, it is Mr. Anselmo's right to be here, but he is not required to be here. He has informed counsel that he is comfortable with this hearing proceeding without him.

And this proceeding is no different than any other post-conviction appeal where, you know, you wouldn't have the defendant being required to show up at the Nevada Supreme Court, for example. It's no different here. There's no requirement that I'm aware of that he must state in writing that he waives his right to be here. There's no requirement in the statute that he be here at this hearing, and there was no requirement in Your Honor's order of January 10, 2020, that he be here.

This is a motion hearing where we are discussing argument about whether or not the genetic material identified in the petition should be tested. It's not my understanding that this is an evidentiary hearing. This is solely argument to determine whether or not the petition is granted to the extent that the genetic material would be tested. And Mr. Anselmo is represented by counsel at this hearing and waives his right through counsel to be here at this hearing. That's sufficient, and we can go forward.

THE COURT: So the State's concern, on the one hand it is on your petition, and obviously I have read everything and I'm prepared to address. But in the State's response the State is

asserting that he, on various grounds, that he, it should not be granted, and in fact that it should be dismissed. So does the remedy that the State is requesting change your argument in any way?

MS. GAMBEE: No, Your Honor.

THE COURT: So the Court could dismiss the petition without him being present.

MS. GAMBEE: Mr. Anselmo is aware of the potential consequences of this hearing today, and he is comfortable not being here. He has a right to be here, but he is not required to be here. So yes, we would feel comfortable proceeding today.

THE COURT: And so you had a specific discussion with him -- I can ask about scheduling, I'm not going to ask about substance -- but regarding this hearing, that he has the right to appear, and he declined to do so?

MS. GAMBEE: Yes, Your Honor.

THE COURT: And as an officer of the court you are representing that he understands that if I were to rule from the bench today his petition could be dismissed, and he understands the consequences of that.

MS. GAMBEE: So I did not have the conversation personally, but Miss Springer did, so I'll let her address that to you.

MS. SPRINGER: Yes. We discussed the consequences of this petition and that there could be a ruling from the bench

today or at a later date as a result of the argument today.

THE COURT: And he made the choice not to be here.

MS. SPRINGER: That's correct. He is recently employed, and he didn't want his missing a day of work to have a consequence on that new employment.

THE COURT: All right. Well, I understand the State's position that what they are concerned about is alleviating potential claims in the future, but I see this as unless there's an actual requirement that he be at one of these proceedings, that that, and that's his right to appear. I don't see, I actually did some quick research before I came out to see if I could locate something that actually requires him to be present at this type of hearing. I understand the desire for a waiver, but I could not find a requirement, an actual statutory or case law requirement that he execute a waiver.

Does anyone have any authority to the contrary?

MS. GAMBEE: I do not, Your Honor.

MS. CATE: No, Your Honor.

THE COURT: We will proceed. So counsel, do you have anything to add to the documents that -- I have some specific questions I want to ask.

Let me step back for a minute. I do want to make sure that the minutes reflect the State's concern about his presence and that it is a policy in their office that they require waivers. I want the minutes to also reflect that counsel as

officers of the Court have indicated that they had a discussion regarding scheduling with Mr. Anselmo as well as the consequences that might occur as a result of the Court's ruling, and that he knowingly decided he did not want to be here and to waive his opportunity to be here and to waive his opportunity to be there.

Have I accurately stated that?

MS. GAMBEE: Yes.

MR. SMITH: Yes.

THE COURT: So now you can go ahead and proceed. As I said, I do have some specific questions to ask, but I would like you go ahead and make your arguments, and then not to take offense when I probably interrupt you. Go ahead.

MS. GAMBEE: Thank you, Your Honor. The relief requested here is authorized by statute, as we are all aware, and is available to any person convicted of a felony who meets the statutory requirements. To address what I hope is one of Your Honor's first questions, based on the January 10 order, as an initial matter, whether the petitioner is currently incarcerated doesn't have any bearing on his standing to bring the petition or the Court's --

THE REPORTER: Your Honor, I'm sorry.

THE COURT: What we are going to have to do is take a breath and slow down.

So your position is that -- I had read in the State's information about his release, but I should indicate to everyone

that I actually read about it in the paper. Unknowingly I started reading this article and then recognized that, it was very short, and it was Mr. Anselmo. And so out of an abundance of caution I wanted to indicate that in my order so that we could place it on the record today, even knowing, I think the State indicated in a footnote that he was released in October of 2019. But I just felt that it was appropriate to make sure was in the record because I had also seen that little clip.

So he's, your position is he has standing to continue to assert. And he remains on parole, correct?

MS. GAMBEE: He does, yes.

THE COURT: All right. I did not find anything that would indicate that once the petition is filed that even if a petitioner is released that you cannot go forward down this path. I mean it seems to me, and I didn't check with regard to the registry that you identified, but the actual cases where those defendants were released, but it seems that it has occurred before. This is isn't the first time.

MS. CATE: Your Honor, I can probably assist. The State agrees. Even though he's out of custody, and I actually reviewed that in the legislative history, that was the intent, and the statute doesn't provide that he has to be in custody. So the State is in agreement. So we can probably move forward from that.

THE COURT: I want to make sure, like I said, because

of the reasons that I had found out in addition. So I am comfortable proceeding. I had reached that conclusion. So go ahead.

MS. GAMBEE: Understood, Your Honor.

So we are here to determine whether or not the Court is going to grant the petition to test the genetic material that's identified in the petition. Your Honor has determined twice previously that the statutory requirements have been met, at least initially in the initial order granting the petition in part, which was in March of 2019, and then in the order directing testing, which was rescinded the next day, in September 2019.

THE COURT: Right. That was due to a miscalendaring in Department 6, with apologies to all parties, and I think with somewhat a heart attack to the district attorney's office.

MS. GAMBEE: But the issues have not changed here just because of the filing of the State's response. The statutory requirements have still been met by Mr. Anselmo.

The first requirement is that he identified evidence. It doesn't appear that the State disputes that, and Mr. Anselmo did identify specific evidence in his petition that he would like to be tested.

I think it's the second factor that is really in dispute here, so I'll skip that for a moment.

We did identify the type of genetic marker analysis and a statement that that analysis was not available at the time of

the trial. It seems those issues --

THE COURT: Slow down.

MS. GAMBEE: So the only issue that does appear to be in dispute today is whether there is a reasonable probability that Mr. Anselmo would have either not been prosecuted or would not have been convicted had the genetic material been tested at the time of trial. Here the State contends the petition fails as to that factor because the State first contends that the petition is unsupported by citations to the record. The statute requires a declaration supporting the petition, and Mr. Anselmo --

THE COURT: I'm going to interrupt you. Because the State's concern as I read it was that the information stating a good-faith belief wasn't correctly set forth in Mr. Anselmo's affidavit. So do you have, I know your position is that it is. It seems to me a bit of it is wordology. It just is what he said based on the facts that were relayed distilled down into a to good-faith belief on his part and doesn't consist of any misrepresentation. So the State's concern is where they come in and actually cite to the record that that contradicts the sufficiency of your petition.

MS. GAMBEE: Correct, Your Honor.

THE COURT: Correct?

MS. GAMBEE: I understand that that is the dispute.

THE COURT: So the response to that?

MS. GAMBEE: So first we submit that the declaration is

sufficient. But second, as noted in the reply, Mr. Anselmo's declaration, his petition, all of the statements in his petition are adequately supported by the record. And you can find those record cites in the reply. There have been no material misrepresentations in Mr. Anselmo's petition.

For example, the State raises that Mr. Anselmo's petition states that the semen sample found had to come from someone who was sterile or had a vasectomy. That's not what the petition says precisely. The petition says that that is a possibility that was raised, was that a semen sample could have come from someone who was sterile or had a vasectomy.

Mr. Anselmo is not required to present all of the opinions about what possibly could be true about that semen sample. For example, he did not state that the opinion was given at trial that sperm could have been removed from that sample based on degenerative qualities.

THE COURT: That's what the doctor said after the State points it out.

MS. GAMBEE: That's just one of the opinions that that expert provided in addition to the other opinions that Mr. Anselmo noted. And Mr. Anselmo noted the opinions that support his request for relief here. He noted that had the genetic material been tested, had the semen been tested, there is this theory that was presented at trial that the semen could have only been given by someone who was sterile or had a vasectomy.

That was one of the options. So if that semen had in fact been tested and come back that it was not Mr. Anselmo's, that certainly would have been relevant to the case. That would have been relevant because it would have been inconsistent with the confession, for one, in which Mr. Anselmo allegedly, he claimed that he sex with the victim. But if the semen sample did not belong to Mr. Anselmo, that would certainly call into question the confession. And here this case rests largely on the confession. There was no physical evidence that linked Mr. Anselmo to the crime at the trial.

So testing here of the physical evidence that is able to be tested now that couldn't be tested back in the '70s when this trial occurred is certainly relevant to the petition, is certainly relevant to Mr. Anselmo's reasonable possibility that he would not be convicted if he had had the opportunity to test this genetic material.

In the same way the circumstances that Mr. Anselmo recounts in his petition relating to his confession are adequately supported by the record. Mr. Anselmo notes that he informed police that he had been awake for 36 hours and that he had not eaten at the time of his interrogations. That is true. That is supported by the record. There is additional information surrounding Mr. Anselmo's confession certainly, but that was not misrepresented in Mr. Anselmo's petition. Mr. Anselmo was awake for 36 hours. By the time he was awake for 48 hours he had to be

injected with coramine.

All of this calls into question the circumstances surrounding the confession. And that combined with genetic testing that could show that Mr. Anselmo does not match any of the genetic material found on the victim's purse, hand, clothes, the semen sample, and all of that combined shows a reasonable possibility if Mr. Anselmo would not have been convicted if he had had this genetic testing available to him at the time of trial. That is a factor that the Court has to consider here, is whether there's a reasonable possibility that Mr. Anselmo would not have been convicted or wouldn't have been prosecuted.

I would like to point out that Mr. Anselmo, nowhere in his petition did he say that the police engaged in nefarious tactics. That is not something we characterized in the petition of the police. Rather, we were showing the circumstances of the confession, that if the jury were presented with genetic testing of this material that did not match Mr. Anselmo, coupled with all of the circumstances surrounding the confession, the outcome could very well have been different. Mr. Anselmo may not have been convicted. And that is why we are asking for testing of this genetic material here.

There are a number of inconsistencies regarding the confession that I don't think I need to go into any further here unless the Court has specific questions. But in any event, what we are looking at here is an extraordinary case where from the

'70s we have genetic material that is capable of being tested today, and it can exonerate Mr. Anselmo. Mr. Anselmo should have the right to have that evidence tested, particularly given the gravity of his conviction. It's a murder conviction. It's a felony charge that will follow him for the rest of his life. He's on parole now, and he still faces certain restrictions in connection with his parole today. He can't go up to Oregon to visit his mother because he can't leave the state of Nevada. And what's at issue is the potentially exonerating Mr. Anselmo, showing his actual innocence.

The next argument that the State raises is that the petition is not timely. The statute doesn't include a statute of limitations. And that was intentional, Your Honor, because like Mr. Anselmo's case, there's many cases out there where genetic testing simply was not available at the time of the conviction. These defendants should have the opportunity to demonstrate their actual innocence through testing of this genetic material that's now available.

THE COURT: But does the doctrine of laches apply where it's very clear that representatives of Mr. Anselmo's, attorneys or someone from the Innocence Project, came in 2013 and reviewed what evidence they could, or reviewed the, whether or not the evidence existed, and then no petition was filed for years? Does that make a difference?

MS. GAMBEE: No, Your Honor, because the other key

element of the defense of latches is prejudice, and there has been no prejudice alleged by the State here. The difference that we are talking about is a matter of five years, from 2013 to 2018 when the petition was filed. There's been no change in circumstance on behalf of the State from 2013 to 2018.

We are talking about a case that's already well over 40 years old, and an additional five years does not change anything. We are not talking about a case where the evidence is no longer able to be located within that five years. There's simply no change in the State's position from the time of 2013 to 2018. And specifically the statute does not include a statute of limitations. That was intentional.

So we can argue whether laches evens applies here. I would submit it does not. It was something that could have been resolved very easily if the legislature had wanted to include a statute of limitations. But they did not, simply because of the nature of these cases where this happens and genetic testing is available later on that wasn't available at the time of trial.

So Your Honor, I would submit that no, laches is not applicable here because there is simply no prejudice to the State with that delay of five years from 2013 to 2018.

The final thing that the State raises is the statements of Mr. Anselmo in his parole board hearing back in 2005. These are not statements that should preclude Mr. Anselmo's requested relief here.

First of all, the timing of that parole hearing is very relevant. The parole hearing was December 14, 2005. Mr. Anselmo had just had a request for testing denied in the prior year, so the statutory remedy was not available to him at that time. And he made statements to the parole board, like many of these defendants who come up for parole during the long terms of their sentences. It's widely known that there are false confessions, there are statements to parole boards that even secure early release on parole for defendants convicted of felony crimes who are later found innocent of those crimes through genetic testing. That should not preclude Mr. Anselmo's relief here.

And again, that is not something listed in the statute for consideration of whether or not to grant the petition for genetic testing. The statute does not say that the relief is unavailable to a defendant who has confessed at trial, entered a guilty plea, made statements to the parole board in support of his release. That's simply not in the statute anywhere. So notably none of these things are itemized in the statute for consideration about whether or not to grant a petition for genetic testing.

And Mr. Anselmo has met the statutory factors. He's identified evidence, he's identified a reasonable possibility that he would not have been convicted or prosecuted if the genetic material was tested at the time of trial, he's identified the type of testing, and he's also submitted statements that this

testing was not available at the time of trial.

Mr. Anselmo should be provided the opportunity to establish that he is innocent. And we are just at the very early stages of this. We just want the evidence to be tested so Mr. Anselmo can have that opportunity to make a motion for a new trial or whatever else comes later on down the road. So for those reasons, Your Honor, we would ask that you grant the petition and order the evidence be tested.

THE COURT: Were any of the cases that you identified on page 6 in footnote 4 from the registry, were those Nevada cases, or do you know?

MS. GAMBEE: One moment, Your Honor.

THE COURT: In particular, the, towards the end, actually it's footnote 5, where you identify the John Duvall defendant that had admitted guilt twice to a parole board before he was exonerated.

MS. GAMBEE: Off the top of my head I don't know, Your Honor. That's something we could submit additional briefing on if you would like.

THE COURT: I was, I didn't want to reach a conclusion, but I noticed that the citation was University of Michigan. I was just curious more, because frankly I was somewhat surprised by that.

Okay. Anything else?

I want to make sure, just a minute, that I have asked

you my questions.

I did ask them. So Miss Cate.

MS. CATE: Thank you, Your Honor. So first I'd like to address subsection 3, which is what counsel started her argument with as well, on whether the petition even satisfies the statutory requirements. And the first part, just in subsection 3, the petition cannot contain any material misrepresentations of fact. And as the Court hit on, petitioner has to have a good-faith basis in relying on particular facts or requests.

During argument, the argument was well, we didn't necessarily say Mr. Anselmo was categorically excluded based on the testimony at trial in our petition. That's false. Page 5 of the petition says importantly, Dr. Labaster (phonetic) opined that the contributor of the semen was either sterile or had received a vasectomy based on the lack of sperm in the semen sample. At the time of trial Mr. Anselmo's seminal fluid was examined, and the presence of sperm was identified in the sample. Meaning that Mr. Anselmo could not have been the source of the sterile semen found in Miss Hiler.

That's false based on the record. And so that assertion was important to this Court when you originally held a hearing on this matter. In fact the Court, on page 5 of the Court's order in that March order, talked about the specific evidence and whether Mr. Anselmo met the standard. But the Court said in pertinent detail the Court finds persuasive the original

testing of semen found in Miss Hiler belonged to a individual who may have been sterile or recently had a vasectomy, neither of which applied to Mr. Anselmo. Then the Court concludes that if testing was available, exculpatory results would be obtained.

So this is a presentation that is material, because if the Court relied on that, and as the State pointed out, that's just not the substance of what the doctor's testimony was at trial. The doctor testified actually first that the reason sperm wasn't found was because of the degenerative nature of sperm cells and then in that sample. But the doctor knew that it was seminal fluid associated with a male due to testing that was done, but there was no actual semen. And the doctor talked about where Miss Hiler's body was found, kind of the nature of being outside for a period of days prior to being found could impact the sample, and explained that as a first reason why he suspected that semen wasn't found in that sample.

Then the doctor said, I think responding to a question, I believe, on cross-examination, was that well, yes, it's possible that the contributor was sterile or had a vasectomy. So there's the two potentials.

But that wasn't what was represented. What was represented by Mr. Anselmo is it wasn't him because the contributor was sterile or had a vasectomy. And that is in their petition, and that is what was relied on by this Court to even start this process. And it's false.

Mr. Anselmo contends that he simply has a duty to tell the Court what's helpful to his petition. That's false. Again, the statute requires that he has a good-faith basis in relying on the facts for his request.

Also the State would submit that's a candor to the Court issue. If you are representing that it couldn't possibly be him based on the evidence at trial, and that claim is just simply belied by --

THE COURT: But are they saying it can't possibly be him, or are they saying there's no material misrepresentation of fact that he has a good-faith basis for relying on particular facts? I mean it doesn't say that petitioner has to state every fact that's against them. The statute very clearly says that he can rely on particular facts. And I understood their argument to be not that it could not absolutely be him, but that there's a reasonable possibility he would not have been convicted. I see those a bit differently.

MS. CATE: I agree. I think there's, the assertion in the petition originally was that it could not have been him categorically. Now that position has been walked back slightly, and now the argument is actually repeatedly could not, you know, could, there's a lot of reference to could, not necessarily the reasonable probability standard. You know, these could show, these could show, well -- I mean I'll move on from that point. But I think that is important, Your Honor. You did rely on that

specifically in your original order, and it's belied by the record if nothing else.

THE COURT: Let's go back to this language that is included in NRS 176.0918. Does your argument change based on the use of the word particular, or two words, particular facts? To me that doesn't say all facts, but actually indicates that the petitioner can utilize particular facts.

MS. CATE: Right. It says before that you have to have a good-faith basis to make your assertion.

THE COURT: So how do we determine if it's a good-faith basis? Is it something a person simply has to include in their declaration, or is it the process that the Court considers what you have now presented? Because obviously at the time the first order was written, I didn't have the benefit of the State's response, and nearly inadvertently foreclosed it, but I do now. And so does this statute then compel a court in considering this to really move on from what was stated in the petition but actually to compare it to the record?

MS. CATE: So I actually think it does, because the statute provides that the Court can dismiss the petition without even hearing from the State. It's only when the Court is going to consider whether to grant the petition that then the State's response is triggered after those inventories are filed. So I believe that kind of principle is a reliance on the record to provide the Court with a basis, a good-faith basis to even move

into this process, to even hold the inventory hearing to even have the State respond.

But we are here today, the State has responded, you have the benefit of the record, the State's response, and so certainly you can make the decision now that you have that. It's just, you know, part of the State's argument is he didn't satisfy it initially.

THE COURT: I understand.

MS. CATE: And so that's where that's coming from, Your Honor.

But I do want to address, without belaboring it too much, but subsection (b), so 3(b), the rationale for why a reasonable possibility exists that petitioner would not be convicted if exculpatory results had been obtained.

THE COURT: But it says would not have been prosecuted or convicted, right?

MS. CATE: Right. And I mean I think in this case a lot of argument, well, maybe it's prosecuted too, but certainly convicted, because we have the benefit of the trial record. And the problem again that Mr. Anselmo has is he can't satisfy this portion of the analysis either, and didn't on his petition, but certainly can't if the Court considers the actual record in the trial, because exculpatory results were presented to the jury. The jury heard from the doctor that Mr. Anselmo had sperm in his sample. They also heard that there was no sperm present in Miss

Hiler's body. That's exculpatory. That's not saying that Mr. Anselmo was obviously the contributor.

Now, the jury heard that Mr. Anselmo's sample, he had a low-level sperm count, under kind of the general population of males, and due to the degenerative nature could have reasonably concluded that it was still Anselmo that murdered and potentially raped her because of the evidence. But that was exculpatory. That fact that the doctor said the sample is, for Mr. Anselmo, has sperm, Miss Hiler's doesn't. That's exculpatory.

So that was a big reliance, you know, of Mr. Anselmo bringing this forward is well, I'm not sterile, I didn't have a vasectomy, so it could not have been me. But that information wasn't presented to the jury, and the jury didn't believe it. The jury decided, a reasonable conclusion, chose to decide it was still Mr. Anselmo who murdered Miss Hiler.

THE COURT: Does it make a difference that even if there was exculpatory information provided, it isn't the nuanced and very specific information that DNA testing provides? As I understand there's, I want to say the phosphates or something that remains even if the sperm degenerated. But there is something that DNA can be compared to now that it wasn't available then.

MS. CATE: Your Honor, I am not a scientist, I don't know, because I think the sperm cells are what actually contain the primary genetic material. So if there are degenerate -- but

I don't know specifically the answer to that question.

THE COURT: So I think this is an important point, because in reading all of this, I was looking at if, like you say, he still had, now Judge Polaha, presented at trial that some exculpatory information, but he did not have the benefit of the kind of exculpatory information that a DNA testing would yield. It's just much more specific. And my perception was that that DNA test could still be done on the matter that is on the slide, and it does not actually have to be the sperm cell, but rather it can be done on the, I think it's called phosphates. So am I wrong about that?

MS. CATE: So the broader question of whether if there's a kind of more detailed exculpatory result available?

THE COURT: Right.

MS. CATE: So I think I will address that, because even if, and I can jump to that now. But the State's, the position of Mr. Anselmo is that his confession that he now claims was false was what essentially the case conviction was based on. And so my, and the State's position is that even if exculpatory results were obtained from the DNA sample from the pantyhose that Mr. Anselmo's DNA cells, skin cells were not on the pantyhose or it wasn't his hair, the State submits to this Court, based on the record, that there isn't a reasonable probability that he wouldn't have been convicted. In other words, he would have been convicted anyway, and it's because of all of the facts.

When you look at the actual trial record as a whole, it was not based on Mr. Anselmo's confession only that he was convicted. And so I think that's important to kind, for the State to highlight a few of those facts.

THE COURT: But is that for, procedurally, is that for a day in the future in response to a motion for a new trial? Or is that a question that's for determining whether or not testing is appropriate? Because that answer can still, even if they are granted the opportunity to get the testing, there still can be a denial of new trial, and it seems to me these same arguments come up, right?

MS. CATE: Right. But we don't get there, and I think that's because subsection (b) does say that there has to be a reasonable possibility exists that petitioner would not have been prosecuted or convicted if those exculpatory results were presented. But that requires the analysis of the record.

THE COURT: Doesn't it actually say the petition must include this? Not whether or not we test every possibility of whether he would have been prosecuted or convicted. I mean is this a procedural basis, like here's why, doesn't it say that they just have to provide the rationale for why reasonable probability exists? Is it your position that, with regards to the statute, that the Court actually determines whether he would have or would not have been prosecuted at this time?

MS. CATE: Yes.

THE COURT: Or convicted. Okay.

MS. CATE: Your Honor, I think that goes along, I think that's pretty consistent with case law concerns petitions, the supreme court's case law regarding the importance of finality of convictions. This is a very limited basis for relief. And the legislature has given this Court the authority to dismiss a petition if it doesn't meet what the requirements are.

But I would also point the Court back to that there isn't a material misrepresentation of fact. That takes into account the requirement of the Court to consider the record below and determine whether these are actual facts that entitle petitioner to relief. Because what could happen is we have petitions filed on this and then genetic marker tests ordered. That's not what the statute wants. The statute is very clear that there actually has to be a number of things at that point and an analysis by the Court before that can go forward.

THE COURT: So where in the statute does it say that the Court has to do that analysis?

MS. CATE: Your Honor, again I would refer to subsection 3.

THE COURT: But subsection 3 says the petition must include without limitation. It doesn't say that the Court has to do an analysis of A, B, C, D, and E. It just says they have to put it in their petition.

MS. CATE: So, but on subsection 4, the Court can

dismiss the petition if it doesn't meet the requirements set forth in this section. And so I think kind of the reference to the facts, or my position, excuse me, remain the same. Reference to the facts, the good-faith belief, all of that gives the Court the ability to assess that and weed out these petitions that are improper. And that's consistent with other post-conviction authority as well, and that the Court has to do an independent assessment. And that's in Chapter 34.

But, so if I do turn to the facts, Your Honor, why it is important to consider the actual, the entirety of the record, Mr. Anselmo, like I said, wasn't convicted simply because of his confession. There were circumstances kind of surrounding his acts prior to trial that came, or prior to trial, excuse me, prior to Miss Hiler's disappearance, his actions around finding Miss Hiler, the information that came about related to her belongings and his unique knowledge about where certain things were found that could only be, could only occur if he was somehow involved in the crime.

THE COURT: And those are documented in the police reports, right, that were attached I think as your Exhibit 2?

MS. CATE: Actually, Your Honor, I didn't attach police reports. I think that's a hearsay issue.

THE COURT: Did you attach the -- okay, I'm sorry.

MS. CATE: I refer specifically, these facts do come out in the State's recitation of the facts at trial. And I won't

go too long, but I do want to highlight a couple.

July 14, the night before or early morning before Miss Hiler disappeared. Patsy Brett observed petitioner in the parking lot of the Crystal Bay Club hiding behind a car. It was about 3:00 a.m. She testified she had just gotten off work, very suspicious, it scared her. That was the same parking lot it turns out that Miss, that the car that Miss Hiler was driving that day. It's not her car.

THE COURT: Miss Weider's (phonetic) or Weider?

MS. CATE: That's right. Her car was found where the steering wheel was bent, there was markings on her car that they thought maybe the tires had skidded, the clutch was out, the brake lights were on. Very odd circumstances. That is where, that parking lot that Miss Brett referred to the night before is where she saw petitioner lurking at about 3:00 a.m.

On the 15th, so after Miss Hiler's roommates reported that she was missing, and police officers are in the parking lot with two of the roommates, and talking to them about, you know, their concerns, petitioner actually approaches. This is again early morning hours after they had gotten off work. This is when Miss Hiler didn't show up to pick up her roommate. And petitioner approaches officers again in that same area, same vicinity, and asks about ex-felon registration. And in the transcript, the officers are saying it was odd generally, I'm paraphrasing, but expressing some concern over why this person

would be approaching in the middle of the night to ask about ex-felon registration. So that's the next early morning hours, and that's the same early morning hours that Miss Hiler disappeared.

Then you have the 17th where again in the early morning hours Mr. Anselmo approaches security for the Crystal Bay Club, and he tells them he had seen a woman dragged off with a male, and, you know, so he tells them we should go look for them. So the first security officer he approaches was Mr. Greenwald (phonetic). And Mr. Greenwald got another security officer involved, Mr. Rose, and police ended up searching too, but they all started searching the area. And it seems from the record that Mr. Rose spent more time with Mr. Anselmo during that search. And Mr. Rose noted that it was really heavy brush, but petitioner knew where he was going and was very determined about which areas they should search, they needed to search by this cabin, very particular.

And so what was actually most interesting to me when I was reviewing the transcripts was Mr. Rose's recount at trial about how the body was discovered, how Miss Hiler's body was discovered and the facts surrounding that. And it was that he -- so Mr. Anselmo wanted to continue searching. And it seemed the search had kind of died down.

Mr. Rose and Mr. Anselmo go back to Mr. Rose's office, Mr. Rose is going to write a report. Mr. Anselmo, he wants to

keep searching, and he asks for a flashlight. Mr. Rose has to dissuade him it's the middle of the night. Mr. Anselmo insists and takes the flashlight and leaves. He returns in 15 minutes and says he found Miss Hiler's body, or he found a body.

So then Mr. Rose follows Mr. Anselmo to this location. And Mr. Rose said it took 10 minutes to get where Mr. Anselmo found the body. Now he had only been gone for 15, but Mr. Rose said it took 10 to get up there. But Mr. Rose commented on how unusual it was that Mr. Anselmo could have found this body, given where it was, what was going on, the dark, and, you know, just the manner. And he commented on how calm Mr. Anselmo was and just odd. And that came across in that testimony. And then I think Mr. Rose said it was like finding a needle in a haystack. That's how he --

MS. GAMBEE: Your Honor, I have to object at this point, because it sounds a lot like a closing argument of the initial trial. Just to put that objection on the record that that's not the purpose of this petition hearing to go through the sufficiency of evidence on the underlying trial, but rather to determine whether there is a reasonable possibility he would not have been convicted with the testing of the evidence. That's what we are here on today.

THE COURT: Your objection is noted.

I'm going to allow you to continue.

MS. CATE: Thank you. Finally, I'm almost done with

the facts, finally, the other kind of thing that is beyond Mr. Anselmo's confession that really was I believe strong in this case was that Mr. Anselmo knew where some of Miss Hiler's items were that were not visible, they just weren't visible to the search. And as the State put forth in its response, searches occurred in the few days after Miss Hiler's body was discovered.

But one of the most critical things or striking things to myself when I read the transcript was that Mr. Anselmo knew where Miss Hiler's keys were. He threw them into the lake and described where he had done that, and scuba divers actually found her keys subsequently based on Mr. Anselmo's description.

THE COURT: Doesn't he later say, though, that somebody asked him to do that?

MS. CATE: That's what my next point was, Your Honor, is that he, it either, I mean now he's claiming he just had no involvement, but his knowledge of the keys either, as he testified at trial, was because he was an accessory after the fact, he helped Mr. Scores get rid of Miss Hiler's belongings, but he knew where the body was, and that's why he got there so quickly. Or it says something else.

And that was presented to the jury. As Mr. Anselmo testified, and the State would submit uncredibly, because he said that he ran into Mr. Sores, Mr. Sores forced him essentially to help hide some of the evidence and threatened to kill him and all of those things. And then in the State's rebuttal case, as the

Court saw from the response, the State disproved that Mr. Sores was anywhere in the area.

So my point in going through that all that, Your Honor, is that he had a connection to Miss Hiler, even if just limited to that those keys. But that had to be explained at trial, and the way that was explained was his testimony about Mr. Sores. But there is a connection.

So even if the jury heard exculpatory information, which it did, the jury heard about the semen, as the State's already argued, the jury heard about the hair samples, that the hair didn't compare to Mr. Anselmo's, and that's actually in Mr. Anselmo's petition, that the hair samples did not match Mr. Anselmo's samples, or that Mr. Anselmo's fingerprints weren't found on the vehicle, all that information was available. The jury believed, based on, the State would submit, all the circumstances that the State's outlined, that it was Mr. Anselmo because of the way he, you know, thinking about the way he was lurking, it was circumstantial evidence. But the jury can certainly rely on circumstantial evidence to find guilt beyond a reasonable doubt. That happens frequently, I would say.

So to now claim that there's a reasonable possibility that had exculpatory results been presented, that the jury would have not convicted him? The State submits that's just, if you look at the record, that's just not true. And so the State submits Mr. Anselmo hasn't satisfied the general statutory

requirements for a petition, so it should be dismissed on that basis.

I won't spend too much time on the other arguments, except that with respect to laches and in post-conviction matters the State doesn't have to prove that, essentially prove the basis of laches or prove that we are harmed. Although I would submit to Your Honor if Mr. Anselmo is successful, prosecuting him for murder 48 years, 50 years after he was convicted would certainly be a problem for the State and meet the standard.

But in post-conviction matters if five years has passed, the State can affirmatively assert laches without any, and I cited that in my brief, but can affirmatively assert laches, and that is a rebuttable presumption that actually the petitioner has to disprove. So the State has no burden except to assert it and provide the petitioner the ability to respond, which is today, which is their reply brief. But the State has no affirmative burden with respect to laches.

THE COURT: So you are saying although there would be prejudice if you had to put on the case again, that you don't have to even assert that, because five years have passed, and you can simply move to dismiss based on laches.

MS. CATE: That's correct.

THE COURT: And then the burden shifts to them.

MS. CATE: That's correct. And then Your Honor touched on this, and I would also argue kind of the timing of the

petition does go to the State's laches argument that in 2013 Mr. Anselmo was obviously aware of his ability, was trying to review evidence at the sheriff's office, and didn't file his petition for five years. That does go to the laches argument.

But also just the general, and the State cited it, but the general case law in respect to post-conviction petitions and finality of these convictions is that the supreme court has recognized that there's a new statutory requirement created that a petitioner who is challenging kind of their conviction, their judgment, generally has a year to raise it once they are aware of it.

THE COURT: But was it our statute that used to or a different state statute that had a statute of limitations or a limitation period in the DNA request statute, but it has been specifically deleted from ours?

MS. CATE: You know, Your Honor, I don't recall in my review seeing that in the prior statute. And if it had been deleted, I think even if it was there originally and had been deleted, I still think in line with the current statutory scheme related to post-conviction petitions and current Nevada Supreme Court case law that this would still be under that timeline.

THE COURT: Wouldn't that defy common sense in a way, because anyone within a year would have had the ability to have that type of testing done.

MS. CATE: No, because, I mean again the supreme court

has repeatedly talked about the importance of finality, one time through the process. And so the idea here, and this is one of those cases, Mr. Anselmo has repeatedly been able to challenge his conviction. In fact in, I think he filed it here in 2005, but the supreme court affirmed the district court's dismissal of his petition in 2006. But he raised an actual innocence claim, he raised an unconstitutional argument related to his confession. So those are also issues that are potential law of the case problems for Mr. Anselmo and now making any claims on the basis of his alleged false confession.

And then finally, Your Honor, with respect to judicial estoppel, the central argument is people falsely confess so the Court should ignore the fact that Mr. Anselmo told all the justices of the supreme court, told the governor and the attorney general that he killed Miss Hiler and he was sorry. He got relief, and this Court should now ignore that, just because sometimes some people falsely confess. Your Honor, that's just not a reason. Judicial estoppel was created for the integrity of the judiciary and integrity of the courts, and allowing Mr. Anselmo to benefit from one assertion and turn around and try to benefit here is the very thing judicial estoppel is designed to prevent.

I want to make sure I addressed all of my other little notes, and I think I did. And so, Your Honor, unless you have any other specific questions for me, I would submit.

THE COURT: Let me just flip through your opposition. I have asked them all that I had flagged.

MS. CATE: Thank you.

THE COURT: Counsel.

MS. GAMBEE: Your Honor, many of the State's arguments in opposition to this petition for testing of the genetic material are actually arguments in opposition to a motion for new trial, which is not before the Court today. Those are not the arguments that are at issue or in play today. The Court is not being asked today to verify the sufficiency of the evidence upholding Mr. Anselmo's conviction. Rather the question is whether Mr. Anselmo presented a rationale for the reasonable possibility that he would not have been convicted or prosecuted if exculpatory evidence had been obtained through genetic testing. That's the issue today.

And what is at stake here is the possibility that Mr. Anselmo is actually innocent. I would submit that that outweighs any burden to the State. I didn't hear any harm that the State would suffer if this testing were to go forward. The challenges in putting on a new trial are more appropriately evaluated in connection with a motion for new trial, not necessarily this petition. Those challenges, interestingly, do not change whether Mr. Anselmo had filed his petition in 2013 versus 2018. I would submit the laches argument simply does not apply here. There is simply no difference between having the

petition filed in 2013 versus 20188 here.

And going back to the very beginning of the State's argument, just to clear up something about the alleged misrepresentation in the petition. The petition does not misrepresent that Dr. Laubsher's (phonetic), I'm probably butchering that, testimony. The petition states that Dr. Laubsher opined that the contributor of the semen was either sterile or had received a vasectomy based on lack of sperm in the semen sample. That is true. That is something the doctor did opine. Did he enter additional opinions as well? Yes, he did. But this is the relevant opinion on which Mr. Anselmo relies, his good-faith reliance on specific facts to show a rationale that he, there's a reasonable possibility he would not have been convicted had this testing taken place.

And the next sentence that counsel referred to on page 5 of the petition, at the time of trial Mr. Anselmo's seminal fluid was examined, and the presence of sperm was identified in the sample, meaning that Mr. Anselmo could not have been the source of sterile semen found in Miss Hiler. That is not a statement attributable to the doctor. That is part of the rationale supporting the reasonable possibility that Mr. Anselmo may not have been convicted had this genetic material been tested. That is not a misrepresentation of what the doctor opined to at the trial. It's just simply part of the rationale that Mr. Anselmo is required by statute to present to this Court.

We are not, we are also not arguing that Mr. Anselmo only has a duty to present facts in his favor. He has a duty to present specific facts that support his rationale for a reasonable possibility that there is, that he would not have been convicted had the testing occurred.

And Mr. Anselmo has presented the rationale. He has established that there is the possibility of exculpatory evidence that could be admitted in a new trial, after of course a motion for a new trial under the statute. Just because Mr. Anselmo had some exculpatory evidence presented at trial does not mean that he is precluded from presenting the ultimate exculpatory evidence, DNA evidence. And here we have that highest form of exculpatory evidence, DNA evidence.

THE COURT: And it does not match.

MS. GAMBEE: Correct, of course, which is what we are asking for. We are asking for the testing so we can get through this gate to see if the DNA evidence matches Mr. Anselmo. Because if it doesn't, that would be the ultimate exculpatory evidence. And that is the best evidence in this case, not the circumstantial evidence that was also presented at trial.

And we are not talking about just semen here. We are talking about other biological material, blood, fingernails, hair. We are talking about epithelial cells and skin cells that contain genetic material. And if Mr. Anselmo does not match the material on the pantyhose, the material on the purse, the

material under the fingernails, the hair found in the car, and the semen, that is certainly a basis to conclude that there's a reasonable possibility that had that 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 Mr. Anselmo, that also goes to Mr. Anselmo's defense that there was another person who committed these crimes, there was another person in the area who committed this crime, and specifically another person who had sex with the victim, which again calls into question Mr. Anselmo's confession on which the State relied heavily at trial. Mr. Anselmo confessed to also having sex with the victim, and if he did not, if that is proven to be false, that calls into question the entire confession that he made, in addition to the other circumstances that were laid out in the petition.

I'm not going to go through every single recitation of the fact that the State went through at the underlying trial, because I think that is more appropriate for a motion for new trial. But interestingly, the burden is not even as high as a reasonable likelihood of success on the merits, which is required for injunctive relief or anything like that. It's a reasonable possibility that Mr. Anselmo would not have been prosecuted. And here we are talking about DNA evidence, which was simply not available at all in any form in this 1972 conviction of Mr. Anselmo. Had a jury been presented with DNA evidence that

Mr. Anselmo did not match any of these samples, that there were multiple samples of DNA collected in this case, and that Mr. Anselmo does not match any of them, that certainly would have been relevant to their consideration.

And as far as the parole board statements, I think that we have adequately covered that. But these statements are something that happen in a lot of these cases where there is circumstantial evidence, there wasn't the ability for DNA testing, and in fact many of the defendants that take advantage of these statutory schemes for DNA testing do have false confessions in their underlying trials. And in those cases, DNA evidence has still been shown to exonerate those defendants. Just because the defendant made a false confession, just because the defendant made a statement in an attempt to obtain parole, it does not preclude other defendants from getting relief under these types of statutory --

MS. CATE: Your Honor, I have to object to the Court's consideration of any general other defendants type of evidence. I mean the Court's considering whether to dismiss the petition on the basis of the petition in the record, and I think the case law related to post-conviction petitions and what the Court needs to consider related to the sufficiency of those is based on the record and the petitions themselves, not some form of citation to hearsay or other alleged evidence. The Court can't rely on other alleged evidence.

THE COURT: I asked specifically if any of that was Nevada cases. I understand your broad statements. I consider them argument, and I'm going to give them the weight I deem appropriate. I absolutely understand your concern. I was frankly expecting to hear an objection before. But because it is in that footnote, and I asked you about it, I'm going to allow, but I'm going to give it the weight that I deem appropriate.

So I think you can move on.

MS. GAMBEE: More relevantly, Your Honor, that's not a factor that's listed in the statute. There is no preclusion on a defendant who has a false confession or who made statements to a parole board for bringing a petition under this statute in Nevada.

The most important consideration here, Your Honor, is that a man's potential ability to prove his innocence is on the line, and there's simply no harm to the State in allowing the testing of the genetic material. All of the arguments that have been raised by the State today really go to the next step after the testing of the genetic material, a motion for new trial. They are simply not relevant to the inquiry of whether to test genetic material that exists, that is still stored within the crime lab, or within the evidence vault, from the 1970s that can now be tested and have conclusive DNA results available to determine whether there's a reasonable probability or possibility that the defendant may not have been convicted.

Because there's no harm to the State, because all of the statutory requirements have been met with the petition, Mr. Anselmo requests that you grant the petition and order that the genetic material be tested.

THE COURT: One additional part of Miss Cate's argument that I would like to address is the concept that in a case where it's more than five years, that they do not have to show any prejudice, but rather they can assert laches, and then the burden shifts to Mr. Anselmo because it is a rebuttable presumption.

MS. GAMBEE: Your Honor, I didn't see that in the State's response, and so I wasn't prepared to address that specific argument today. I'm not sure what authority the State was relying on in that there is a burden shifting scheme --

THE COURT: Well, it's a rebuttable presumption. So the presumption is that if five years, this is what was relayed, in post-conviction matters if five years has passed, the State can assert laches. And that's a rebuttable presumption, so it would move to the opposing party to rebut the presumption of laches.

MS. GAMBEE: What was the case, Your Honor?

THE COURT: She did not indicate any. She identified the legal theory, but did not identify an actual case, which I'm going to address with both of you in a moment. Okay?

MS. GAMBEE: Okay. I'm not aware of any authority that suggests that, but even in the event there is a rebuttable

presumption and the burden shifts to Mr. Anselmo, Mr. Anselmo has an interest in being able to present the exculpatory evidence that was not available at the time of trial. If that were the case that after five years no defendant could pursue a petition under this statute, then effectively the statute would be rendered useless after five years. I mean there is a possibility for defendants to move under this statutory scheme even if there was genetic material that was available and it wasn't tested at the time of trial. But all of the defendants who have already been convicted and are sitting incarcerated or out on parole or what have you would have no relief under this statute.

It just seems that that would be something that the legislature would have put in the statute if they had intended there to be some kind of limitation, outer limitation on the time frame that a person convicted of a felony can bring a petition under that statute.

MS. CATE: Your Honor, I did want to state one thing. I did cite the statute in my response.

THE COURT: For the laches argument?

MS. CATE: Yes, Your Honor. That's on page 18.

THE COURT: Let me just look.

MS. CATE: It's lines 21 through 23.

THE COURT: So you cited the NRS 34.800, subsection 2, allowing the State to proves laches in response to petitions challenging the validity of a judgment or sentence if a five-year

delay, and this relates to post-conviction.

MS. CATE: It does. And I would note that the petition is titled a post-conviction petition.

THE COURT: Right. Actually, I should have recalled that, because I went back and looked at the name of their petition right after I read that.

MS. GAMBEE: Your Honor, that statute applies to a petition challenging the validity of a judgment of sentence. But this statute does not challenge the validity of the judgment. It provides a scheme by which we can test the genetic material. The procedural motion that would challenge the validity of that judgment would be the motion for new trial, so we are not at that point yet, arguably would be the motion for a new trial, and we are not at that point yet.

But in any event this statute is, yeah, this is challenging a sentence or a judgment. And that's not what we have here. What we have here is a petition for testing of evidence that is still available, still in existence, and it was not tested at the time of the trial. I would say if this even applies, which I dispute that it does, it would apply at a later date, not today.

THE COURT: So you are indicating although it was identified as a post-conviction petition, that NRS 34.800, 2, does not apply.

MS. GAMBEE: I would have to take another look at it,

but that's my understanding.

THE COURT: Okay. Thank you. Thank you, counsel, very much for answering my questions. Obviously on the one hand I respect the seriousness of this case. I have to balance it on what rights are afforded to a petitioner and recognizing that this was a very serious crime that he was convicted of.

What I would like you to do is, as a result of my questions and some of the points that I have focused on, if you have or you want to provide any more authority, I'm going to give you 10 days to provide supplemental authority. You don't have to. I just think I asked both of you some questions that I don't want to foreclose you from providing it. Why don't I do that 14 days. That's more consistent. We will do 14 days.

And then I want within, how much time would you need to prepare, each side to prepare a proposed order?

MS. CATE: Your Honor, may I clarify. Is that after we submit the briefs or just from today's date?

THE COURT: Either one. I mean you may choose not to submit anything. I just don't want to foreclose it, because I think a couple of my questions gave pause to both sides. So if you want to supplement, it's fine with me.

I'm sure you recognize I'm going to do some more of my own research. But I also was looking at the court schedule coming up in the next month. And I think that what I would like, and I'm going to tell you in advance, I rarely use it outright if

you provide me a proposed order, but you would provide the proposed order denying or dismissing, however you determine that you want to; you would draft a proposed order granting. So then, and I want them emailed to my assistant.

But I just thought in an abundance of fairness to both sides, because of a couple of my questions, that if you want to provide any authorities, you may, but you don't have to. There's not going to be any, I'm not going to make a determination either way based on whether you choose to stand with what you provided to me. So you have 14 days if you wish to provide any supplemental authority.

In addition, I just was asking generally, because I know everyone's schedules, certainly, I'm sure in all of your offices you are very busy, I want a very specific order. So how long do you think you might need, Miss Cate?

MS. CATE: Just, I'm not sure.

THE COURT: Do you want to do it after?

MS. CATE: Well, I can do it, I think maybe if I just submit it based on, I submit a proposed order and my post-hearing brief on the same day. I think that makes sense. Then it's consistent with what the State's argued, I guess.

THE COURT: I'm requiring simultaneous. I'm not going to go to the back and forth. So why don't you both do that, then. Fourteen days, if that gives you enough time, you will do any supplemental authorities. I'm not looking for a big

document. There's some things I asked specifically if you have any, I want the authority. I just want you to have the opportunity to provide that to me, because I think some of my questions may not have been anticipated. So in fairness to both sides I'm going to allow you to do that.

On the same date you will provide a proposed order. There's no requirement that you circulate that proposed order to the other side. I'm going to take your orders, review them, and then utilize that information to draft my order. And some of the reasons why, frankly, I feel as though I can allow additional time is just the very essence of how much time has gone by in this case. I think it's very important to get this right, because I'm sure that there may be a request for relief if anyone is unhappy with what the ultimate decision is.

I would also like a written waiver confirming what was represented to the Court as officers of the court that Mr. Anselmo knowingly waived his opportunity to be here and the consequences that might result from the arguments and the petition. But I would like that to be submitted in writing as well.

MR. SMITH: Your Honor, would you like that for future hearings, that we obtain a waiver from our client every time we attend a hearing?

THE COURT: Well, I don't know if there's, I don't know if there's going to be more hearings. We will see after I make

my decision. But I think it's wise. I understand what the State is saying, that in their experience that nonappearances sometimes result in sequential filings with regard to second guessing what counsel did or did not. It's a simple document. I just think that if you can get a waiver for this hearing, we can address waivers in the future. You can discuss with him, he's not going to be two days or how many days into his job, and he's not wanting to lose his job. I mean that's what I heard from you. But I definitely heard what the State's concerns were, and I think it's an easy resolution.

MR. SMITH: Thank very much, Your Honor.

(3:05 p.m., proceedings concluded.)

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STATE OF NEVADA)
) ss
COUNTY OF WASHOE)

I, LESLEY A. CLARKSON, Official Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, DO HEREBY CERTIFY:

That I was present in Department No. 6 of the within-entitled Court on Tuesday, February 25, 2020, and took stenotype notes of the proceedings entitled herein and thereafter transcribed them into typewriting as herein appears;

That the foregoing transcript is a full, true and correct transcription of my stenotype notes of said hearing.

Dated this 27th day of February, 2020.

/s/ Lesley A. Clarkson

Lesley A. Clarkson, CCR #182

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Attorney for Respondent

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

MICHAEL PHILLIP ANSELMO,

Petitioner,

v. Case No. 271359

THE STATE OF NEVADA Dept. No. 6

Respondent.
_____/

THE STATE'S POST-HEARING BRIEF

COMES NOW, the State of Nevada, by and through Marilee Cate, Appellate Deputy, and hereby submits this Post-Hearing Brief pursuant to the Court's oral order on February 25, 2020. This Brief is based on the pleadings and papers on file with this Court, and the following points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

This Court should dismiss Michael Phillip Anselmo's (hereinafter, "Anselmo") Petition for Genetic Marker Analysis for the reasons stated in the State's Response and at argument on this matter. During the hearing, the Court inquired regarding its ability to weigh the evidence at trial when considering a genetic marker petition. The State submitted that the language of NRS 176.0918 permitted the Court to consider the

Petition in light of the record in this case. Anselmo's counsel disagreed and essentially asserted that the Court should act as a rubber stamp when petitions of this nature are filed, even if the claims in the petitions are belied by the record. Anselmo's position in this regard is without merit.

To the extent that the Court believes the statute is ambiguous on this point, the Court should consider the purpose of NRS 176.0918 and the relevant legislative history on point. Indeed, "[w]hen interpreting a statute, the legislative intent is the controlling factor." *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (citation and internal quotations omitted). The starting point of the analysis is the statute itself. *Id.* When a statute is clear on its face, the court must attribute its plain meaning. *Id.* If the statute is open to two or more reasonable interpretations, then the statute is ambiguous and the court may look to legislative history in order to construe it in a manner that is consistent with reason and public policy. *Id.* If a statute is ambiguous, the court must examine the context and spirt of the law as an interpretive aid. *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 717 (2007).

Contrary to Anselmo's position, the purpose of NRS 176.0918 was not to allow genetic testing in all cases. NRS 176.0918 contemplates that the Court will act as a gate keeper and dismiss frivolous petitions. The legislative history reveals that the proponents of the bill contemplated that district courts should consider the record in determining the merits of a petition and that district courts should have the power to dismiss petitions that are without merit. As the State has previously discussed, prior to 2009, petitions for genetic marker analysis were not available to anyone other than an individual who was sentenced to death. In 2009, the legislature overhauled the statute

and expanded its scope to allow individuals like Anselmo to pursue a petition for genetic marker analysis.[1]

At the first hearing on the bill in 2009, one of the proponents, Kate Kruse, discussed the balance between creating a remedy for truly innocent people and preventing a flood of litigation. *See* Exhibit 1, Minutes from March 10, 2009 Assembly Committee on Corrections, Parole, and Probation Hearing on A.B. 179, pg. 23. Ms. Kruse indicated that the proponents of the bill were amenable to the District Attorney's Association amendments, which were partially intended to resolve the statute's prior perceived restriction on district courts' ability to dismiss meritless petitions and avoid the State having to respond to frivolous petitions. *See id.* at 23; *see also* Exhibit 2, *Exhibit C to the March 10, 2009 Committee Hearing Minutes.* When explaining subsections (3) and (4) of the statute, Ms. Kruse noted that the subsection will assist courts when they sort through the petitions. Ex. 1, pg. 23 (concluding, "[i]n the event that there are petitions that are filed that do not have a basis in the case, the court can look at the face of the petition and dismiss it"). Ms. Kruse also reiterated that in order for a court to order genetic testing, "there must be a reasonable possibility that the petitioner would not have been prosecuted or convicted have the results been obtained earlier." *Id.* at pg. 26. In other words, the proponents of the bill and legislature contemplated that the district courts would evaluate a petition in light of the record before ordering genetic marker analysis. This Court should engage in the analysis contemplated by the legislature.

[1] Amendments were made to NRS 176.0918 in 2013, but not to the subsections at issue here. The 2013 amendments were focused on adding a right to appeal, as well as other minor amendments.

As discussed in the State's Response and at oral argument, the evidence in this case overwhelmingly pointed to Anselmo's guilt. Anselmo's defense lawyer, now Judge Polaha, highlighted for the jury the various pieces of exculpatory evidence. His efforts made no difference. The State maintains that even if some arguably exculpatory evidence is available from a "rape kit", hairs found in Ms. Hiler's roommate's car, Ms. Hiler's purse or pantyhose, etc., the evidence would not have made a difference given the other evidence of Anselmo's guilt that exists in the record. The jury rejected Anselmo's theory of innocence, and this Court should likewise reject Anselmo's most recent challenge to his conviction. Simply put, Anselmo has not demonstrated that there is a reasonable possibility that he would not have been prosecuted or convicted if exculpatory results were obtained earlier. Exculpatory evidence was presented to the jury and they convicted Anselmo anyway. Anselmo's assertions are insufficient to require testing, as they are belied by the record in this case. Therefore, the Court should dismiss Anselmo's meritless Petition.

AFFIRMATION PURSUANT TO NRS 239B.030

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

DATED: March 10, 2020.

CHRISTOPHER J. HICKS
District Attorney

By /s/ MARILEE CATE
MARILEE CATE
Appellate Deputy

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on March 10, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Sydney R. Gambee, Esq.

Jessica E. Whelan, Esq.

J. Robert Smith, Esq.

Joshua Halen, Esq.

/s/ *Tatyana Kazantseva*
TATYANA KAZANTSEVA

INDEX OF EXHIBITS

Exhibit 1, Minutes from March 10, 2009 Assembly Committee on Corrections, Parole, and Probation Hearing on A.B. 179, 38 pages

Exhibit 2, Exhibit C to the March 10, 2009 Committee Hearing Minutes, 6 pages

EXHIBIT 1

EXHIBIT 1

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON CORRECTIONS, PAROLE, AND PROBATION

Seventy-Fifth Session
March 10, 2009

The Committee on Corrections, Parole, and Probation was called to order by Chairman William C. Horne at 8:13 a.m. on Tuesday, March 10, 2009, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/75th2009/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman William C. Horne, Chairman
Assemblyman Tick Segerblom, Vice Chair
Assemblyman Bernie Anderson
Assemblyman John C. Carpenter
Assemblyman Ty Cobb
Assemblywoman Marilyn Dondero Loop
Assemblyman Don Gustavson
Assemblyman John Hambrick
Assemblyman Ruben J. Kihuen
Assemblyman Mark A. Manendo
Assemblyman Richard McArthur
Assemblyman Harry Mortenson
Assemblyman James Ohrenschall
Assemblywoman Bonnie Parnell

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Allison Combs, Committee Policy Analyst
Katherine Malzahn-Bass, Committee Manager
Julie Kellen, Committee Secretary
Kyle McAfee, Committee Secretary
Karyn Werner, Committee Secretary

OTHERS PRESENT:

Chuck Callaway, Sergeant, Intergovernmental Services, Las Vegas Metropolitan Police Department, Las Vegas, Nevada
Karen Hughes, Lieutenant, Vice Section, Las Vegas Metropolitan Police Department, Las Vegas, Nevada
Bernard W. Curtis, Chief, Division of Parole and Probation, Department of Public Safety
P.K. O'Neill, Chief, Records and Technology Division, Department of Public Safety
Jason Frierson, Chief Deputy Public Defender, Clark County Public Defender's Office, Las Vegas, Nevada
Orrin Johnson, Deputy Public Defender, Washoe County Public Defender's Office, Reno, Nevada
Rebecca Gasca, Public Advocate, American Civil Liberties Union of Nevada, Reno, Nevada
Lucy Flores, External Affairs and Development Specialist, University of Nevada, Las Vegas, Las Vegas, Nevada
Katie Monroe, Executive Director, Rocky Mountain Innocence Center, Salt Lake City, Utah
Kate Kruse, Director, Innocence Clinic, William S. Boyd School of Law, University of Nevada, Las Vegas, Las Vegas, Nevada
Sam Bateman, representing Nevada District Attorneys Association, Las Vegas, Nevada
Renee L. Romero, Director, Forensic Science Division, Washoe County Sheriff's Office, Reno, Nevada

Chairman Horne:
[Roll taken.] We are going to hear two bills today: Assembly Bill 238 and Assembly Bill 179. Both of them are my bills, so it is William Horne day. Vice Chair Segerblom will be conducting the hearings.

We will start with A.B. 238.

Assembly Bill 238: Provides that persons who are convicted of certain offenses involving pandering or prostitution of a child are subject to lifetime supervision. (BDR 14-177)

Vice Chair Segerblom:
We will open the hearing on A.B. 238.

Assemblyman William C. Horne, Clark County Assembly District No. 34:
I am presenting Assembly Bill 238. This bill deals with lifetime supervision for pandering a minor. I am not going to say that it is a simple bill, but the concept is very simple.

If a neighbor of yours were to go down the street in the neighborhood and solicit a 15-year-old to have sex and was discovered, he would be convicted of a sexual offense of a minor. He would have to report on the sex offender registry and be put on lifetime supervision until such time that he could petition to be removed from that registry. That time period is seven years. If that same person wants to have sex with a minor who happens to have been put out for prostitution, he would likely be cited and possibly arrested for solicitation of prostitution, but he would not have to register or be put on lifetime supervision.

I would like to think that those are equal crimes, because they are putting a minor at risk from something that we have put on our books that we are going to protect these minors from. Why should this person, who has decided to participate in this type of conduct, be protected because this child victim happened to have been a runaway, for whatever reason, or forced out on the streets to prostitute?

This bill is attempting to shine a light on these people. It is a risk that one is going to take if he solicits a prostitute. This prostitute may be underage. He may have to register as a sex offender for life if he chooses to conduct himself in this manner. Some people have told me that the age of consent in Nevada is 16 years of age. What about those kids who are 16 years old or older? The difference is that a 16- or 17-year-old who truly consents to having sex with an adult is different than a 16- or 17-year-old who is participating in an illegal activity. That is not consent, because a minor cannot consent to do an illegal activity. That is how I draw this distinction. This is a policy question for this Committee on whether or not we want to protect those minors who are not afforded the opportunity to live in the suburbs and be protected by our general statutes on sexual offenses against a minor.

Sitting next to me is Assemblyman Hambrick, who had a similar bill. Instead of having two separate bills, he has agreed to be a primary sponsor on my bill. He is asking this Committee to amend his name onto A.B. 238 as a primary sponsor.

Assemblyman John Hambrick, Clark County Assembly District No. 2:
We are all familiar with Judge William Voy's attempts to address some of these issues in his family court in the Eighth Judicial District. His courtroom has seen, and I prefer to use this word only once, prostitutes. In the federal sector, they are called victims. He has seen them as young as 11 years old.

The teen sex trade is a disgrace to any state that tolerates it. I am thankful to Chairman Horne for adding my name as a primary co-sponsor. This scourge has got to be addressed. Civilized society has no place for the teen sex trade. It must be stopped.

Most of you know my background, and I come to this in a beat cop mentality. Some say that we are never going to stop it, not on our beat, but we must.

Vice Chair Segerblom:
Right now, it is illegal for someone to have sex with someone under the age of 16 years. Is that correct?

Assemblyman Horne:
That is correct.

Vice Chair Segerblom:
Does this change the penalty for prostitution or voluntary sex?

Assemblyman Horne:
The charge for sexual assault on a minor under 16 years of age is not going anywhere. That will still be there and still be applicable. However, what is different is that sex with a prostitute who is 16 or 17 years old will no longer be a consensual act. It will be a felony crime requiring lifetime supervision.

Vice Chair Segerblom:
Is this a knowing crime? If they are under 18 years of age, but the person soliciting sex did not know that, does that make a difference?

Assemblyman Horne:
I do not believe that should make a difference. We currently have statutory crimes for sex with a minor. Age of consent is 16 years of age, and under that it becomes statutory rape. We have all heard the stories of the gentleman who

goes to the nightclub, and the girl looked like she was over 21 years old and had a fake ID. He came to find out, after sexual relations with her, that she was under the age of 21 or even under the age of 16. He can be convicted of statutory rape. That is the level that we place on protecting these kids. It does not matter if he knew, if she lied with a fake ID, or if she looked older. This is a group that we are going to protect.

If you move that level of protection to these kids who are on the street, I think that the protection should be the same. The vast majority of the kids on the street, no matter their age, are not there of their own volition. They have been forced or coerced to be there, and I believe that level of protection should exist. How do we attempt to dry up this solicitation of minors? I believe that once it is understood that if the person is soliciting sex from a minor, and he would have to report if caught, it would stop people from seeking out prostitutes in the first place.

This is not going to affect the legal brothels that we have. Those operations are legal, and the proprietors of those businesses thoroughly vet their workers, and that should not be a problem. If there was a minor who was working at a brothel, someone would stand a chance of being convicted of this crime.

Vice Chair Segerblom:
Does this also include the pimp who puts the girl out there? Will they be subject to lifetime supervision?

Assemblyman Horne:
Yes.

Vice Chair Segerblom:
Because we are going to amend the bill to add Assemblyman Hambrick's name, are you interested in having anyone else be a sponsor?

Assemblyman Horne:
Anyone else who would like to amend their name onto the bill, I would be happy to have them.

Vice Chair Segerblom:
Assemblyman Cobb, do you want your name on this great bill?

Assemblyman Cobb:
Actually, I would.

Assemblyman Horne:
It was pointed out to me that this will have to be done in drafting later, to get the true intent of this bill because it incorporates *Nevada Revised Statutes* (NRS) 201.300 through 201.340. At NRS 201.300, subsection 3, it says that "this section does not apply to the customer of a prostitute." Obviously, that is not the intent of this bill; it is supposed to apply to a customer of a prostitute. We may have to amend the definition of "minor prostitute" in this bill in order to incorporate the "customer."

Assemblyman Hambrick's bill was basically the same bill, but his bill adds a conviction for an attempt to crime. That would be the amendment proposed to be blended from his bill into A.B. 238. Assemblyman Hambrick's bill does not have a bill number yet, but it is Bill Draft Request (BDR) 15-977.

Assemblyman Anderson:
Will we be seeing this in a mock-up?

Assemblyman Horne:
Yes, this will be in a mock-up ready for the Committee's consideration at a work session yet to be determined.

Assemblyman Anderson:
Assemblyman Hambrick is going to drop his bill?

Assemblyman Hambrick:
It is my intent to let it die. I do not want competing bills out there. I would like to see my bill merged into Chairman Horne's bill.

Assemblyman Carpenter:
Assemblyman Horne, could you explain the amendment with NRS 201.300? How would you amend that?

Assemblyman Horne:
It was brought up to me this morning that this section does not apply to a customer of a prostitute. I am not exactly sure how the drafting would go, but it would outline what a minor prostitute is. For a prostitute under the age of 18, in the context of this bill, it calls for lifetime supervision for those customers of the minor prostitute and those persons who put her out to prostitute. Right now, the draft does not include the customer, but we want the customer to be included for these penalties, in this context for minors. We will have an opportunity to look at that when we have the mock-up.

Assemblyman Carpenter:
It is probably there now to protect the legal brothels in the rural areas. We need to be careful how we draft this.

We have these laws on the books. How successful are they at getting convictions now?

Assemblyman Horne:
There are not a large number of convictions. I received a notice of eight arrests in 2008 from the Las Vegas Metropolitan Police Department (Metro). From the District Attorney's (DA) Office, there were 11 people charged with this crime in these parameters. That was the request that I had made to them. I was asked how much this lifetime supervision proposal was going to cost. The numbers were small, and until this bill passes, it is not a felony crime. We are looking at small numbers now.

Assemblyman Carpenter:
I represent the area where there are legal brothels. Every time I go to Las Vegas, it makes me wonder why things go on there that we are able to control in the rural areas.

I understand what you are getting at, and I have no problem with it as long as it does not reach into the places where brothels are legal. That is the best way to handle it because the police make regular checks on the brothels, and the girls have to see a doctor regularly. I think it is a better situation, and I want to make sure that we do not disturb that.

Assemblyman Horne:
There is no intent of going into the legal brothels in the rural areas.

Assemblywoman Parnell:
Am I reading this correctly that there would be a level playing field for both the pimp and the customer? Is that what this bill does as far as level of punishment and lifetime supervision?

Assemblyman Horne:
Yes. I think they are equally responsible. The customer is the person who has the demand, and the pimp is supplying that demand. They are on either side of the victim. Without this demand—the customer—the pimp has nothing to provide for this child. I think that they are equally complicit in this crime.

Assemblyman Anderson:
This trade in underage prostitution, even in a legalized system, is unfortunately growing tremendously. I think that even though we have taken steps in the past to protect those who are being forced into houses of prostitution, whether they are legalized or not, the police cannot be there 24 hours a day supervising the activities of those places. We have to be concerned about that and make sure that the pandering or transportation of these people through the state does not take place. We want to make sure that these perpetrators are charged. Does this not happen with this piece of legislation?

Assemblyman Horne:
I know that I have already said this, but it is not our intent to reach into the legal brothels. I do not think that anyone would turn a blind eye if someone was forcing minors into these legal establishments, nor do I believe that the operators of these legal establishments want those minors there. They do everything that they can to get them out of there. How bad would it be for business if they had minors in the brothel, and there was a sting, and their customers were arrested? The operators do not want that situation, nor do we want it. If somebody tries to dodge this by hiding this activity in a legal brothel, we need to punish them.

Assemblyman Carpenter:
They are going to lose their license to operate. You need to be very careful.

Chuck Callaway, Sergeant, Intergovernmental Services, Las Vegas Metropolitan Police Department, Las Vegas, Nevada:
We wholeheartedly support this bill. Lieutenant Karen Hughes, who is standing by in Las Vegas, can probably give a more technical side as to why we support the bill.

Karen Hughes, Lieutenant, Vice Section, Las Vegas Metropolitan Police Department, Las Vegas, Nevada:
The department supports this bill. We see the sexual exploitation of these kids every day. I do not want to get too technical, but I do want to go beyond some of the comments that have already been made in regard to the numbers. Last year in 2008, just our unit was able to identify 150 exploited kids who have been put into a life of prostitution. Many of those kids are from Nevada. Some are transported throughout the country to Nevada, and are exploited within our Strip Corridor in Las Vegas. They are not exploited into legalized houses of prostitution. This is specific to Clark County. It is alarming to us to see the number of kids who are coming into this lifestyle as young as 11 years old. Many are high-risk runaways between the ages of 11 and 15. They are being exploited by the pimps who consider them quite vulnerable. They are turned

out into a life of prostitution where they are soliciting customers and tourists within our corridor.

We support the bill wholeheartedly.

From a pimp's standpoint, these men are profiting off the backs of these young kids, and these kids are a special group of victims. They are damaged, and it is a difficult road to recovery for them if they do recover their innocence. In my unit, I have an entire squad that deals with nothing but child pandering cases, and we made 84 arrests last year of pimps and those who have exploited these kids in their life of prostitution. Some of them have been what we call the bottom girl in the stable; that is also a part of the recruitment and training of these young kids as they come into a life of prostitution.

We are making arrests. I cannot speak to the numbers of convictions, but I am sure that the Clark County DA's Office can attest that we were pretty successful, especially in child pandering cases. We charge for statutory sexual seduction. When these pimps recruit these girls into what they would like these young ladies to believe is a lavish lifestyle, the girls are sexually assaulted, beaten, and raped. That is typical behavior of these pimps. Lifetime supervision is appropriate for these types of offenders. They are pretty horrific.

I made a presentation last week to my department and the sheriff, and we spoke about quite a few of the cases that we are now putting together. The focus of my unit is on pandering and putting the violent offenders behind bars, and many of them prey on our kids. It is a feather in their cap when they have a child who is part of their stable. It is a strong statement when we can get a pimp in custody and sentenced, and if he is released, he has lifetime supervision. These pimps deal with each other and recruit from across the country, and lifetime supervision, in my opinion, is very appropriate.

Bernard W. Curtis, Chief, Division of Parole and Probation, Department of Public Safety:
We are in support of this bill. It is the right thing to do, and yes, there will be some impacts upon the Division of Parole and Probation, but it is well worth it.

P.K. O'Neill, Chief, Records and Technology Division, Department of Public Safety:
Within the division is a sex offender registry. I wish to express our concurrence with Chief Curtis, as the bill will have an impact, but we will absorb that. We think that it is the appropriate bill for us.

Vice Chair Segerblom:
While we say lifetime supervision, the same provisions that apply to other lifetime supervision will apply here, correct? There is an appeal process, and after a certain number of years one has the right to appeal for removal of his name.

P.K. O'Neill:
Lifetime supervision is handled by Parole and Probation. Yes, they would also have an appeal process within our tiering system of the sex offender registry.

Vice Chair Segerblom:
Do you know what tier this would be, or would it depend on the case?

P.K. O'Neill:
Under the current guidelines that we work under, I cannot say for sure because it depends on the criminal history of the individual. Most likely, because of the age of the victim, they would probably fall into tier 2 or tier 3.

Vice Chair Segerblom:
Are there any other individuals who would like to speak in favor of this bill? How about those in opposition?

Jason Frierson, Chief Deputy Public Defender, Clark County Public Defender's Office, Las Vegas, Nevada:
In this instance, we do not take issue with the effort in requiring that people who victimize those under the age of 18 have to register. Our concern is that we do not believe this bill does that. This bill relies on a statute, and that statute is the pandering statute in which subsection 1, paragraph (a) in NRS 201.300 provides that someone "who induces, persuades, encourages, inveigles, entices or compels a person to become a prostitute or to continue to engage in prostitution" is guilty of pandering. That is essentially a conversation in a bar.

While we have not, at the Public Defender's Office, represented a significant number of cases where the prostitute turned out to be under the age of 18, there is a reason for that. It is because we are often involved in representing those juveniles in a family court capacity, protecting them. However, we have, in the last couple of years, represented nearly 100 defendants charged with pandering where they were essentially having a conversation at a bar.

Paragraph (a) does not require that there be an agreement to exchange money, and it does not require that there be anything other than encouragement for someone to engage in what is otherwise a legal activity. In the counties where

it is legal, if you are encouraging someone to engage in prostitution, this will subject you to felony treatment in the statute.

My issue with the instant bill is that it is relying on that statute and possibly opening the door to require people to register as lifetime sex offenders who are not necessarily predators. We have no issue with isolating, identifying, and registering for life people who victimize children.

Our concern is that this bill opens the door, and we have had many examples where the judge has thrown out a case because the judge concluded that it was just a casual conversation at a bar. For every one of those cases, there are other cases that do not get thrown out or get negotiated because of fear of lifetime felony implications. We believe that paragraph (a) is the primary problem with this bill and its reliance on that statute. We are going after those who threaten or force someone to engage in prostitution with the pandering statute. Paragraph (f) deals with the exchange of money, and if someone enters into an agreement to convince someone to become a prostitute and discuss an exchange of money, that is illegal conduct.

To simply say, "There is an opening at the Bunny Ranch; I think you should go apply," and to make this a felony and to rely on this statute for lifetime supervision, the implication is problematic. I have spoken with law enforcement about the effort on putting "attempt" into the pandering legislation, which broadens it even more. If you encourage or "attempt" to encourage someone to engage in prostitution, that broadens it. We would be far less concerned if paragraph (a), which requires no exchange of money, was removed from the pandering statute. To some extent, that would eliminate the need for concern, litigation, and continued appeals on cases where it is a conversation at a bar. While that might seem like the exception to the rule, oftentimes that is what we, at the Public Defender's Office, deal with, the exception. Those cases are oftentimes negotiated down or dismissed, but it is a tremendous amount of litigation, and for those individuals, a tremendous amount of exposure over a broad statute that makes it a felony to have a conversation.

Assemblyman Anderson:
When I read NRS 201.300, I read paragraph (a) as a preliminary sentence which includes "encourages," and it gets progressively harsher with threats and exchange of money. It seems to me that one needs paragraph (a) and any of the other paragraphs in order to fit into the pandering definition.

Jason Frierson:
I would like it to be read that way, but, unfortunately, in practice, pandering is charged under any of those sections. I believe from paragraph (e) to

paragraph (f) it says "or." That means any of those criteria would meet the statutory requirements for pandering. The threats of force and other criteria are there but do not have to be relied on. If someone encourages someone to engage in prostitution, that meets the definition of pandering. It has been charged that way, at least in Clark County.

Vice Chair Segerblom:
Realistically, was this a conversation with an undercover officer?

Jason Frierson:
Yes, they are typically sting operations. This is where an undercover officer is at a bar, typically in a casino, and she is targeting people who she identifies as potential panderers. I have a transcript from a recent preliminary hearing where the undercover officer listed the factors that they look for, and it was the way the person dresses, looks, and their race. That was that particular officer's criteria for the type of person they would approach at a bar to engage in a conversation and to feel out whether or not that person was trying to pander them. This undercover officer would rely on language that, through their training, they believe is typical in pimp language.

In the course of representing individuals who are charged with this crime, we have obtained some of the materials that the officers rely upon. In particular, there is an article from 1979 that officers today rely on about pandering language, the lingo, to determine whether or not this person at the bar is saying things that would make him a panderer.

Vice Chair Segerblom:
When you said that they look for a certain race, what race would that be?

Jason Frierson:
That would be African American. An attorney in our office collected some statistics over the last couple of years of the pandering cases that we have had. While the typical pandering cases resulted in 25 arrests, it appears 36 percent of those were black males. The sting operations resulted in 66 arrests, and 97 percent of those targeted were black males. The officer testified that is what she looked for.

Vice Chair Segerblom:
If we eliminated paragraph (a), you would have no problem with the rest of the bill?

Jason Frierson:
Whether or not someone is labeled as a sex offender for life, I think, is within the purview of this body, and we would respect what the Legislature decides are appropriate levels of supervision. We would have no opinion on this bill if paragraph (a) was removed from the statute. We think that would make the statute much less problematic, and therefore, relying on it to register someone as a sex offender much less problematic.

Assemblyman Carpenter:
I think I am getting the sense of what you are saying. You are able to get many of these people off? Is that correct?

Jason Frierson:
A good percentage of all our cases negotiate down. There is no exception in this case. The difference in this case is that people are subjected to sex-related crimes, and for it to be that level of penalty, with lifetime consequences for something that could turn out to be casual conversation, there is much more at stake.

Orrin Johnson, Deputy Public Defender, Washoe County Public Defender's Office, Reno, Nevada:
I echo what Mr. Frierson said.

Rebecca Gasca, Public Advocate, American Civil Liberties Union of Nevada, Reno, Nevada:
We would like to echo the sentiments expressed by Mr. Frierson. Obviously, the idea that racial profiling is being used in order to address pandering is highly problematic. We hope that you take that into consideration. Beyond that, this statute and all the statutes that relate to pandering are extremely broad. It is likely that the legislative intent, when these statutes were created, was meant to be broad. When the Legislature changes the application of criminal penalties, it highlights how overly broad the pandering statutes are.

Currently, the crime of pandering is not limited to illegal prostitution. There is one exception, and that is in NRS 201.354, which makes an exception for licensed houses of prostitution. The definition of pandering, as it relates to prostitution, is not limited to illegal prostitution. Before you make any decisions on this bill, I encourage you to review all of the statutes that this bill is proposing to cover because, for example, NRS 201.300, subsection 1, paragraph (e) covers an individual who "takes or detains a person with the intent to compel the person by force, threats, menace or duress to marry him or any other person." What this would do is cover the young girl who is

17 years old and her boyfriend who is 18 years old and is encouraging her to runaway with him. As you see, the language provided there is broad.

Nobody knows better than this Committee the seriousness with which the label of "sex offender" affects a person's life. Because of that, we have challenged the application of the law as this body applied it in the 2007 Session. Currently, we are involved in litigation in the Ninth Circuit. There is a possibility that the question of the laws as currently written, and not yet in effect in the State of Nevada, could go all the way up to the Supreme Court. Congress, at a federal level, is reviewing the Adam Walsh Act, and that is with good reason. It is being applied in problematic ways across the nation. Being classified a sex offender can prohibit a person from living in a certain place, cause lifetime supervision, be extremely expensive, and in the cases in which a person who, under paragraph (a), for example, induces or persuades a person to engage in prostitution, which could be legal if in a rural county, they would be covered. For example, two young girls who are best friends are talking about what their future is going to be. If the two of them are inducing each other to become prostitutes when they turn 18, that would be covered by the way this statute is written.

Most importantly, the way that the pandering statutes are written, it shows that pandering is not actually a sexual act. What this does is, if this body decided to apply the definition of "sex offender" to the acts as delineated in the pandering statutes—although this panderer is not committing a sexual act but is inducing people or trying to get somebody to become involved in prostitution—is label that person as a sex offender even though they are not committing any sexual acts. This dilutes the pool of sex offenders and, as someone noted earlier, is meant to address those individuals who are the worst of the worst.

I am not here to say that some of the possibilities that might fall under the pandering statute are awful. I am saying that the pandering statutes are overly broad and are vague. When applying the sex offender definition to these statutes, I think that it opens up a Pandora's Box that this state should not open up.

Assemblyman Anderson:
Is it the American Civil Liberties Union's (ACLU) position that anything dealing with sex crimes should not be dealt with because of Megan's Law and pandering, and we should just ignore the questions dealing with the peculiarity of Nevada's rural counties that have legal prostitution? I do not think that any other state has legalized houses of prostitution, so we should stay away from the question entirely? Is that what your contention is?

Rebecca Gasca:
That is quite a complicated question. You are right, and as far as I am aware, Nevada is the only state where the majority of its counties allow prostitution. The application of different prostitution laws is very different in our state. Therefore, because we find ourselves in a unique situation—not only with prostitution but also with the sex offender laws that are currently in litigation—Nevada as a state should not move forward with an additional overbroad application of sex offender laws.

I am by no means an expert in this area, and for those of you who have detailed questions, I would be happy to put you in touch with Maggie McLetchie, who is the attorney currently litigating the Adam Walsh Act at the Ninth Circuit.

Assemblyman Anderson:
Maybe they are overly broad because Nevada has those 15 counties that have legal prostitution. We have always been careful in making accommodations for that. Nevada may not feel it is necessary to wait around for the determination of a particular piece of federal legislation. We can wait for the court system to operate forever, and we would never get anything done.

Rebecca Gasca:
What you said does ring true in that the body of law that covers issues of public policy is ever-evolving. This Legislature needs to make decisions at some point and has to make it in the best interest of their constituents. I am not here to determine how the history of Nevada law relates to the legalized forms of prostitution. I am sure that could be a doctoral dissertation. I am here to ask you to consider the implications of the way that the pandering statutes are worded and how that applies to the sex offender laws. It is a large question, but I am here with good intent to offer the information that we have.

Assemblyman Hambrick:
There was an analogy mentioned a few minutes ago about this bill affecting the casual conversation in a bar. Do you believe that an 11-year-old could have a casual conversation with a pimp about prostitution?

Rebecca Gasca:
I am not an attorney, and I am not involved in situations like that. I do not think that me saying yes or no would make a difference. It would be a pure supposition.

Assemblyman Hambrick:
That is what I am asking.

Rebecca Gasca:
Is it possible? Probably, and I understand that there is an intent of this bill to address highly problematic situations that have been identified in the public sphere. I go back to the way that these laws are written, and how overly broad they are. The targeting is not clear.

Assemblywoman Dondero Loop:
With all due respect, I think you missed the operative word "bar." I have three daughters, and I do not think any of them at 11 years old looked old enough to be in a bar. Rephrasing that question, do you think that an 11-year-old could sit in a bar and be induced into that situation?

Furthermore, the way I am reading this—and someone in the legal community will have to correct me if I am wrong because I am an educator—what if two 18-year-old girls are sitting in a bar who have fake IDs, and they are talking to each other about becoming a prostitute. Using the language of NRS 201.300, a panderer "induces, persuades, or encourages." In this case, "persuades" means, "I have decided to do it." "Encourages" means, "I have decided to do it." So does "compels." It does not mean that the person has just thought about it and did not do it. Someplace along there, the action takes place, and that is the part that is escaping me when I am hearing the opposition.

Rebecca Gasca:
The example of the bar was presented by Mr. Frierson. I could be wrong, but when I presented the example of two girls talking, I did not describe it in the setting of a bar because that could happen in the setting of a school. Teachers or principals could hear it, and after extracting it out of them, they both get in trouble, and one parent is extremely upset and wants their daughter's friend to be prosecuted because they believe that she is the one who is influencing this.

When it comes to finding 11-year-olds in a bar, it could very well be possible. An 11-year-old girl can get a fake ID and get into a bar. Young women these days are very mature looking sometimes, and as has been identified, problems such as that have been presented. I am not here to deny that there is an issue that is meant to be addressed by this bill. I am here to help put forward the recognition that these pandering laws, as currently written, are overbroad in their application to sex offenders.

I apologize to the Committee. I am not an attorney, so I cannot follow up on that last interpretation of paragraph (a).

Assemblyman Horne:
We know that this is not a court of law, and this will not be a rebuttal. I knew about the Adam Walsh dilemma that currently exists, and I asked Legal to keep that in mind in drafting this. I was aware of that when working on the bill.

Many of these Committee members have served with me on this Committee before and know that I am one of the first to step up when particular bills or statutes are not supposed to capture certain people or are too broad. In introducing it, I understand, as with all pieces of legislation, there may be some issues. With that said, I brought this bill with the best intent, which was primarily to protect our children who are out there being victimized in the realm of prostitution.

Vice Chair Segerblom:
I will close the hearing on A.B. 238.

[Recessed and reconvened.]

Vice Chair Segerblom:
I will open the hearing on Assembly Bill 179.

Assembly Bill 179: Revises provisions governing post-conviction genetic marker analysis. (BDR 14-869)

Assemblyman William C. Horne, Clark County Assembly District No. 34:
Today, I am presenting Assembly Bill 179. Assembly Bill 179 creates a post-conviction deoxyribonucleic acid (DNA) testing statute. Currently, Nevada provides for post-conviction DNA testing only for death row inmates. The Ninth Circuit Court of Appeals recently ruled that prisoners have a right to this testing if the evidence is in the state's possession and the evidence has the potential to prove innocence.

If this Committee remembers testimony from the Department of Corrections earlier this session, the cost per year, per inmate, for incarceration is more than $20,000. A recent study establishes an error rate of 36 percent in the criminal justice system. Besides being the right thing to do, it would be fiscally prudent to identify those innocent persons who are currently being incarcerated in our state.

With me today are Katie Monroe, the Executive Director of the Rocky Mountain Innocence Center, and Professor Kate Kruse of the William S. Boyd School of Law Innocence Clinic. They will go through this bill in more detail and describe

how post-conviction DNA testing is supposed to be implemented and the successes that they have witnessed.

There are some friendly amendments to this bill being presented today. In fact, this is a consensus amendment made by Katie Monroe, Kate Kruse, and Sam Bateman of the Nevada District Attorneys Association. One of them will outline, in more detail, the amendments which have already been passed out to you (Exhibit C).

I was first introduced to the Rocky Mountain Innocence Project last year when I was working at Snell & Wilmer. A couple of people there had benefited by this effort to find those individuals who have been wrongfully convicted. The DNA evidence at the time of their conviction either was not available or, due to less advanced technology, gave insufficient results. Those individuals were later exonerated for the crimes that they were incarcerated for and have since been released.

I will be relinquishing my seat to Lucy Flores at the witness table.

Assemblyman Cobb:
Do you want to take questions on the particulars of the bill now? I did not know if the witnesses were going to speak directly to the aspects of the bill or just provide a background on the Innocence Project.

Assemblyman Horne:
They are going to do both.

Assemblyman Cobb:
I will wait until they have the chance to testify.

Lucy Flores, External Affairs and Development Specialist, University of Nevada, Las Vegas, Las Vegas, Nevada:
As Chairman Horne mentioned, when we did this presentation regarding wrongful convictions, we did bring some exonerees who gave their story. That is what we are going to start with today. Unfortunately, we could not bring anyone in person, but we are going to introduce a short video regarding that.

In addition, we are going to talk about wrongful convictions and give a background on that, but we are also going to go through A.B. 179, which would extend Nevada's post-conviction DNA testing statute to noncapital crimes.

[Showed video (Exhibit D).]

I will hand it over to Katie Monroe to give an introduction on the wrongful conviction area.

Katie Monroe, Executive Director, Rocky Mountain Innocence Center, Salt Lake City, Utah:
[Provided PowerPoint presentation (Exhibit E).]

We investigate provable and credible claims of actual innocence in three states: Nevada, Utah, and Wyoming. We work in conjunction with the Innocence Clinic formed at the beginning of this school year that is based at William S. Boyd School of Law in Las Vegas, Nevada. It is directed by my colleague, Professor Kate Kruse. Together, we work on cases and investigate claims of innocence in Nevada.

That video introduced you to three exonerees from Texas. We have actually had, in our country, 232 DNA exonerations. The most recent happened a few weeks ago. What this means is that these individuals had claims of innocence and were able to get access to physical evidence that had been left by the actual perpetrator at the scene of the crime 5, 10, 15 years ago and had been collected at the time. The evidence either was never subjected to DNA testing because it was not available as a science or for any number of reasons was not subjected to DNA testing. DNA testing has the capacity to take the biological evidence left by the actual perpetrator and identify both the person who did not commit the crime and, in 50 percent of those exonerations, the actual perpetrator of the crime. These 232 individuals came from 31 different states and, on average, spent 12 years individually in prison; collectively they wrongly spent 2,789 years in our prisons.

DNA testing has established that our criminal justice system makes mistakes. It has also established a number of causes for those mistakes. You heard a few of them in the video. Eyewitnesses often get it wrong, and police often rush to judgment and latch onto the wrong person. Sometimes prosecutors cut corners to win a conviction, and defense attorneys often do not do justice for their client. Most importantly, DNA has established that a number of forensic sciences that we used to rely on in the past, like blood, hair, or fiber comparison, are not actually reliable.

DNA evidence has the scientific certainty to establish who did or did not commit a crime. As a result, it serves a variety of purposes. It does not just benefit the innocent prisoner, but it is also a service to the crime victim, law enforcement officials, and the public, because at the end of the day, no one wins when the wrong person goes to prison. When the wrong person is in prison, the right person is still free on the streets to commit additional crimes. The crime victim

has not had closure or justice because the person who actually committed the crime against them or their loved one has not been brought to justice and imprisoned. The public's faith in law enforcement is weakened drastically, and precious public funds are wasted on investigating, trying, prosecuting, and imprisoning the wrong person.

I wish I had a particular person at the table to speak to today, but I do not. Her name is Jennifer Thompson Cannino, and she is a rape victim from North Carolina who illustrates the importance of DNA testing to the crime victims better than anyone else. Jennifer was a college student in North Carolina, and she awoke one night to someone in her bedroom and was subjected to four hours of violent and almost fatal rape.

During the course of her rape, Jennifer decided that she was going to survive, and she was going to memorize the face of her attacker so she could put the person who was harming her in prison.

When Jennifer was finally able to escape her rape and get to the police that same evening, they asked her, "Can you identify your rapist." She said, "Absolutely." She had actually gotten her rapist into the kitchen and turned on a light. She had gotten him to relax a little bit in her house so she could get a good look at him. Unfortunately, as a result of the way eyewitness identification works, she started with a drawing, then moved on to photo identification, and then to a live identification. Jennifer actually picked the wrong young man, Ronald Cotton. This innocent young man went to prison for Jennifer's rape while the actual rapist, Bobby Poole, went on to rape eight other women in Jennifer's apartment complex before being caught and put in prison.

Ronald was able to get access to DNA testing 12 years into his prison sentence, and the evidence proved not only that Ronald Cotton was not her rapist, but that Bobby Poole was.

The reason Jennifer is not here is because she and Ron, after this horrible ordeal, became friends and now tell their story together. Last week they published a book called *Picking Cotton* that they wrote together and which tells the story, so they were not available to come here today.

I cannot overemphasize what DNA testing has the capacity to do for all of us in the room, and particularly for crime victims. When the wrong person goes to prison, they suffer a double tragedy. It is easy for us to say this as an Innocence Project, but our goal is not to assist a guilty person in prison. Our goal is to identify people in prison who may be innocent and give them a remedy to be rightly released. If that DNA evidence can exonerate an innocent

person, it can be put into a program, and ideally, the DNA can identify who actually committed the crime. We see this as a win-win situation for law enforcement officials. The DNA evidence has the capacity to prove who actually committed the crime with scientific certainty. If someone were to bring a false claim of innocence and get access to DNA testing, the DNA testing would have the capacity to shut down that case forever and bring true finality. Either way, law enforcement wins and the crime victim wins, because the innocent person is released, the guilty person is identified, or a false claim of innocence is put away forever.

I want to make one last policy point. Currently, there are 44 states that have DNA testing statutes. Often, when DNA testing is being considered as a statutory remedy for a prisoner with a claim of innocence, the concern is how many requests there will be. Will there be a flood of litigation? From our research, the answer to that is no. I have personal experience on this. I have worked on DNA cases in Virginia, Maryland, and Washington, D.C. I now work on them in Nevada, Utah, and Wyoming. The states that have tracked the number of requests for DNA testing have found that there have been very few requests. There are a couple of reasons for that. The vast majority of criminal cases do not have biological evidence that can be tested for DNA. This is because it was not the kind of crime where the perpetrator left biological evidence at the scene, or because it was not collected or preserved. In order to get access to DNA testing, the prisoner must meet standards. He must be able to say that he is making a credible claim of innocence and that evidence exists to prove that innocence. Most statutes build in a punitive measure for those who might be bringing a frivolous or false claim. The innocence projects that handle these cases have strict vetting processes because our goal is not to assist a guilty person. Long before we would ever seek DNA testing in a case, a years-long investigation has gone on to make sure that this prisoner has a credible and provable claim on innocence.

I would like to turn it over to my colleague, Professor Kate Kruse, who is going to walk us through the components of this bill.

Vice Chair Segerblom:
Ms. Kruse, do you have the proposed amendments?

Kate Kruse, Director, Innocence Clinic, William S. Boyd School of Law, University of Nevada, Las Vegas, Las Vegas, Nevada:
Yes, I have the proposed amendments.

I am going to talk about the post-conviction DNA testing statute in Nevada, the changes that we want to make to it and how those changes fit into the larger

picture of the remedies that are available for people who are claiming innocence in Nevada.

Like 43 other states in the nation, Nevada does have a statute that allows prisoners to petition for post-conviction DNA testing. However, unlike 42 of those states, Nevada does not have a remedy for prisoners not on death row, including all of the people you saw in the video, Ronald Cotton, and anyone who is not serving a death sentence. Nevada's statute applies only to capital cases. There are six states that have no statute, while Nevada and Kentucky have a statute that applies only to capital cases.

It is important to understand that once someone is convicted, innocence is no longer a question. For people who are not serving death sentences, the whole appellate process is focused on whether they got a fair trial and not on whether the jury reached the correct result, and one cannot admit new evidence into the process. The appellate courts are looking solely at whether or not the defendant received a fair trial based on the evidence that was presented at that trial. There is a habeas corpus remedy where someone can file a post-conviction habeas corpus claim, but that does not provide a remedy for someone who is claiming innocence. It provides a remedy for someone who claims that there was a constitutional violation in the way his case was handled.

The way that someone claiming innocence could get a new trial based on newly discovered evidence would be through NRS 176.515. This is a statute that allows one to petition a new trial based on newly discovered evidence. This is typically what new DNA evidence is; however, motions for a new trial under that statute are limited to two years. In 1989, the Nevada Supreme Court decided, for important policy reasons, that the court could not provide exceptions for that two-year limit.

The case *Snow v. State*, 105 Nev. 521 (1989), is interesting because it is based on an assumption, which was probably true at the time, that the longer the case is around, the staler the evidence becomes. It is not fair to the state to allow a petitioner to reopen a case after a certain amount of time because the evidence that could be used to reconvict them at a new trial has gotten older and less useful.

The first DNA exoneration was in 1989, the very year that the *Snow* case was decided. That first exoneration changed the way that people looked at older cases. Unlike other evidence, DNA testing gets more powerful as time goes by because DNA technology improves. Blood or body fluid samples can now be tested that could not be tested in 1989. In 1989, a significant amount of a sample was needed in order to subject it to testing. The technology has

improved so that only small amounts of biological material left at the crime scene are needed. We used to think that we did not have a test available for hair samples without the follicle, but now the technology is advancing to the point where hair can be tested even if it does not contain the cells in the hair follicle. We are at the frontier of developing technology to lift DNA off of fingerprints. There is an ever-widening pool of old evidence that could bring us answers that we did not have before, because the evidence is actually getting better rather than worse.

In 2003, Nevada passed the DNA testing statute that we currently have. It recognized that DNA was different from other kinds of evidence, and it created a procedure to petition for DNA testing if there is a reasonable possibility that new tests available now would change the outcome of an old case. If the DNA tests came back favorable to the petitioner, our DNA testing statute allows an exception to that two-year limit. There is a special exception for DNA because of the different type of evidence that DNA is. However, as we have mentioned, it applies only in capital cases.

I am going to talk about the five main changes that we are proposing to A.B. 179. We have had some time to talk to Mr. Bateman, who is representing the district attorneys (DA), and to work on some additional language which has been distributed to you (Exhibit C). We all find this language agreeable. We are all concerned about the balance between allowing a remedy for truly innocent inmates when new technology can shed light on their old evidence, and preventing a flood of people who could get in under the current language in the Nevada statute.

The first major change is in section 1; this would extend Nevada's post-conviction DNA testing statute to all category A and B felonies. If you go lower than that, you are talking about crimes that carry a maximum sentence of five years. This adds a subsection 3 to section 1. Subsection 3 creates a clear definition of what needs to be alleged in the petition for DNA testing. It basically says that, if a prisoner wants to ask for testing, in his petition he must state what evidence he thinks the state has, and explain why testing that evidence now would help support a claim of innocence.

The reason the petition needs to specify these things is because we want courts to be able to sort through these petitions. In the event that there are petitions that are filed that do not have a basis in the case, the court can look at the face of the petition and dismiss it. These are amendments in what is now subsection 4. It creates a sorting mechanism for the court. The court can dismiss petitions that are inadequate on their face, and can also appoint counsel in cases where a good claim appears to be alleged. I think that is especially

important so that someone can go through and negotiate with the DAs about what should be tested and the extent of testing. When the tests come back for many of these cases, there can be stipulations for a new trial or to dismiss the charges if the testing warrants it.

Assemblyman Carpenter:
Will you go back to the situation where you want to change it to an A or B felony and give your reasons?

Kate Kruse:
When you get down to category C felonies, the sentences are one to five years. I think the types of cases that are most important are older convictions where the technology has changed since the time of trial, and the person is still serving his sentence for that crime. It is not for defendants who could have gotten a test prior to trial—but decided not to—but for those where the technology has changed and a new test could be done. I think limiting testing to category A and B felonies would be responsive to the concern of the overburdened crime labs that they would be flooded with requests for testing; yet, it would leave a remedy available in those situations where post-conviction remedies are needed.

Assemblyman Carpenter:
As I understand it, in your handouts (Exhibit F), there are very few people who ask for this, especially when your organization, or an organization similar to yours, does a lot of pretesting.

Kate Kruse:
I share your concern to make the remedy as widely available as possible. However, it takes several years to develop the type of investigations that we are talking about. We do not see those types of investigations occurring in cases where the perpetrator is serving less than five years in prison. The one exception might be for inmates serving sentences for lower category felonies where habitual offender enhancements have created longer than normal sentences.

Assemblyman Carpenter:
It is okay if I disagree with you, right?

Assemblyman Anderson:
Justice Hardesty's Advisory Commission on Sentencing has a piece of legislation that they have been pursuing in this general area. One of the issues that they have been looking at is that the people who are incarcerated may want to pay for the testing themselves. Thus, the lower end crimes would fall into this category.

Oftentimes, individuals do not behave well inside the prison system, and as a result, they end up being there longer than two or three years. Part of our prison population may be serving longer than you were anticipating, and you would not want to cut off their opportunity. Are you trying to broaden this so anyone who feels they have been wrongfully convicted would now have the opportunity to have DNA testing done?

Kate Kruse:
Your questions may be better addressed when Renee Romero from the crime lab comes up. I believe that our willingness to limit this to A and B felonies comes from our desire to present you with some compromise legislation where everyone who is involved in these questions can agree to the terms. We would not oppose broadening the crime categories or broadening them with the provision that people in other crime categories would have to pay for the testing themselves.

The proposed amendments to the bill also create two disincentives for those who know they are guilty and who are filing petitions. First is their knowledge that the test results will be forwarded to the Parole Board if those results are not favorable to the petitioner, and this appears in subsection 8, paragraph (f).

The second disincentive appears in subsection 12. The cost of the genetic marker analysis will be born by the Department of Corrections only if the petitioner is incarcerated, is indigent, and the genetic marker analysis is found to support the petition. Slightly before this hearing, we and Mr. Bateman agreed to "support the petition or if the results of the testing are inconclusive." This means that it is only if the tests come back in a way that is not favorable or is culpatory to the petitioner that they would be asked to bear the cost. I think that the prospect of having the costs of the tests laid on them, and also having the Parole Board notified of unfavorable results, provides a disincentive to people. It is our experience that it is an important part of the process of counseling our clients as to whether they want to push for genetic marker analysis—DNA analysis—and that they understand there is a downside for them if it comes back unfavorable.

Vice Chair Segerblom:
This may be a rhetorical question, but if one is an incarcerated indigent, how does that person pay for it?

Kate Kruse:
I take your question to being whether it will really deter people if they know that they are judgment proof.

Vice Chair Segerblom:
I said that it may be a rhetorical question.

Assemblyman Anderson:
Can the lab reject a sample if it knows it is not of a quantity or quality to be tested? What happens if testing has already been requested and completed? They cannot request a second or third test, thus increasing the cost to the Department of Corrections, correct? Even when new technology comes around, do they have only one request?

Kate Kruse:
The process is that the court holds a hearing on the petition after it is filed. Part of that hearing process is to request an inventory from the agency that holds the evidence. At that hearing, the court and both sides consider what evidence actually exists and what condition it is in. The court will then make an order for the evidence to be tested. For the court to request an order, there must be a reasonable possibility that the petitioner would not have been prosecuted or convicted had the results been obtained earlier, that evidence exists, and the evidence had not previously been subjected to genetic marker analysis, unless it was subjected to another type of analysis or an analysis that was inconclusive.

The last major change that our bill—not the amendments—makes is to provide notice to the victims, pursuant to the statutes that already apply to victims' rights, that the hearing has been ordered.

The flip side of one of these stories of a wrongfully convicted person is the story of Christopher Ochoa, and the parallel story to that crime about Jeannette Popp, who is the mother of the young woman who was raped and murdered in that case. Under interrogation by the police, Christopher broke down and confessed to a crime that he did not commit. Usually, when that happens, the law enforcement officer is pushing and saying that they, the police, have the evidence, and they have a scenario of how they think the crime occurred.

Based on the physical evidence that they had at the time, the police believed the crime was committed by more than one person, and they believed it was a multiple sexual assault that involved both rape and sodomy. The confession that Christopher Ochoa gave was consistent with the police's interpretation of the physical evidence at the time. He included the detail that the victim was shot as she was down on her knees begging for her life. For 12 years, her mother had to live with that image in her mind. When the true perpetrator finally confessed, it was a single person and a single rape. There was no

begging for her life on her knees before she was shot. It was a much less painful thing for the victim to live with. The true perpetrator confessed because he went through a religious conversion while in prison for other rapes.

The DA behaved honorably in this case. When the true perpetrator contacted them, they contacted Christopher Ochoa and told him that someone else confessed to his crime. They asked him if he wanted the DNA to be tested. He was afraid of how it would affect his parole and declined the offer to test the DNA while still claiming his guilt. Eventually, he contacted the Innocence Project of New York and asked for help. He finally consented to have the DNA testing completed. As soon as that request was made, the DA tested it because they wanted to know and to preserve the evidence. When the DNA was tested, it turned out that the man who confessed after the fact was, indeed, the true perpetrator. Both Christopher Ochoa and his co-defendant, who was also wrongfully convicted, were excluded by those tests.

I have had the pleasure of hearing Jeannette Popp speak, and it is a moving story. Some say that Christopher Ochoa should have to live with the consequences of falsely confessing. He chose to confess and plead guilty; however, the victim in that case did not choose to live with the version of events that was not true. DNA has the power to change everyone's view of the case and to bring the truth to light. We would encourage you to extend that remedy beyond capital cases.

Lucy Flores:
I wanted to bring your attention to a publication that you all have that is called *200 Exonerated* (Exhibit G). It is little snippets of stories of the first 200 exonerees that were exonerated based on DNA evidence. We are not dealing with one victim, but many victims. It is in all of our interests to have the true perpetrator incarcerated rather than an innocent person. I hope that the Committee will take a moment to look at this.

Vice Chair Segerblom:
What is the average cost of the DNA tests?

Katie Monroe:
There are a variety of DNA tests. The most basic form is testing just to identify the DNA sample. This is called Short Tandem Repeat (STR) testing, and that testing costs anywhere between $800 and $1,500. There is a secondary type of testing that isolates a biological sample from a male or female and is often run in a rape case. This testing is called Y-chromosome Short Tandem Repeat (YSTR) testing and costs anywhere between $2,000 and $2,500. The most expensive DNA testing is a new form called mitochondrial testing. This can be

done on hairs, bones, and teeth. This is not a common form of DNA testing, and we have never requested it in a case. Most of the 232 exonerations were based on biological evidence that can be tested by an STR or Y-STR DNA test. A mitochondrial test can run in the range of $10,000 or more.

I would like to give a couple of extra numbers. In Utah, where we unanimously passed a post-conviction DNA testing statute applying to all felonies, we have had seven requests for DNA testing since 2002. Arizona, which passed its statute in 2000, has had no more than 20 requests. In Wyoming, we passed this same statute last year, and they have had no requests, and we do not have any in the near future. Nevada should not expect any kind of flood. There will be some fiscal impact, but it will not be huge amounts. We made these numbers available in the handouts you received earlier (Exhibit F).

Assemblyman Cobb:
Is this bill intended to have a retroactive effect on those who have already been convicted?

Katie Monroe:
In spirit, yes. One of the things that we have discovered is that these exonerations are based on cases from 10 to 15 years ago when DNA testing was not available, or the testing that was available is not as scientifically accurate as it is now. Ideally, going forward, testing will happen in a pretrial setting, and the questions about who the actual perpetrator may be will happen before anyone goes to trial or is wrongly convicted. That said, this bill is not meant to be retroactive. The idea is that if someone ends up being wrongfully convicted and finds himself in prison and testing was not available at the time, or as testing gets more advanced, or for any number of reasons, it is important to test that evidence. Ideally, we will see fewer numbers going forward.

Assemblyman Cobb:
There is an issue of spoliation of evidence because we do not hold onto this evidence indefinitely. However, this bill requires that you cannot apply that retroactively because, in many cases, the evidence has been removed, so there is nothing to compare it to anymore. I have not examined the entire bill and amendments to see if there would be a legal issue there, because I do not think there is any type of allowance for spoliation of evidence on behalf of the DA's office or the courts.

The other issue is bringing these matters before the trial occurs. We do not want to have the cost of the trial when we can clear an individual with DNA testing ahead of time. I have been told by the DA that they already do this if there is a question of identity.

Katie Monroe:
All of the cases that I have worked on personally, and the cases that we are currently working on, are from some years in the past. There are some cases that raise the legitimate question that DNA testing was not available at the time. This bill does not require evidence preservation. I commend Nevada because we often find in this state that the evidence does exist. We have a case right now that is 26 years old, and all of the physical evidence from the crime scene was preserved by the trial court. We can put this kind of matter to rest. In other states where I have worked, in 75 percent of the cases, we do not find the evidence because it is no longer available. That is a tragedy for all involved. This bill does not mandate evidence preservation, but it does require that once a petition is filed and a hearing is scheduled, the state must inventory the evidence it has and preserve it for the purposes of the testing going forward. We did not attempt to address the former complex issue of statewide evidence preservation in this bill.

Kate Kruse:
There may be other legislation coming on evidence preservation, but this remedy applies only to evidence that exists at the time the petition is filed. It requires that the evidence be held onto while the petition is pending, and that an agency would not respond to a petition by losing or destroying evidence. It is a separate question, and we would hope that it would not be necessary to test evidence into the future, but in the event that there is evidence to be tested and technology has advanced to the point where we can get answers to stuff that we did not know before, it allows us to seek those answers. At this point, people who are convicted of noncapital cases in the State of Nevada can be sitting in prison with the evidence sitting in the crime lab or evidence vault, and there is no way to test it. There is no way for the person sitting in prison to ask for it to be tested.

Assemblyman Cobb:
There is nothing in existing law or in this bill, and is certainly not the intent of this bill, to provide some type of remedy to a convicted felon because evidence has disappeared over time, intentionally or not? We are not going to see court cases down the line where a convicted felon is making the argument of the state not living up to the requirements under this statute; therefore, since there was spoliation of evidence, he should be released?

Kate Kruse:
This does not provide a remedy based on the destruction of evidence. It provides a remedy for the testing of evidence that still exists.

Assemblyman Cobb:
It is a due process argument, regardless of whether it is explicitly written in statute, if the state does not live up to their obligations under evidentiary rules and such.

Kate Kruse:
There may be a due process argument that could be made, but this statute would not be the way to make it. The way to make that argument would be through already existing state habeas corpus proceedings. This would not change that in any way.

Katie Monroe:
We had a case in Virginia where the courthouse wrongfully disposed of all of the physical evidence in a capital case. It was understood by all of the authorities that the evidence was supposed to be preserved. The state actually said that it was on the verge of criminal. The defendant, Robin Lovitt, was represented by Ken Starr. He was facing the death penalty, and he had no remedy because the evidence no longer existed. He had no argument to make other than saying, "If the evidence were still around, it would prove my innocence." That evidence was not, so there was nothing further to do in the case. Fortunately, the governor at the time, Mark Warner, commuted Lovitt's death sentence to life, with the understanding that there was a potential claim of innocence, but he had no remedy.

Assemblyman Horne:
I came up to the table for clarification about the last line of questioning on the spoliation of evidence, but I believe that Ms. Monroe addressed that adequately.

Sam Bateman, representing the Nevada District Attorneys Association, Las Vegas, Nevada:
I wanted to note, on behalf of the Nevada District Attorneys Association, that we are not opposed to post-conviction DNA testing. We believe, in the vast majority of cases, that it is going to vindicate individual prosecutor's decisions and vindicate law enforcement's investigations. In the past, we have worked with the Rocky Mountain Innocence Project doing DNA testing. Currently, there is one in the Clark County District Attorney's Office from the early 1980s. I want to make sure that the Committee is aware of the Nevada District Attorneys Association's position in that regard.

Initially, when we reviewed A.B. 179, we were concerned. The concern was that this statute in existence applied only to those convicted of the death penalty. It did not have some of the safeguards that other statutes have across the west that encompass more felony convictions than just those of individuals

sentenced to death. As a result, I spoke with the sponsor, Assemblyman Horne, and I reviewed some of the statutes in the west to see what kinds of safeguards are included in those statutes. I wanted to know what other states were doing in this regard, given the fact that we are opening it up to a substantial amount of felony convictions.

I came up with an initial set of amendments that were taken largely from those other statutes. I sat down yesterday with interested parties, and we worked out the amendments that you have before you (Exhibit C). Those amendments are something that our association and interested parties can live with. I cannot speak for the Las Vegas Metropolitan Police Department (Metro) or any other law enforcement agency, but I believe that they feel comfortable with the amendments that are included. I think the amendments strike a balance between the interest in exoneration, if that can be done, and the interest of the people in the State of Nevada, in the finality of judgments. The amendments create some clear standards: they give courts flexibility to address cases, and they address who is going to pay the costs.

I am not as concerned about groups like the Innocence Project coming forward and asking for this testing. I am more concerned about the potential of a flood of requests, and I understand that there are numbers from other states that would suggest that this is not going to happen. Unfortunately, I think things happen differently in Nevada. I am concerned about an influx of, for instance, *pro se* or *pro per* petitions. We already deal with those now in the context of petitions for writs of habeas corpus, and they can be very time consuming and difficult to deal with. I think that the structure that we have included in these amendments and to the existing statute would address the potential for that type of litigation.

I would note one additional point. I spoke with our lab director, Linda Krueger, recently about this situation, and the status of their DNA testing in the Clark County laboratory. Currently, they are four months behind in DNA testing. We ask for quite a bit of DNA testing because it is more available for ongoing criminal cases prior to conviction. I think going forward, we will be doing more and more of that, but right now, we are four months behind on cases that are in the system where we are either trying to solve crimes or are in the actual criminal justice process prior to conviction, when defendants have the most rights.

The concern from the Clark County laboratory's standpoint is that a flood may occur and extend that four-month period. We are delaying investigations and hampering public safety to some extent. That is why the amendments are proposed the way they are. They strike that balance that will not have a

significant negative impact on the system. With the amendments, the Nevada District Attorneys Association can support A.B. 179.

Chuck Callaway, Sergeant, Intergovernmental Services, Las Vegas Metropolitan Police Department, Las Vegas, Nevada:
We support A.B. 179 with the proposed amendments from the DA's office.

Assemblyman Anderson:
Currently, who covers the cost of the DNA testing that is done through the Clark County office for both the prosecution and defense? Is there a screening process with DNA testing? How is that information shared with the defense?

Sam Bateman:
I assume you are referring to prior-to-conviction testing. I do not know all of the funding mechanisms for how the Metro pays for testing, but I assume it comes out of their budget. The State of Nevada pays for it prior to conviction.

Assemblyman Anderson:
The State of Nevada or the county pays for it?

Sam Bateman:
That might be a better question for the representative from Metro to answer. I do not know how the funding operates for preconviction DNA testing.

Assemblyman Anderson:
What about the sharing of that information to all of the potential people whose DNA is tested?

Sam Bateman:
The first part of your question was how we screen. It is like any other investigation. We decide whether or not DNA testing would be relevant to the case. That is often done by law enforcement before it gets to our office. We may do it after it gets to our office upon further review of the case. We are obligated to provide to the defense attorney discovery regarding any reports in the case and any testing. Sometimes the defense will ask us to do specific testing, and if we think it is relevant, we might comply with that request. In anticipation, we either negotiate the case or go to an actual trial. We provide all information that we intend to use at trial to the defense. If the DNA ultimately is exculpatory, we have some obligation to provide that information as well.

Assemblyman Manendo:
Back in 2001, Assemblyman Price had a similar piece of legislation, so I appreciate this piece coming forward.

Along the same lines as Assemblymen Anderson and Cobb, when one is put into the position of trying to be convinced to confess to a crime, and when a test can be done to find out for sure if that is the right person, why is that not done in the first place? I have an issue with anyone spending time in jail or prison for a crime that they did not commit. I think that it is an absolute waste of time and energy for everybody in our system. The judicial system, the prison system, and jails are bloated, and nobody wins. Maybe you can explain that to me and why you believe that is not the right way to go.

Chuck Callaway:
I wholeheartedly agree with you. I think that the right thing to do, if we have that evidence beforehand, is to test it. In the majority of cases, we are either lacking the evidence, or the crime is not of a magnitude to justify the expense of the DNA testing beforehand. We might have other evidence which we feel is sufficient enough to prosecute. Submitting for a DNA test, which is expensive, is something that the officer or the department may choose not to do.

I do agree that if it is a case of such magnitude where someone could spend a degree of time in prison, it would be in the best interest of the public and the department to do that testing prior if we are able to.

Assemblyman Manendo:
In a case of rape or murder, if you have a piece of DNA, do you test in every single situation? And if not, why not?

Chuck Callaway:
I would like to say that, yes, we do. If we do not, it would be decided on an individual, case-by-case basis as to why that testing was not done.

Assemblyman Manendo:
Is it because you think you have the right person?

Chuck Callaway:
I would say in a case of major magnitude where someone is charged with murder or rape, and they will probably go to prison for a long time, that DNA would be tested prior to the trial date.

Vice Chair Segerblom:
I think, Assemblyman Manendo, we are dealing with prior cases as opposed to current cases. I think that they do test everything now.

Chuck Callaway:
We support this bill with the proposed amendments.

Renee L. Romero, Director, Forensic Science Division, Washoe County Sheriff's Office, Reno, Nevada:
I support the bill with the amendments. Initially, I did not support this bill, but now that I have gotten the chance to see the amendments, I do support it. I was concerned about all felonies and the floodgates, much of which has been discussed today.

Today, we test DNA for touched samples. We can process touch DNA, and I worry about the floodgates opening from the lower crimes in analyzing touch DNA. For example, a controlled substance case where a baggie of drugs was taken off of the individual, and now we want the bag tested for who touched the bag. Hopefully, there would be enough vetting out that something as irrelevant would not come forward, but that is where I had concerns. I do support the amendments that were provided today.

Assemblyman Cobb:
In reference to the sixth amendment listed on page 2, is that meant to be aimed toward achieving that goal of having these issues handled pretrial? It makes reference to tactical or strategic decisions, and I would like to hear more about that. Are you trying to require a defendant to request this evidence up front and avoid the cost of the trial? What type of penalty would there be if one does not request this pretrial and waits until after the trial?

Sam Bateman:
A number of statutes around the West have that type of limitation, which is to say that if DNA testing is readily available prior to trial and one chooses not to take advantage of that, or perhaps one chooses a theory of defense that would render DNA testing irrelevant, there could be a penalty. The example I can think of is sexual assault where someone claims that it was a consensual encounter as opposed to, "I was not there, and I did not do it." DNA would prove that. I think there is an interest in providing some incentive to do that up front and make those requests early on, if they are available, and to identify whether that can be helpful as opposed to going through the process with one particular type of defense and later, even five years later, someone makes the request. We would not be the only state to include something of that nature. I think it would vet these cases by having that particular requirement in there.

Assemblyman Cobb:
That answers my question, that you are just encouraging the defendants to request this up front in pretrial at their cost.

Sam Bateman:
Yes, and that happens now mostly in cases where DNA is an issue. Defense attorneys will file motions with the court to have their own independent testing done to either try to corroborate or to vet the testing done in our crime labs. They absolutely have that ability to make the motion prior to trial. Very rarely does the state oppose that type of motion so long as strict controls are placed upon the testing. The crime lab in Clark County has controls about how they send biological evidence out to private labs on request of defense counsels. Those are all intermediate steps the defense counsel can take if DNA is an issue in the case, and if it would make DNA an issue in the case.

I will make one more point. There is nothing in this bill that would eliminate the ability of a petitioner and a prosecuting agency from entering into a stipulation to test DNA evidence. There is one particular statute in another state that has that exact provision. While this creates a scheme for people to file these motions, there is nothing to prevent, for instance, the Innocence Project from coming to the Clark County DA's office and saying, "Hey, this is our case, and this is what we have been investigating. We think testing on this particular piece of evidence would be beneficial and helpful. Would you agree with us to do that?" For any of the other concerns that are out there for lower level felonies and such, this statute would not necessarily preclude testing where the parties agree to testing on their own terms.

Rebecca Gasca, Public Advocate, American Civil Liberties Union of Nevada, Reno, Nevada:
I am in support of A.B. 179. I would like to comment that the American Civil Liberties Union (ACLU) would like to see the language re-expanded out to include other felonies. As Assemblyman Manendo noted, we have bloating in our system, and in the cases in which we could spend $2,000 to exonerate an individual, rather than keep him incarcerated for five years, there would be a huge cost savings.

On the amendment that has been proposed, in section 1, page 3 of the document that you have (Exhibit C) it says, "A person convicted of a crime [crime and under sentence of death] category A or B felony..." What is also added is "who is currently under sentence of imprisonment." We would object to the addition of that language because we believe that the due process rights still cover their requests after they have served their time. This Committee knows that when a person is convicted of a serious felony, particularly A or B, it is difficult to live a productive life after their sentence ends. It is hard to do things, for example get a job, if there is a felony on one's record. If a person maintains his innocence and wants to try to get that conviction overturned after

he has already served many years, we are certainly of the ilk that he deserves to have his day in court and have that addressed.

Finally, there was a statement made earlier by one of the women from the Rocky Mountain Innocence Center who was testifying as to the intent of this bill and whether it is retroactive or not. Clearly, there have been 232 people mentioned today whose convictions have been overturned based on evidence that was kept from crimes that may have been committed as long as 25 years ago. We hope this bill will be entered in, as record of the intent of this legislative body, to allow those people whose crimes were tried years ago to have the opportunity to enjoy the full establishment of rights.

Vice Chair Segerblom:
It looks to me, due to the last sentence of the bill, it is definitely retroactive and applies to anyone who was convicted before October 1 or after October 1.

I want to thank you for bringing this. I think this a fantastic piece of legislation.

Assemblyman Ohrenschall:
I wanted to thank you as well, Assemblyman Horne. I actually got to meet Mr. Cotton at the William S. Boyd School of Law. As someone who served a decade of his life for a crime he did not commit, and going around lecturing and campaigning for this type of legislation, he makes a very powerful statement. It tears me apart to think that there might be people who are sitting in prison right now and who cannot access this DNA evidence because we do not have this provision in law.

Assemblyman Anderson:
Justice Hardesty's advisory committee has similar concerns, and Bill Draft Request (BDR) 14-518 will be dropped today which addresses some of the other concerns that were raised. The Innocence Project may want to take an examination of it.

Assemblywoman Parnell:
I do not know if you are all aware, but *60 Minutes* ran Mr. Cotton's story on Sunday night. It is probably still easy to access.

Vice Chair Segerblom:
We will close the hearing on A.B. 179.

[Assemblyman Horne resumed chair.]

Chairman Horne:
There is a work session on Thursday. I believe Chairman Anderson has a number of bills for the Assembly Committee on Judiciary's work session on Thursday.

[The meeting adjourned at 10:58 a.m.]

RESPECTFULLY SUBMITTED:

_____
Julie Kellen
Committee Secretary

APPROVED BY:

_____
Assemblyman William C. Horne, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Corrections, Parole, and Probation

Date: March 10, 2009 Time of Meeting: 8:13 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 179	C	Katie Monroe, Kate Kruse, and Sam Bateman	Proposed amendments to Assembly Bill 179.
A.B. 179	D	Lucy Flores	Video of exonerees due to DNA testing.
A.B. 179	E	Katie Monroe	PowerPoint presentation.
A.B. 179	F	Katie Monroe, Kate Kruse, and Lucy Flores	Handouts explaining Nevada's post-conviction statute.
A.B. 179	G	Katie Monroe, Kate Kruse, and Lucy Flores	*200 Exonerated* booklet.

EXHIBIT 2

EXHIBIT 2

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March 2, 2008

SPONSOR: **Chairman William Horne, Committee on Corrections, Parole and Probation**

BILL: **AB 179 – Revises Provisions Governing Postconviction Genetic Marker Analysis (BDR 14-869)**

STATEMENT OF INTENT OF THE AMENDMENTS:

AB 179 changes NRS 176.0918 to authorize persons convicted of any felony in Nevada to file a postconviction petition for genetic marker analysis at State expense, regardless of whether any analysis was completed prior to the petitioner's conviction. Currently, NRS 176.0918 allows only those sentenced to death to petition for genetic marker analysis, and then only in those cases where genetic marker analysis was not done. AB 179 also requires victims to be notified upon the filing of a petition for genetic marker analysis.

The existing statute, NRS 176.0918, places no specific requirements on a petitioner to identify relevant evidence, delineate the type of genetic marker analysis requested, or provide a rationale for the petition before a court sets a hearing on the petition. Upon the filing of the petition, and before a court has determined the petition's merits, NRS 176.0918 also requires law enforcement to create inventories of all evidence in the case, regardless of the relevance of the evidence. With AB 179's changes, the statute would also require the State to notify victims before a hearing is even scheduled.

The existing statute, NRS 176.0918, while imperfect provides a sufficient scheme to address the very small number of convicted persons sentenced to death in Nevada. Once this statute is expanded to all felonies, however, the present statutory scheme fails to provide guidance to a petitioner and restricts the court's discretion to handle postconviction petitions too severely. Further, it requires law enforcement and district attorneys to take action before a determination has been made that the petition has any merit. Finally, it runs the risk of a significant fiscal impact on the State.

The attached proposed amendments, which are consistent with statutory requirements contained in neighboring jurisdictions, provide safeguards to ensure that those whose claims are meritorious are granted while those without merit are denied, all with the least possible effect on the existing system:

1) limit the individuals that may file a petition pursuant to this section to those convicted of category A and B felonies and who are currently under sentence of imprisonment as a result of the challenged conviction;

2) require the petitioner to include in her petition specific information necessary to make a fair decision regarding the request;

3) give the court discretion to dismiss frivolous petitions without a hearing or, if there appears to be some merit to the petition or the issues appear complex, appoint counsel to review and supplement the petition;

4) limit the inventorying of evidence to relevant evidence;

5) define the nature of the evidence that may be allowed at any hearing scheduled on the petition and require the judge who presided over the case up to, and including, conviction to hear the postconviction petition;

6) limit those who may take advantage of postconviction genetic marker analysis based on preconviction tactical or strategic decisions

7) limit the district attorney's responsibility to notify victims, depending on whether the court set a hearing and whether the victim requested notification;

8) places the cost on the petitioner unless the petitioner is incarcerated at the time of the petition, is indigent, and the results were favorable to the petitioner.

The Nevada District Attorney's Association can support AB 179 with the proposed amendments contained herein and stands ready to work with the sponsor and any other stakeholders going forward.

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C-2

[Proposed Amendments in BOLD and UNDERLINED]

[ ] equals deletion

Section 1. NRS 176.0918 is hereby amended to read as follows:

1. A person convicted of a [crime and under sentence of death] **category A or B** felony **who is currently under sentence of imprisonment**, and who meets the requirements of this section may file a postconviction petition requesting a genetic marker analysis of evidence within the possession or custody of the State which may contain genetic marker information relating to the investigation or prosecution that resulted in the judgment of conviction. [and sentence of death. The] ***If the case involves a sentence of death, the*** petition must include, without limitation, the date scheduled for the execution, if it has been scheduled.

2. Such a petition must be filed with the clerk of the district court for the county in which the petitioner was convicted on a form prescribed by the Department of Corrections. A copy of the petition must be served by registered mail upon:
(a) The Attorney General; and
(b) The district attorney in the county in which the petitioner was convicted.

3. A petition filed pursuant to this section shall be verified under penalty of perjury by the petitioner and include a good faith, particularized factual basis containing the following information:

(a) That specific evidence either known or believed to be in the possession of the state can be subject to genetic marker analysis; and

(b) Why 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 identified in subsection (a);

(c) That the type of genetic marker analysis to be conducted is specified and, if applicable, the results of all prior genetic marker analysis in the case;

(d) That the specific genetic marker analysis requested was not available at the time of trial or, if it was available, that the failure to request genetic marker analysis prior to conviction, was not due to a strategic or tactical decision;

[ ]4. If a petition is filed pursuant to this section, the court **[shall] may:**

(a) dismiss the petition without hearing if the petition shows to the satisfaction of the court that the petitioner is not entitled to relief based on the criteria of this section;

C-3

(b) appoint counsel for the limited purpose of preparing and presenting the petition for genetic marker analysis, after determining whether petitioner is indigent in accordance with NRS 171.188, and whether counsel had been appointed in the case in which the subject conviction arose; or

(c) set a hearing on the petition, at which time the court shall determine which person or agency has possession or custody of the evidence and shall immediately issue an order requiring, during the pendency of the proceeding, each person or agency in possession or custody of the evidence to:

[(a)] **(i)** Preserve all evidence within the possession or custody of the person or agency that may be subjected to genetic marker analysis pursuant to this section;

[(b)] **(ii)** Within [30] **90** [days], prepare an inventory of [all] **any** evidence **relevant to petitioner's claims** within the possession or custody of the person or agency that may be subjected to genetic marker analysis pursuant to this section; and

[(c)] **(iii)** Within [30] **90** [days], submit a copy of the inventory to the petitioner, the prosecuting attorney and the court.

[(4)] **(iv)** Within [30] **90** [days] after the inventory of all evidence is prepared pursuant to subsection 3, the prosecuting attorney may file a written response to the petition with the court.

5. **If the court holds** [The court shall hold] a hearing on a petition filed pursuant to this section**, the petitioner and the state may present evidence by affidavit, testimony, or any other method approved by the court; provided however, any affidavit shall be served on the opposing party at least fifteen (15) days prior to the hearing. Any hearing or consideration of a petition shall be heard by the judge who conducted the trial that resulted in the petitioner's conviction unless the judge is unavailable.**

6. The court shall order a genetic marker analysis if the court finds**, after considering the requirements of subsection 3 and any other evidence,** that:
(a) 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 identified in the petition;
(b) The evidence to be analyzed exists; and
(c) [The] ***Except as otherwise provided in subsection 7, the*** evidence was not previously subjected to [:
(1) A] ***a*** genetic marker analysis **.** [involving the petitioner;
or
(2) The method of analysis requested in the petition, and the method of additional analysis may resolve an issue not resolved by a previous analysis.]

C-4

7. If the evidence was previously subjected to a genetic marker analysis, the court shall order a genetic marker analysis pursuant to subsection 6 if the court finds that:
(a) The result of the previous analysis was inconclusive;
(b) The evidence was not subjected to the type of analysis that is now requested and the requested analysis may resolve an issue not resolved by the previous analysis; or
(c) The requested analysis would provide results that are significantly more accurate and probative of the identity of the perpetrator than the previous analysis.

8. If the court orders a genetic marker analysis pursuant to subsection 6 [,] *or 7,* the court shall:

(a) Order the analysis to be conducted promptly under reasonable conditions designed to protect the interest of the State ***and the petitioner*** in the integrity of the evidence and the analysis process.

(b) Select a forensic laboratory to conduct or oversee the analysis. The forensic laboratory selected by the court must:
(1) Be operated by this State or one of its political subdivisions, when possible; and
(2) Satisfy the standards for quality assurance that are established for forensic laboratories by the Federal Bureau of Investigation.

(c) Order the forensic laboratory selected pursuant to paragraph (b) to perform a genetic marker analysis of evidence. The analysis to be performed and evidence to be analyzed must:
(1) Be specified in the order; and
(2) Include such analysis, testing and comparison of genetic marker information contained in the evidence and the genetic marker information of the petitioner as the court determines appropriate under the circumstances.

(d) Order the production of any reports that are prepared by a forensic laboratory in connection with the analysis and any data and notes upon which the report is based.

(e) Order the preservation of evidence used in a genetic marker analysis performed pursuant to this section for purposes of a subsequent proceeding or analysis, if any.

(f) If the results of the genetic marker analysis are not favorable to the petitioner, order the results to be forwarded to the Nevada parole board.

C-5

[8.] *9.* If the results of a genetic marker analysis performed pursuant to this section are favorable to the petitioner:
(a) The petitioner may bring a motion for a new trial based on the ground of newly discovered evidence pursuant to NRS 176.515; and
(b) The restriction on the time for filing the motion set forth in subsection 3 of NRS 176.515 is not applicable.

[9.] *10.* The court shall dismiss a petition filed pursuant to this section if:
(a) The requirements for ordering a genetic marker analysis pursuant to this section are not satisfied; or
(b) The results of a genetic marker analysis performed pursuant to this section are not favorable to the petitioner.

[10.] *11.* For the purposes of a genetic marker analysis pursuant to this section, a person [under sentence of death] who files a petition pursuant to this section shall be deemed to consent to the:
(a) Submission of a biological specimen by him to determine his genetic marker information; and
(b) Release and use of genetic marker information concerning the petitioner.

[11.] *12.* **The petitioner under this section shall bear the cost of the genetic marker analysis unless the petitioner is incarcerated, is deemed indigent, and the genetic marker analysis is found to support the petition. In the case of a person meeting these criteria,** the expense of an analysis ordered pursuant to this section is a charge against the Department of Corrections and must be paid upon approval by the Board of State Prison Commissioners as other claims against the State are paid.

[12.] *13.* The remedy provided by this section is in addition to, is not a substitute for and is not excluive of any other remedy, right of action or proceeding available to a person convicted of a crime. [and under sentence of death.]

14. If a petitioner files a petition pursuant to this section, **and a hearing is ordered on the petition,** ***the district attorney in the county in which the petitioner was convicted shall provide to any victim of the crime for which the petitioner was convicted,*** **who has elected to receive notice pursuant to NRS 178.5698,** ***notice of:***
(a) The fact that the petitioner filed a petition pursuant to this section;
(b) The time and place of any hearing that may be held as a result of the petition; and
(c) The outcome of any hearing on the petition.

C-6

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

MICHAEL PHILLIP ANSELMO,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 271359
Dept. No. 6

SUPPLEMENTAL POINTS AND AUTHORITY IN SUPPORT OF PETITION REQUESTING GENETIC MARKER ANALYSIS OF EVIDENCE WITHIN THE POSSESSION OR CUSTODY OF THE STATE OF NEVADA

Petitioner Michael Phillip Anselmo ("Petitioner" or "Mr. Anselmo") hereby submits this Supplemental Points and Authority in Support of Petition Requesting Genetic Marker Analysis of Evidence Within the Possession or Custody of the State of Nevada ("Supplement") pursuant to the Court's invitation to submit the same in response to questions posed during the hearing

held on February 25, 2020 at 1:30 p.m. This Supplement is based on the following points and authorities, the pleadings and papers on file in this case, any exhibits attached hereto, and any argument the Court may entertain.

I. INTRODUCTION

Mr. Anselmo seeks the opportunity to test genetic material in the possession of the State of Nevada that is currently available and able to be DNA tested.[1] At stake is Mr. Anselmo's potential exoneration for the crime for which he has already served 48 years in prison. Though recently released on parole, Mr. Anselmo remains subject to the conditions of his parole and must contend each day with the consequences of his felony murder conviction. Now, the technology exists to test physical evidence that could demonstrate Mr. Anselmo's innocence of this crime.

The Nevada Legislature specifically created a vehicle for those like Mr. Anselmo, who were convicted of felonies but were unable to have physical evidence DNA tested at the time of trial, to test the genetic material and potentially open the door to proving their innocence. Mr. Anselmo's Post-Conviction Petition Requesting Genetic Marker Analysis of Evidence within the Possession or Custody of the State of Nevada (the "Petition") satisfies the requirements set forth in NRS 176.0918 and his request for DNA testing should be granted. At the hearing held on February 25, 2020 at 1:30 p.m. (the "Hearing"), the Court asked a series of questions to counsel and invited counsel to submit a supplemental brief addressing those questions raised at the Hearing. Mr. Anselmo therefore respectfully submits this Supplement.

[1] On March 7, 2019 this Court entered its Order Granting, in Part, Post-Conviction Petition Requesting Genetic Marker Analysis of Evidence; Order to Set Hearing; and Order Directing Preservation and Inventory of Evidence. Based upon the Petition, this Court scheduled a hearing for April 19, 2019, at which it was established that the physical evidence Mr. Anselmo is requesting be DNA tested exists and remains in the custody of the State.

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II. DISCUSSION

A. Mr. Anselmo's Petition Requesting Genetic Marker Analysis of Evidence Satisfies NRS 176.0918, Initiating the First Step of a Two-Step Process: DNA Testing.

As an initial matter, a question arose regarding the scope of the Court's analysis at this stage of the proceedings. Transcript of Proceedings, February 25, 2020 Hearing at 28-29, attached hereto as **Exhibit 1**. The relevant statutes, NRS 176.0918, 176.09183 and 176.09187 establish a two-step process for considering petitions seeking genetic marker analysis. First, an individual convicted of a felony may petition for post-conviction DNA testing, and second, only if the results are favorable to the petitioner, the petitioner may file a motion for a new trial based on the newly discovered evidence. NRS 176.0918; NRS 176.09187; *see also* Minutes of the Senate Committee on Judiciary, Seventy-Fifth Session, Testimony of Katie Monroe regarding A.B. 179 at 35 (May 6, 2009), attached hereto as **Exhibit 2** and also available at https://www.leg.state.nv.us/Session/75th2009/Minutes/Senate/JUD/Final/1119.pdf.

In his Petition, Mr. Anselmo met all of the requirements outlined in NRS 176.0918 to satisfy the first step of the two-step process, which is simply DNA testing of the available physical evidence. Mr. Anselmo's request for DNA testing does not reverse his conviction, it does not free him from his parole conditions, it does not impugn the integrity of the judicial process, and it does not prejudice the prosecutor who prosecuted the original case. At this stage, Mr. Anselmo requests only that the physical evidence that could not have been DNA tested at the time of his trial 48 years ago be tested now, in the interests of justice.

Specifically, in his Petition, Mr. Anselmo outlined "particular facts for his request" for DNA testing and signed a declaration attesting under penalty of perjury that the Petition does not contain any material misrepresentation of fact. NRS 176.0918(3). Mr. Anselmo relied on the particular facts outlined in his petition to establish a "rationale for why a reasonable possibility exists" that he would not have been prosecuted or convicted had exculpatory DNA results been available at the time of trial. NRS 176.0918(3)(b).

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The reasonable possibility standard is intentionally low because it is just the first step of the process, simply requesting testing. Minutes of the Senate Committee on Judiciary, Seventy-Seventh Session, Testimony of Assemblywoman Flores regarding A.B. 233 at 29 (April 29, 2013), attached hereto as **Exhibit 3** and also available at https://www.leg.state.nv.us/Session/77th2013/Minutes/Senate/JUD/Final/994.pdf. The intent of such a low standard was that "[i]f there is any possibility whatsoever, the court must grant the petition." *Id.* at 32. "The idea was to have the court grant these petitions so we can discover whether the evidence can prove the person's innocence. *Id.*

For reasons unknown, the State opposes Mr. Anselmo's Petition to simply have DNA testing performed. The Court, however, must order DNA testing if the NRS 176.0918(3) requirements are met. NRS 176.09183(1) ("The court shall order a genetic marker analysis…"). As demonstrated in prior briefing, at the Hearing, and herein, Mr. Anselmo's Petition should be granted and the evidence tested because (1) Mr. Anselmo provided particular facts to support his rationale for why a reasonable possibility exists that he would not have been prosecuted or convicted if exculpatory DNA results had been available at the time of trial; (2) Mr. Anselmo's Petition is timely; and (3) Mr. Anselmo should not be judicially estopped from requesting DNA testing.

B. DNA Evidence Is a Specific and Potentially Highly Exculpable Form of Evidence, and Mr. Anselmo Provided Particular Facts Supporting His Rationale for Why a Reasonable Possibility Exists that He Would Not have Been Prosecuted or Convicted if Exculpatory ***DNA*** Evidence had Been Available At Trial.

At the Hearing, the Court asked whether DNA exculpatory evidence is different from other exculpatory evidence that may have been introduced at trial. Exhibit 1 at 26. DNA evidence is extremely specific and important exculpatory evidence, which can be the ultimate exculpatory evidence at trial notwithstanding other types of exculpatory evidence. It is because DNA evidence is so critical that the Nevada Legislature passed the statutory scheme for genetic marker analysis in the first place. *See* Exhibit 2 at 33-34.

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A petition filed pursuant to NRS 176.0918 "must be accompanied by a declaration under penalty of perjury attesting that the information contained in the petition does not contain any material misrepresentation of fact and that the petitioner has a good faith basis relying on particular facts for the request." NRS 176.0918 (3). This, too, is meant to establish that there is a "credible claim of innocence." *See* Exhibit 2 at 33-34. The statute does not require the petitioner to provide a full recitation of the facts. NRS 176.0918 (3).

Mr. Anselmo provided particular facts supporting "[t]he rationale for why 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" he requested be tested in his Petition. NRS 176.0918(3)(b). Mr. Anselmo specifically referenced the seminal fluid that was collected from Ms. Hiler's body for the purpose of showing that seminal fluid was collected, examined, and is available for DNA testing. *See* Petition at 4-5 (filed herein November 2, 2018). DNA testing the physical evidence in this case is the best evidence available. A DNA profile identified on the evidence collected from Ms. Hiler and the crime scene (1) could call into question Mr. Anselmo's conviction, which was already obtained under questionable circumstances, and (2) could render Dr. Laubscher's hypothetical opinions from 1972 irrelevant.

DNA testing in this case can conclusively prove that Mr. Anselmo is innocent. Mr. Anselmo has adequately outlined the particular facts required in NRS. 176.0918 to establish a reasonable possibility he would not have been convicted or prosecuted, and this Court should grant his Petition requesting DNA testing.

C. Mr. Anselmo's Petition Is Timely, and Laches Does Not Bar Relief.

At the Hearing, the Court also asked whether the doctrine of laches as codified in NRS 34.800 would apply to preclude the relief requested here. Exhibit 1 at 17, 36-37, 45-46.

First, the term "petition" as used in NRS 34.720 to NRS 34.830 is expressly defined as a "postconviction petition for habeas corpus filed pursuant to NRS 34.724." NRS 34.722. Mr. Anselmo's Petition is not a petition for habeas corpus filed pursuant to NRS 34.724. NRS

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34.800 applies only to such petitions for habeas corpus relief. NRS 34.724; NRS 34.800. Therefore, the rebuttable presumption found in NRS 34.800(2) and the doctrine of laches espoused in NRS 34.800(1) do not apply whatsoever to Mr. Anselmo's Petition.

For the same reason, the State's suggestion that the statute of limitations in NRS 34.726 may apply in this case is without merit. NRS 34.726 provides " [u]nless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after the entry of the judgment or conviction, or if an appeal has been taken from the judgment, within 1 year after the appellate court of competent jurisdiction . . . issues its remittitur." NRS 34.726. The term "petition" as used in NRS 34.726 is a petition for habeas corpus filed pursuant to NRS 34.724. NRS 34.722. Moreover, Mr. Anselmo's Petition is not challenging the validity of a judgment or sentence. Rather, Mr. Anselmo filed a petition for genetic marker analysis under NRS 176.0918.

Second, the application of any doctrine of laches or other period of limitation would not make sense in connection with Mr. Anselmo's Petition requesting genetic marker analysis. Application of any such periods of limitation or doctrine of laches would effective preclude relief for any petitioner that did not file a petition within the first 1-5 years after enactment of the statute. Application of the one-year statute of limitations in NRS 34.726 or the five-year rebuttable presumption for laches under NRS 34.800 as the State suggests would render NRS 176.0918 meaningless and would therefore limit post-conviction DNA testing to only those cases where DNA testing was available at the time of trial, cases post 2015.

The Nevada Legislature intentionally avoided this possibility by omitting any period of limitation from NRS 176.0918 and NRS 176.09183. Further, the Nevada Legislature notably set aside the only applicable statute of limitations in NRS 176.09187. Specifically, if the results of the DNA testing are favorable to the petitioner, NRS 176.09187(1)(b) sets aside the two-year statute of limitations otherwise outlined in NRS 176.515 controlling timeliness for a motion for a new trial. Thus, a motion for a new trial on the basis of newly discovered DNA evidence pursuant to NRS 176.09187 purposely does not have any statute of limitations.

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In fact, in 2009, testimony in support of broadening access to the post-conviction DNA testing statute beyond those sentenced to death specifically addressed the two-year statute of limitations that would ordinarily limit the time for which a defendant could file a motion for a new trial. Minutes of the Meeting of the Assembly Committee on Corrections, Parole, and Probation, Seventy-Fifth Session, Testimony of Kate Kruse at 22 (March 10, 2009), attached hereto as **Exhibit 4** and also available at https://www.leg.state.nv.us/Session/75th2009/Minutes/Assembly/CPP/Final/388.pdf; Exhibit 2 at 39-40 (Testimony of Katie Monroe). The Nevada Legislature recognized that DNA evidence is unique and provided "a special exception for DNA because of the different type of evidence that DNA is" and intentionally waived the statute of limitations. Exhibit 4 at 23 (Testimony of Ms. Kruse).

Moreover, the same year, in 2009, a companion bill (codified as NRS 176.0912) was passed requiring the preservation of "any biological evidence secured in connection with the investigation or prosecution of the defendant. . . until the expiration of any sentence imposed on the defendant." NRS 176.0912(1); *see also* Exhibit 3 at 30 (Testimony of Assemblywoman Flores). The companion statute ensures that DNA evidence will be available for potential post-conviction DNA testing. The statute intentionally requires preservation until the individual's sentence is expired, not merely five years post-conviction. Therefore, the State's suggestion that Mr. Anselmo had only until five years after he was able to file a petition to do so is meritless and unsupported by the Legislative intent, as well as the plain language of all applicable statutes. NRS 176.0912; *see also* Exhibit 3 at 30.

Accordingly, Mr. Anselmo's petition is timely and should be granted.

D. Judicial Estoppel Should Not Bar Mr. Anselmo's Pursuant of DNA Testing, and There Is Precedent in Nevada for DNA Testing Even Where the Petitioner Confessed.

At the Hearing, the Court asked whether there are Nevada cases where a petitioner initially confessed to the felony and later was exonerated by DNA evidence. Exhibit 1 at 20. There are such cases in Nevada.

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In 1979, Cathy Woods confessed to killing Michelle Mitchell, a 19-year-old student at the University of Nevada in Reno. National Registry of Exonerations (last Visited March 5, 2020), available at http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4656.[2] Ms. Woods was convicted of first-degree murder in Washoe County in 1980 based almost exclusively on her confession and records showing she lived in the area at the time. *Id*. Ms. Woods was sentenced to life in prison without the possibility of parole. *Id.* In 2013, Ms. Woods requested post-conviction DNA testing and the DNA identified on the evidence belonged to a male. *Id*. In July 2014, the DNA results identified on the evidence collected from the homicide scene were linked to a man named Rodney Halbower in the FBI's national DNA database. *Id*. Halbower had been arrested for rape and was out on bond awaiting trial in February 1976 when Mitchell was murdered. *Id.* In September 2004, Ms. Woods' was granted a new trial after the FBI disclosed Halbower's DNA was linked to the murders of three other women in California around the same time as Michell's death. *Id*.

Mr. Anselmo requests the same access to justice Ms. Woods was granted in 2013. The Supreme Court of Nevada has "held that judicial estoppel is an extraordinary remedy and that it does not preclude changes in position not intended to sabotage the judicial process." *Price v. Uchikura (In re Estate of Coventry)*, Nev. Unpub. LEXIS 1807, *5 (2012) (internal quotations omitted). Judicial estoppel should only be applied "when a party's inconsistent position arises from ***intentional wrongdoing*** or an attempt to obtain an ***unfair*** advantage." *NOLM, LLC v. County of Clark*, 120 Nev. 736, 743(2004) (internal quotations omitted, emphasis added). Mr. Anselmo's intent is not to "sabotage the judicial process" nor is it "to obtain an unfair advantage." *See Price*, Nev. Unpub. LEXIS at *5; *see also NOLM, LLC*, 120 Nev. at 743. "Sabotage" is not the same as seeking justice, and after 48 years of incarceration, Mr. Anselmo deserves justice.

[2] Counsel is in the process of obtaining the court records from this case, State v. Cathy Woods, C79-1210.

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While it is true that Mr. Anselmo expressed remorse for taking Ms. Hiler's life during his parole hearing, he did so to be eligible for a reduced sentence which allowed him the possibility of parole. This is certainly not out of the ordinary for an individual who has been incarcerated for more than 35 years. "[A] prisoner's willingness to own up to his misdeeds - to acknowledge culpability and express remorse for the crime for which he is currently incarcerated - is a vital part of the parole decision making calculus." Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 Iowa L. Rev. 491, 493 (2008), attached hereto as **Exhibit 5**. "[P]arole boards simply lack the capacity to verify a prisoner's claim of innocence" so they "normally presume the guilt of the inmates seeking release … and leave it to the post-conviction litigation process to conclude otherwise." *Id.* at 494. "The prison grapevine has presumably informed the parole hearing-bound population that remorse is essentially a quid pro quo for release, casting doubt on the sincerity of many pleas of repentance before the board." *Id.* at 496.

This dilemma was specifically considered by the Nevada Legislature when considering the relevant statutory scheme for genetic marker analysis. The Nevada Legislature heard testimony about a case similar to Mr. Anselmo's: Christopher Ochoa initially provided a detailed confession to police for the rape and murder of a woman which he did not actually commit. Exhibit 4 at 26-27. After Mr. Ochoa was convicted and incarcerated, the actual perpetrator of the crime confessed and prosecutors approached Mr. Ochoa to see if he wanted to DNA test the evidence. *Id*. Mr. Ochoa "was afraid of how it would affect his parole and declined the offer to test the DNA while still claiming his guilt" and seeking parole. *Id*. He later consented to the DNA testing and he and his co-defendant were found to be innocent and the other man who confessed was the actual perpetrator. *Id*.

"DNA has the power to change everyone's view of the case and bring the truth to light." *Id*. at 27. For these reasons, the Nevada Legislature did not provide restrictions in NRS 176.0918 limiting access to post-conviction DNA testing to only those who had not confessed pre-trial, pleaded guilty, or provided an admission of guilt to the parole board. Instead, the

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Nevada Legislature chose to grant broad access to post-conviction DNA testing for individuals who have been convicted of a felony.

As judicial estoppel is an extraordinary remedy this Court should not exercise its power in this case. Testing the physical evidence in this case has the power to conclusively show that Mr. Anselmo is innocent, and the Petition should be granted.

The undersigned affirms pursuant to NRS 239B.030 that the preceding document does not contain the social security number of any person.

DATED March 10, 2020.

HOLLAND & HART, LLP

/s/ J. Robert Smith
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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(a), I hereby certify that on the 10th day of March, 2020, I served a true and correct copy of the foregoing **SUPPLEMENTAL POINTS AND AUTHORITY IN SUPPORT OF PETITION REQUESTING GENETIC MARKER ANALYSIS OF EVIDENCE WITHIN THE POSSESSION OR CUSTODY OF THE STATE OF NEVADA** by the following method(s):

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

Division of Probation & Parole

Jennifer Noble, Esq.
Marilee Cate, Esq.
Appellate Division
Washoe County District Attorney
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Reno, NV 89501

☑ U.S. Registered Mail: by depositing same in the United States mail, first class registered mail postage fully prepaid to the persons and addresses listed below:

Office of the Attorney General
State of Nevada
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☑ U.S. Mail: a true copy was placed in Holland & Hart LLP's outgoing mail in a sealed envelope addressed as follows:

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/s/ Cathy Ryle
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LIST OF EXHIBITS

No.	Description	Pages
1	Transcript of Proceedings, February 25, 2020 Hearing	53
2	Minutes of the Senate Committee on Judiciary, Seventy-Fifth Session, Testimony regarding A.B. 179 (May 6, 2009)	49
3	Minutes of the Senate Committee on Judiciary, Seventy-Seventh Session, Testimony regarding A.B. 233 (April 29, 2013)	35
4	minutes of the Meeting of the Assembly Committee on Corrections, Parole and Probation, Seventy-Fifth Session, Testimony regarding A.B. 179 (March 10, 2009)	39
5	Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings,* 93 Iowa L. Recv. 491, 493 (2008)	68

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EXHIBIT 1

Code No. 4185

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BEFORE THE HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE

THE STATE OF NEVADA, Plaintiff, -vs- MICHAEL PHILIP ANSELMO, Defendant.	Case No. 271359 Dept. No. 6

PETITION ON GENETIC MARKER ANALYSIS

February 25, 2020

Reno, Nevada

Reported by: Lesley A. Clarkson, CCR #182

A_P_P_E_A_R_A_N_C_E_S

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RENO, NEVADA, TUESDAY, FEBRUARY 25, 2020, 1:45 P.M.

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THE COURT: This is Case No. 271359, the State versus Michael Philip Anselmo. This is the time set for a hearing on Mr. Anselmo's post conviction petition requesting genetic marker analysis of evidence within the possession or custody of the state of Nevada.

Please state your appearances.

MS. CATE: Marilee Cate on behalf of the State.

MS. GAMBEE: Sydney Gambee on behalf of Michael Anselmo. Here with me also is Rob Smith and Jennifer Springer, also counsel for Mr. Anselmo.

THE COURT: I waited until quarter 'til. Is Mr. Anselmo appearing today?

MS. GAMBEE: No, he is not. He's actually at work today.

THE COURT: He's at work. Counsel.

MS. CATE: Your Honor, because Mr. Anselmo is not here, and because a waiver of his appearance hasn't been filed in the record that I'm aware of, the State has concerns about going forward with argument today. As Your Honor is aware, this is a criminal matter. His, this is a statutory right essentially to pursue this petition for genetic marker analysis, but ultimately the end for Mr. Anselmo is potentially a new trial. That's where

that leads if he's successful.

If the State is successful in having his petition dismissed or the State is ultimately successful after the Court orders genetic marker analysis, Mr. Anselmo could be liable, on the hook for costs associated with the process. And so the State's concerned that ultimately down the road if the State in one manner or another becomes successful, Mr. Anselmo could later argue that his counsel was ineffective in the manner in which they chose to pursue a petition, pursue it against his wishes. So I think just like any petition, post-conviction petition in a criminal matter where the petitioner has a right and is present unless they waive it in writing. We need that same thing in this case.

THE COURT: So do you have authority that requires that, that this is a part of the proceeding that would require a written waiver where it's a post-conviction statutory request?

MS. CATE: Right off the top of my head -- I just discovered this when I showed up today, Your Honor. I assumed he would be present. And the reason I assumed he would be present is because prior to the last hearing Mr. Anselmo was still in custody, and so the State did an order to produce prisoner, pursued the normal course that we do in post-conviction matters, and counsel, opposing counsel reached out and asked why I was doing that. I said if he doesn't want to come, if he doesn't want to be there, then file a waiver, and that's fine with me.

But if there's any substantive issues that are decided going forward, I have very real concerns about what he can claim later on about the way the matter is pursued. And he appeared last time for the inventory marking. And so I think this is still a criminal matter where he certainly has a right to be present, and --

THE COURT: But that's his right to be present. Is it the State's right to compel that he be present? No.

MS. CATE: Well, no, but the State can certainly ask for a waiver, because the State is trying to protect the record later on, when doing this again on appeal or a post-conviction matter again he raises some ineffective argument or that he didn't wish to pursue this, and now he's liable for costs under the statute because the State was successful.

And so all I'm asking for, I'm not saying that he has to be, I'm not saying that he has to be present, without a -- if it's a waiver in writing that says he doesn't wish to be present for these proceedings, the State's comfortable with that. But I am very concerned about the Court making substantive rulings on his petition, potentially dismissing a petition, without him being present in court.

THE COURT: So the written waiver requirement is where?

MS. CATE: Your Honor, I think that's a practice.

THE COURT: That's what I think, too.

MS. CATE: It is, but I think that's to protect the

record later on because it is a criminal matter, where an individual has a right to be in court when the Court is making decisions. And this certainly leads to, I mean it is the criminal nature of the Court in deciding whether he can pursue genetic marker analysis so he can overturn a conviction.

So just like a petition for habeas corpus where that is what a petitioner is ultimately trying to do, they are seeking to claim counsel is ineffective or there is some sort of unlawful hold on them. The same reasoning applies why the State would in those cases ask for a waiver, so that later again --

THE COURT: I understand. I'm trying to drill it down if there actually is a requirement. I'm obviously going to let you respond. And I understand that what you are concerned about, because you are in a Catch-22 here. If he doesn't get the relief he requests, it may afford him further relief. If we don't have a waiver from him saying I'm not going to be there, and I understand that my attorneys are representing me, and, you know, I'm waiving, in essence what you are saying is ineffective counsel. That's what you want for the future.

All right. Counsel.

MS. GAMBEE: Your Honor, Mr. Anselmo is aware of the hearing today. He was present in the courtroom last time that we were here back in April 2019, not because he requested to be here, but because, of course, like you heard, the State requested he be here and got an order for transport for Mr. Anselmo.

Mr. Anselmo is aware of this hearing, contacted counsel, was, preferred to go to work if it wasn't required for him to be here. And like Your Honor touched upon, it is Mr. Anselmo's right to be here, but he is not required to be here. He has informed counsel that he is comfortable with this hearing proceeding without him.

And this proceeding is no different than any other post-conviction appeal where, you know, you wouldn't have the defendant being required to show up at the Nevada Supreme Court, for example. It's no different here. There's no requirement that I'm aware of that he must state in writing that he waives his right to be here. There's no requirement in the statute that he be here at this hearing, and there was no requirement in Your Honor's order of January 10, 2020, that he be here.

This is a motion hearing where we are discussing argument about whether or not the genetic material identified in the petition should be tested. It's not my understanding that this is an evidentiary hearing. This is solely argument to determine whether or not the petition is granted to the extent that the genetic material would be tested. And Mr. Anselmo is represented by counsel at this hearing and waives his right through counsel to be here at this hearing. That's sufficient, and we can go forward.

THE COURT: So the State's concern, on the one hand it is on your petition, and obviously I have read everything and I'm prepared to address. But in the State's response the State is

asserting that he, on various grounds, that he, it should not be granted, and in fact that it should be dismissed. So does the remedy that the State is requesting change your argument in any way?

MS. GAMBEE: No, Your Honor.

THE COURT: So the Court could dismiss the petition without him being present.

MS. GAMBEE: Mr. Anselmo is aware of the potential consequences of this hearing today, and he is comfortable not being here. He has a right to be here, but he is not required to be here. So yes, we would feel comfortable proceeding today.

THE COURT: And so you had a specific discussion with him -- I can ask about scheduling, I'm not going to ask about substance -- but regarding this hearing, that he has the right to appear, and he declined to do so?

MS. GAMBEE: Yes, Your Honor.

THE COURT: And as an officer of the court you are representing that he understands that if I were to rule from the bench today his petition could be dismissed, and he understands the consequences of that.

MS. GAMBEE: So I did not have the conversation personally, but Miss Springer did, so I'll let her address that to you.

MS. SPRINGER: Yes. We discussed the consequences of this petition and that there could be a ruling from the bench

today or at a later date as a result of the argument today.

THE COURT: And he made the choice not to be here.

MS. SPRINGER: That's correct. He is recently employed, and he didn't want his missing a day of work to have a consequence on that new employment.

THE COURT: All right. Well, I understand the State's position that what they are concerned about is alleviating potential claims in the future, but I see this as unless there's an actual requirement that he be at one of these proceedings, that that, and that's his right to appear. I don't see, I actually did some quick research before I came out to see if I could locate something that actually requires him to be present at this type of hearing. I understand the desire for a waiver, but I could not find a requirement, an actual statutory or case law requirement that he execute a waiver.

Does anyone have any authority to the contrary?

MS. GAMBEE: I do not, Your Honor.

MS. CATE: No, Your Honor.

THE COURT: We will proceed. So counsel, do you have anything to add to the documents that -- I have some specific questions I want to ask.

Let me step back for a minute. I do want to make sure that the minutes reflect the State's concern about his presence and that it is a policy in their office that they require waivers. I want the minutes to also reflect that counsel as

officers of the Court have indicated that they had a discussion regarding scheduling with Mr. Anselmo as well as the consequences that might occur as a result of the Court's ruling, and that he knowingly decided he did not want to be here and to waive his opportunity to be here and to waive his opportunity to be there.

Have I accurately stated that?

MS. GAMBEE: Yes.

MR. SMITH: Yes.

THE COURT: So now you can go ahead and proceed. As I said, I do have some specific questions to ask, but I would like you go ahead and make your arguments, and then not to take offense when I probably interrupt you. Go ahead.

MS. GAMBEE: Thank you, Your Honor. The relief requested here is authorized by statute, as we are all aware, and is available to any person convicted of a felony who meets the statutory requirements. To address what I hope is one of Your Honor's first questions, based on the January 10 order, as an initial matter, whether the petitioner is currently incarcerated doesn't have any bearing on his standing to bring the petition or the Court's --

THE REPORTER: Your Honor, I'm sorry.

THE COURT: What we are going to have to do is take a breath and slow down.

So your position is that -- I had read in the State's information about his release, but I should indicate to everyone

that I actually read about it in the paper. Unknowingly I started reading this article and then recognized that, it was very short, and it was Mr. Anselmo. And so out of an abundance of caution I wanted to indicate that in my order so that we could place it on the record today, even knowing, I think the State indicated in a footnote that he was released in October of 2019. But I just felt that it was appropriate to make sure was in the record because I had also seen that little clip.

So he's, your position is he has standing to continue to assert. And he remains on parole, correct?

MS. GAMBEE: He does, yes.

THE COURT: All right. I did not find anything that would indicate that once the petition is filed that even if a petitioner is released that you cannot go forward down this path. I mean it seems to me, and I didn't check with regard to the registry that you identified, but the actual cases where those defendants were released, but it seems that it has occurred before. This is isn't the first time.

MS. CATE: Your Honor, I can probably assist. The State agrees. Even though he's out of custody, and I actually reviewed that in the legislative history, that was the intent, and the statute doesn't provide that he has to be in custody. So the State is in agreement. So we can probably move forward from that.

THE COURT: I want to make sure, like I said, because

of the reasons that I had found out in addition. So I am comfortable proceeding. I had reached that conclusion. So go ahead.

MS. GAMBEE: Understood, Your Honor.

So we are here to determine whether or not the Court is going to grant the petition to test the genetic material that's identified in the petition. Your Honor has determined twice previously that the statutory requirements have been met, at least initially in the initial order granting the petition in part, which was in March of 2019, and then in the order directing testing, which was rescinded the next day, in September 2019.

THE COURT: Right. That was due to a miscalendaring in Department 6, with apologies to all parties, and I think with somewhat a heart attack to the district attorney's office.

MS. GAMBEE: But the issues have not changed here just because of the filing of the State's response. The statutory requirements have still been met by Mr. Anselmo.

The first requirement is that he identified evidence. It doesn't appear that the State disputes that, and Mr. Anselmo did identify specific evidence in his petition that he would like to be tested.

I think it's the second factor that is really in dispute here, so I'll skip that for a moment.

We did identify the type of genetic marker analysis and a statement that that analysis was not available at the time of

the trial. It seems those issues --

THE COURT: Slow down.

MS. GAMBEE: So the only issue that does appear to be in dispute today is whether there is a reasonable probability that Mr. Anselmo would have either not been prosecuted or would not have been convicted had the genetic material been tested at the time of trial. Here the State contends the petition fails as to that factor because the State first contends that the petition is unsupported by citations to the record. The statute requires a declaration supporting the petition, and Mr. Anselmo --

THE COURT: I'm going to interrupt you. Because the State's concern as I read it was that the information stating a good-faith belief wasn't correctly set forth in Mr. Anselmo's affidavit. So do you have, I know your position is that it is. It seems to me a bit of it is wordology. It just is what he said based on the facts that were relayed distilled down into a to good-faith belief on his part and doesn't consist of any misrepresentation. So the State's concern is where they come in and actually cite to the record that that contradicts the sufficiency of your petition.

MS. GAMBEE: Correct, Your Honor.

THE COURT: Correct?

MS. GAMBEE: I understand that that is the dispute.

THE COURT: So the response to that?

MS. GAMBEE: So first we submit that the declaration is

sufficient. But second, as noted in the reply, Mr. Anselmo's declaration, his petition, all of the statements in his petition are adequately supported by the record. And you can find those record cites in the reply. There have been no material misrepresentations in Mr. Anselmo's petition.

For example, the State raises that Mr. Anselmo's petition states that the semen sample found had to come from someone who was sterile or had a vasectomy. That's not what the petition says precisely. The petition says that that is a possibility that was raised, was that a semen sample could have come from someone who was sterile or had a vasectomy.

Mr. Anselmo is not required to present all of the opinions about what possibly could be true about that semen sample. For example, he did not state that the opinion was given at trial that sperm could have been removed from that sample based on degenerative qualities.

THE COURT: That's what the doctor said after the State points it out.

MS. GAMBEE: That's just one of the opinions that that expert provided in addition to the other opinions that Mr. Anselmo noted. And Mr. Anselmo noted the opinions that support his request for relief here. He noted that had the genetic material been tested, had the semen been tested, there is this theory that was presented at trial that the semen could have only been given by someone who was sterile or had a vasectomy.

That was one of the options. So if that semen had in fact been tested and come back that it was not Mr. Anselmo's, that certainly would have been relevant to the case. That would have been relevant because it would have been inconsistent with the confession, for one, in which Mr. Anselmo allegedly, he claimed that he sex with the victim. But if the semen sample did not belong to Mr. Anselmo, that would certainly call into question the confession. And here this case rests largely on the confession. There was no physical evidence that linked Mr. Anselmo to the crime at the trial.

So testing here of the physical evidence that is able to be tested now that couldn't be tested back in the '70s when this trial occurred is certainly relevant to the petition, is certainly relevant to Mr. Anselmo's reasonable possibility that he would not be convicted if he had had the opportunity to test this genetic material.

In the same way the circumstances that Mr. Anselmo recounts in his petition relating to his confession are adequately supported by the record. Mr. Anselmo notes that he informed police that he had been awake for 36 hours and that he had not eaten at the time of his interrogations. That is true. That is supported by the record. There is additional information surrounding Mr. Anselmo's confession certainly, but that was not misrepresented in Mr. Anselmo's petition. Mr. Anselmo was awake for 36 hours. By the time he was awake for 48 hours he had to be

injected with coramine.

All of this calls into question the circumstances surrounding the confession. And that combined with genetic testing that could show that Mr. Anselmo does not match any of the genetic material found on the victim's purse, hand, clothes, the semen sample, and all of that combined shows a reasonable possibility if Mr. Anselmo would not have been convicted if he had had this genetic testing available to him at the time of trial. That is a factor that the Court has to consider here, is whether there's a reasonable possibility that Mr. Anselmo would not have been convicted or wouldn't have been prosecuted.

I would like to point out that Mr. Anselmo, nowhere in his petition did he say that the police engaged in nefarious tactics. That is not something we characterized in the petition of the police. Rather, we were showing the circumstances of the confession, that if the jury were presented with genetic testing of this material that did not match Mr. Anselmo, coupled with all of the circumstances surrounding the confession, the outcome could very well have been different. Mr. Anselmo may not have been convicted. And that is why we are asking for testing of this genetic material here.

There are a number of inconsistencies regarding the confession that I don't think I need to go into any further here unless the Court has specific questions. But in any event, what we are looking at here is an extraordinary case where from the

'70s we have genetic material that is capable of being tested today, and it can exonerate Mr. Anselmo. Mr. Anselmo should have the right to have that evidence tested, particularly given the gravity of his conviction. It's a murder conviction. It's a felony charge that will follow him for the rest of his life. He's on parole now, and he still faces certain restrictions in connection with his parole today. He can't go up to Oregon to visit his mother because he can't leave the state of Nevada. And what's at issue is the potentially exonerating Mr. Anselmo, showing his actual innocence.

The next argument that the State raises is that the petition is not timely. The statute doesn't include a statute of limitations. And that was intentional, Your Honor, because like Mr. Anselmo's case, there's many cases out there where genetic testing simply was not available at the time of the conviction. These defendants should have the opportunity to demonstrate their actual innocence through testing of this genetic material that's now available.

THE COURT: But does the doctrine of laches apply where it's very clear that representatives of Mr. Anselmo's, attorneys or someone from the Innocence Project, came in 2013 and reviewed what evidence they could, or reviewed the, whether or not the evidence existed, and then no petition was filed for years? Does that make a difference?

MS. GAMBEE: No, Your Honor, because the other key

element of the defense of latches is prejudice, and there has been no prejudice alleged by the State here. The difference that we are talking about is a matter of five years, from 2013 to 2018 when the petition was filed. There's been no change in circumstance on behalf of the State from 2013 to 2018.

We are talking about a case that's already well over 40 years old, and an additional five years does not change anything. We are not talking about a case where the evidence is no longer able to be located within that five years. There's simply no change in the State's position from the time of 2013 to 2018. And specifically the statute does not include a statute of limitations. That was intentional.

So we can argue whether laches evens applies here. I would submit it does not. It was something that could have been resolved very easily if the legislature had wanted to include a statute of limitations. But they did not, simply because of the nature of these cases where this happens and genetic testing is available later on that wasn't available at the time of trial.

So Your Honor, I would submit that no, laches is not applicable here because there is simply no prejudice to the State with that delay of five years from 2013 to 2018.

The final thing that the State raises is the statements of Mr. Anselmo in his parole board hearing back in 2005. These are not statements that should preclude Mr. Anselmo's requested relief here.

First of all, the timing of that parole hearing is very relevant. The parole hearing was December 14, 2005. Mr. Anselmo had just had a request for testing denied in the prior year, so the statutory remedy was not available to him at that time. And he made statements to the parole board, like many of these defendants who come up for parole during the long terms of their sentences. It's widely known that there are false confessions, there are statements to parole boards that even secure early release on parole for defendants convicted of felony crimes who are later found innocent of those crimes through genetic testing. That should not preclude Mr. Anselmo's relief here.

And again, that is not something listed in the statute for consideration of whether or not to grant the petition for genetic testing. The statute does not say that the relief is unavailable to a defendant who has confessed at trial, entered a guilty plea, made statements to the parole board in support of his release. That's simply not in the statute anywhere. So notably none of these things are itemized in the statute for consideration about whether or not to grant a petition for genetic testing.

And Mr. Anselmo has met the statutory factors. He's identified evidence, he's identified a reasonable possibility that he would not have been convicted or prosecuted if the genetic material was tested at the time of trial, he's identified the type of testing, and he's also submitted statements that this

testing was not available at the time of trial.

Mr. Anselmo should be provided the opportunity to establish that he is innocent. And we are just at the very early stages of this. We just want the evidence to be tested so Mr. Anselmo can have that opportunity to make a motion for a new trial or whatever else comes later on down the road. So for those reasons, Your Honor, we would ask that you grant the petition and order the evidence be tested.

THE COURT: Were any of the cases that you identified on page 6 in footnote 4 from the registry, were those Nevada cases, or do you know?

MS. GAMBEE: One moment, Your Honor.

THE COURT: In particular, the, towards the end, actually it's footnote 5, where you identify the John Duvall defendant that had admitted guilt twice to a parole board before he was exonerated.

MS. GAMBEE: Off the top of my head I don't know, Your Honor. That's something we could submit additional briefing on if you would like.

THE COURT: I was, I didn't want to reach a conclusion, but I noticed that the citation was University of Michigan. I was just curious more, because frankly I was somewhat surprised by that.

Okay. Anything else?

I want to make sure, just a minute, that I have asked

you my questions.

I did ask them. So Miss Cate.

MS. CATE: Thank you, Your Honor. So first I'd like to address subsection 3, which is what counsel started her argument with as well, on whether the petition even satisfies the statutory requirements. And the first part, just in subsection 3, the petition cannot contain any material misrepresentations of fact. And as the Court hit on, petitioner has to have a good-faith basis in relying on particular facts or requests.

During argument, the argument was well, we didn't necessarily say Mr. Anselmo was categorically excluded based on the testimony at trial in our petition. That's false. Page 5 of the petition says importantly, Dr. Labaster (phonetic) opined that the contributor of the semen was either sterile or had received a vasectomy based on the lack of sperm in the semen sample. At the time of trial Mr. Anselmo's seminal fluid was examined, and the presence of sperm was identified in the sample. Meaning that Mr. Anselmo could not have been the source of the sterile semen found in Miss Hiler.

That's false based on the record. And so that assertion was important to this Court when you originally held a hearing on this matter. In fact the Court, on page 5 of the Court's order in that March order, talked about the specific evidence and whether Mr. Anselmo met the standard. But the Court said in pertinent detail the Court finds persuasive the original

testing of semen found in Miss Hiler belonged to a individual who may have been sterile or recently had a vasectomy, neither of which applied to Mr. Anselmo. Then the Court concludes that if testing was available, exculpatory results would be obtained.

So this is a presentation that is material, because if the Court relied on that, and as the State pointed out, that's just not the substance of what the doctor's testimony was at trial. The doctor testified actually first that the reason sperm wasn't found was because of the degenerative nature of sperm cells and then in that sample. But the doctor knew that it was seminal fluid associated with a male due to testing that was done, but there was no actual semen. And the doctor talked about where Miss Hiler's body was found, kind of the nature of being outside for a period of days prior to being found could impact the sample, and explained that as a first reason why he suspected that semen wasn't found in that sample.

Then the doctor said, I think responding to a question, I believe, on cross-examination, was that well, yes, it's possible that the contributor was sterile or had a vasectomy. So there's the two potentials.

But that wasn't what was represented. What was represented by Mr. Anselmo is it wasn't him because the contributor was sterile or had a vasectomy. And that is in their petition, and that is what was relied on by this Court to even start this process. And it's false.

Mr. Anselmo contends that he simply has a duty to tell the Court what's helpful to his petition. That's false. Again, the statute requires that he has a good-faith basis in relying on the facts for his request.

Also the State would submit that's a candor to the Court issue. If you are representing that it couldn't possibly be him based on the evidence at trial, and that claim is just simply belied by --

THE COURT: But are they saying it can't possibly be him, or are they saying there's no material misrepresentation of fact that he has a good-faith basis for relying on particular facts? I mean it doesn't say that petitioner has to state every fact that's against them. The statute very clearly says that he can rely on particular facts. And I understood their argument to be not that it could not absolutely be him, but that there's a reasonable possibility he would not have been convicted. I see those a bit differently.

MS. CATE: I agree. I think there's, the assertion in the petition originally was that it could not have been him categorically. Now that position has been walked back slightly, and now the argument is actually repeatedly could not, you know, could, there's a lot of reference to could, not necessarily the reasonable probability standard. You know, these could show, these could show, well -- I mean I'll move on from that point. But I think that is important, Your Honor. You did rely on that

specifically in your original order, and it's belied by the record if nothing else.

THE COURT: Let's go back to this language that is included in NRS 176.0918. Does your argument change based on the use of the word particular, or two words, particular facts? To me that doesn't say all facts, but actually indicates that the petitioner can utilize particular facts.

MS. CATE: Right. It says before that you have to have a good-faith basis to make your assertion.

THE COURT: So how do we determine if it's a good-faith basis? Is it something a person simply has to include in their declaration, or is it the process that the Court considers what you have now presented? Because obviously at the time the first order was written, I didn't have the benefit of the State's response, and nearly inadvertently foreclosed it, but I do now. And so does this statute then compel a court in considering this to really move on from what was stated in the petition but actually to compare it to the record?

MS. CATE: So I actually think it does, because the statute provides that the Court can dismiss the petition without even hearing from the State. It's only when the Court is going to consider whether to grant the petition that then the State's response is triggered after those inventories are filed. So I believe that kind of principle is a reliance on the record to provide the Court with a basis, a good-faith basis to even move

into this process, to even hold the inventory hearing to even have the State respond.

But we are here today, the State has responded, you have the benefit of the record, the State's response, and so certainly you can make the decision now that you have that. It's just, you know, part of the State's argument is he didn't satisfy it initially.

THE COURT: I understand.

MS. CATE: And so that's where that's coming from, Your Honor.

But I do want to address, without belaboring it too much, but subsection (b), so 3(b), the rationale for why a reasonable possibility exists that petitioner would not be convicted if exculpatory results had been obtained.

THE COURT: But it says would not have been prosecuted or convicted, right?

MS. CATE: Right. And I mean I think in this case a lot of argument, well, maybe it's prosecuted too, but certainly convicted, because we have the benefit of the trial record. And the problem again that Mr. Anselmo has is he can't satisfy this portion of the analysis either, and didn't on his petition, but certainly can't if the Court considers the actual record in the trial, because exculpatory results were presented to the jury. The jury heard from the doctor that Mr. Anselmo had sperm in his sample. They also heard that there was no sperm present in Miss

Hiler's body. That's exculpatory. That's not saying that Mr. Anselmo was obviously the contributor.

Now, the jury heard that Mr. Anselmo's sample, he had a low-level sperm count, under kind of the general population of males, and due to the degenerative nature could have reasonably concluded that it was still Anselmo that murdered and potentially raped her because of the evidence. But that was exculpatory. That fact that the doctor said the sample is, for Mr. Anselmo, has sperm, Miss Hiler's doesn't. That's exculpatory.

So that was a big reliance, you know, of Mr. Anselmo bringing this forward is well, I'm not sterile, I didn't have a vasectomy, so it could not have been me. But that information wasn't presented to the jury, and the jury didn't believe it. The jury decided, a reasonable conclusion, chose to decide it was still Mr. Anselmo who murdered Miss Hiler.

THE COURT: Does it make a difference that even if there was exculpatory information provided, it isn't the nuanced and very specific information that DNA testing provides? As I understand there's, I want to say the phosphates or something that remains even if the sperm degenerated. But there is something that DNA can be compared to now that it wasn't available then.

MS. CATE: Your Honor, I am not a scientist, I don't know, because I think the sperm cells are what actually contain the primary genetic material. So if there are degenerate -- but

I don't know specifically the answer to that question.

THE COURT: So I think this is an important point, because in reading all of this, I was looking at if, like you say, he still had, now Judge Polaha, presented at trial that some exculpatory information, but he did not have the benefit of the kind of exculpatory information that a DNA testing would yield. It's just much more specific. And my perception was that that DNA test could still be done on the matter that is on the slide, and it does not actually have to be the sperm cell, but rather it can be done on the, I think it's called phosphates. So am I wrong about that?

MS. CATE: So the broader question of whether if there's a kind of more detailed exculpatory result available?

THE COURT: Right.

MS. CATE: So I think I will address that, because even if, and I can jump to that now. But the State's, the position of Mr. Anselmo is that his confession that he now claims was false was what essentially the case conviction was based on. And so my, and the State's position is that even if exculpatory results were obtained from the DNA sample from the pantyhose that Mr. Anselmo's DNA cells, skin cells were not on the pantyhose or it wasn't his hair, the State submits to this Court, based on the record, that there isn't a reasonable probability that he wouldn't have been convicted. In other words, he would have been convicted anyway, and it's because of all of the facts.

When you look at the actual trial record as a whole, it was not based on Mr. Anselmo's confession only that he was convicted. And so I think that's important to kind, for the State to highlight a few of those facts.

THE COURT: But is that for, procedurally, is that for a day in the future in response to a motion for a new trial? Or is that a question that's for determining whether or not testing is appropriate? Because that answer can still, even if they are granted the opportunity to get the testing, there still can be a denial of new trial, and it seems to me these same arguments come up, right?

MS. CATE: Right. But we don't get there, and I think that's because subsection (b) does say that there has to be a reasonable possibility exists that petitioner would not have been prosecuted or convicted if those exculpatory results were presented. But that requires the analysis of the record.

THE COURT: Doesn't it actually say the petition must include this? Not whether or not we test every possibility of whether he would have been prosecuted or convicted. I mean is this a procedural basis, like here's why, doesn't it say that they just have to provide the rationale for why reasonable probability exists? Is it your position that, with regards to the statute, that the Court actually determines whether he would have or would not have been prosecuted at this time?

MS. CATE: Yes.

THE COURT: Or convicted. Okay.

MS. CATE: Your Honor, I think that goes along, I think that's pretty consistent with case law concerns petitions, the supreme court's case law regarding the importance of finality of convictions. This is a very limited basis for relief. And the legislature has given this Court the authority to dismiss a petition if it doesn't meet what the requirements are.

But I would also point the Court back to that there isn't a material misrepresentation of fact. That takes into account the requirement of the Court to consider the record below and determine whether these are actual facts that entitle petitioner to relief. Because what could happen is we have petitions filed on this and then genetic marker tests ordered. That's not what the statute wants. The statute is very clear that there actually has to be a number of things at that point and an analysis by the Court before that can go forward.

THE COURT: So where in the statute does it say that the Court has to do that analysis?

MS. CATE: Your Honor, again I would refer to subsection 3.

THE COURT: But subsection 3 says the petition must include without limitation. It doesn't say that the Court has to do an analysis of A, B, C, D, and E. It just says they have to put it in their petition.

MS. CATE: So, but on subsection 4, the Court can

dismiss the petition if it doesn't meet the requirements set forth in this section. And so I think kind of the reference to the facts, or my position, excuse me, remain the same. Reference to the facts, the good-faith belief, all of that gives the Court the ability to assess that and weed out these petitions that are improper. And that's consistent with other post-conviction authority as well, and that the Court has to do an independent assessment. And that's in Chapter 34.

But, so if I do turn to the facts, Your Honor, why it is important to consider the actual, the entirety of the record, Mr. Anselmo, like I said, wasn't convicted simply because of his confession. There were circumstances kind of surrounding his acts prior to trial that came, or prior to trial, excuse me, prior to Miss Hiler's disappearance, his actions around finding Miss Hiler, the information that came about related to her belongings and his unique knowledge about where certain things were found that could only be, could only occur if he was somehow involved in the crime.

THE COURT: And those are documented in the police reports, right, that were attached I think as your Exhibit 2?

MS. CATE: Actually, Your Honor, I didn't attach police reports. I think that's a hearsay issue.

THE COURT: Did you attach the -- okay, I'm sorry.

MS. CATE: I refer specifically, these facts do come out in the State's recitation of the facts at trial. And I won't

go too long, but I do want to highlight a couple.

July 14, the night before or early morning before Miss Hiler disappeared. Patsy Brett observed petitioner in the parking lot of the Crystal Bay Club hiding behind a car. It was about 3:00 a.m. She testified she had just gotten off work, very suspicious, it scared her. That was the same parking lot it turns out that Miss, that the car that Miss Hiler was driving that day. It's not her car.

THE COURT: Miss Weider's (phonetic) or Weider?

MS. CATE: That's right. Her car was found where the steering wheel was bent, there was markings on her car that they thought maybe the tires had skidded, the clutch was out, the brake lights were on. Very odd circumstances. That is where, that parking lot that Miss Brett referred to the night before is where she saw petitioner lurking at about 3:00 a.m.

On the 15th, so after Miss Hiler's roommates reported that she was missing, and police officers are in the parking lot with two of the roommates, and talking to them about, you know, their concerns, petitioner actually approaches. This is again early morning hours after they had gotten off work. This is when Miss Hiler didn't show up to pick up her roommate. And petitioner approaches officers again in that same area, same vicinity, and asks about ex-felon registration. And in the transcript, the officers are saying it was odd generally, I'm paraphrasing, but expressing some concern over why this person

would be approaching in the middle of the night to ask about ex-felon registration. So that's the next early morning hours, and that's the same early morning hours that Miss Hiler disappeared.

Then you have the 17th where again in the early morning hours Mr. Anselmo approaches security for the Crystal Bay Club, and he tells them he had seen a woman dragged off with a male, and, you know, so he tells them we should go look for them. So the first security officer he approaches was Mr. Greenwald (phonetic). And Mr. Greenwald got another security officer involved, Mr. Rose, and police ended up searching too, but they all started searching the area. And it seems from the record that Mr. Rose spent more time with Mr. Anselmo during that search. And Mr. Rose noted that it was really heavy brush, but petitioner knew where he was going and was very determined about which areas they should search, they needed to search by this cabin, very particular.

And so what was actually most interesting to me when I was reviewing the transcripts was Mr. Rose's recount at trial about how the body was discovered, how Miss Hiler's body was discovered and the facts surrounding that. And it was that he -- so Mr. Anselmo wanted to continue searching. And it seemed the search had kind of died down.

Mr. Rose and Mr. Anselmo go back to Mr. Rose's office, Mr. Rose is going to write a report. Mr. Anselmo, he wants to

keep searching, and he asks for a flashlight. Mr. Rose has to dissuade him it's the middle of the night. Mr. Anselmo insists and takes the flashlight and leaves. He returns in 15 minutes and says he found Miss Hiler's body, or he found a body.

So then Mr. Rose follows Mr. Anselmo to this location. And Mr. Rose said it took 10 minutes to get where Mr. Anselmo found the body. Now he had only been gone for 15, but Mr. Rose said it took 10 to get up there. But Mr. Rose commented on how unusual it was that Mr. Anselmo could have found this body, given where it was, what was going on, the dark, and, you know, just the manner. And he commented on how calm Mr. Anselmo was and just odd. And that came across in that testimony. And then I think Mr. Rose said it was like finding a needle in a haystack. That's how he --

MS. GAMBEE: Your Honor, I have to object at this point, because it sounds a lot like a closing argument of the initial trial. Just to put that objection on the record that that's not the purpose of this petition hearing to go through the sufficiency of evidence on the underlying trial, but rather to determine whether there is a reasonable possibility he would not have been convicted with the testing of the evidence. That's what we are here on today.

THE COURT: Your objection is noted.

I'm going to allow you to continue.

MS. CATE: Thank you. Finally, I'm almost done with

the facts, finally, the other kind of thing that is beyond Mr. Anselmo's confession that really was I believe strong in this case was that Mr. Anselmo knew where some of Miss Hiler's items were that were not visible, they just weren't visible to the search. And as the State put forth in its response, searches occurred in the few days after Miss Hiler's body was discovered.

But one of the most critical things or striking things to myself when I read the transcript was that Mr. Anselmo knew where Miss Hiler's keys were. He threw them into the lake and described where he had done that, and scuba divers actually found her keys subsequently based on Mr. Anselmo's description.

THE COURT: Doesn't he later say, though, that somebody asked him to do that?

MS. CATE: That's what my next point was, Your Honor, is that he, it either, I mean now he's claiming he just had no involvement, but his knowledge of the keys either, as he testified at trial, was because he was an accessory after the fact, he helped Mr. Scores get rid of Miss Hiler's belongings, but he knew where the body was, and that's why he got there so quickly. Or it says something else.

And that was presented to the jury. As Mr. Anselmo testified, and the State would submit uncredibly, because he said that he ran into Mr. Sores, Mr. Sores forced him essentially to help hide some of the evidence and threatened to kill him and all of those things. And then in the State's rebuttal case, as the

Court saw from the response, the State disproved that Mr. Sores was anywhere in the area.

So my point in going through that all that, Your Honor, is that he had a connection to Miss Hiler, even if just limited to that those keys. But that had to be explained at trial, and the way that was explained was his testimony about Mr. Sores. But there is a connection.

So even if the jury heard exculpatory information, which it did, the jury heard about the semen, as the State's already argued, the jury heard about the hair samples, that the hair didn't compare to Mr. Anselmo's, and that's actually in Mr. Anselmo's petition, that the hair samples did not match Mr. Anselmo's samples, or that Mr. Anselmo's fingerprints weren't found on the vehicle, all that information was available. The jury believed, based on, the State would submit, all the circumstances that the State's outlined, that it was Mr. Anselmo because of the way he, you know, thinking about the way he was lurking, it was circumstantial evidence. But the jury can certainly rely on circumstantial evidence to find guilt beyond a reasonable doubt. That happens frequently, I would say.

So to now claim that there's a reasonable possibility that had exculpatory results been presented, that the jury would have not convicted him? The State submits that's just, if you look at the record, that's just not true. And so the State submits Mr. Anselmo hasn't satisfied the general statutory

requirements for a petition, so it should be dismissed on that basis.

I won't spend too much time on the other arguments, except that with respect to laches and in post-conviction matters the State doesn't have to prove that, essentially prove the basis of laches or prove that we are harmed. Although I would submit to Your Honor if Mr. Anselmo is successful, prosecuting him for murder 48 years, 50 years after he was convicted would certainly be a problem for the State and meet the standard.

But in post-conviction matters if five years has passed, the State can affirmatively assert laches without any, and I cited that in my brief, but can affirmatively assert laches, and that is a rebuttable presumption that actually the petitioner has to disprove. So the State has no burden except to assert it and provide the petitioner the ability to respond, which is today, which is their reply brief. But the State has no affirmative burden with respect to laches.

THE COURT: So you are saying although there would be prejudice if you had to put on the case again, that you don't have to even assert that, because five years have passed, and you can simply move to dismiss based on laches.

MS. CATE: That's correct.

THE COURT: And then the burden shifts to them.

MS. CATE: That's correct. And then Your Honor touched on this, and I would also argue kind of the timing of the

petition does go to the State's laches argument that in 2013 Mr. Anselmo was obviously aware of his ability, was trying to review evidence at the sheriff's office, and didn't file his petition for five years. That does go to the laches argument.

But also just the general, and the State cited it, but the general case law in respect to post-conviction petitions and finality of these convictions is that the supreme court has recognized that there's a new statutory requirement created that a petitioner who is challenging kind of their conviction, their judgment, generally has a year to raise it once they are aware of it.

THE COURT: But was it our statute that used to or a different state statute that had a statute of limitations or a limitation period in the DNA request statute, but it has been specifically deleted from ours?

MS. CATE: You know, Your Honor, I don't recall in my review seeing that in the prior statute. And if it had been deleted, I think even if it was there originally and had been deleted, I still think in line with the current statutory scheme related to post-conviction petitions and current Nevada Supreme Court case law that this would still be under that timeline.

THE COURT: Wouldn't that defy common sense in a way, because anyone within a year would have had the ability to have that type of testing done.

MS. CATE: No, because, I mean again the supreme court

has repeatedly talked about the importance of finality, one time through the process. And so the idea here, and this is one of those cases, Mr. Anselmo has repeatedly been able to challenge his conviction. In fact in, I think he filed it here in 2005, but the supreme court affirmed the district court's dismissal of his petition in 2006. But he raised an actual innocence claim, he raised an unconstitutional argument related to his confession. So those are also issues that are potential law of the case problems for Mr. Anselmo and now making any claims on the basis of his alleged false confession.

And then finally, Your Honor, with respect to judicial estoppel, the central argument is people falsely confess so the Court should ignore the fact that Mr. Anselmo told all the justices of the supreme court, told the governor and the attorney general that he killed Miss Hiler and he was sorry. He got relief, and this Court should now ignore that, just because sometimes some people falsely confess. Your Honor, that's just not a reason. Judicial estoppel was created for the integrity of the judiciary and integrity of the courts, and allowing Mr. Anselmo to benefit from one assertion and turn around and try to benefit here is the very thing judicial estoppel is designed to prevent.

I want to make sure I addressed all of my other little notes, and I think I did. And so, Your Honor, unless you have any other specific questions for me, I would submit.

THE COURT: Let me just flip through your opposition. I have asked them all that I had flagged.

MS. CATE: Thank you.

THE COURT: Counsel.

MS. GAMBEE: Your Honor, many of the State's arguments in opposition to this petition for testing of the genetic material are actually arguments in opposition to a motion for new trial, which is not before the Court today. Those are not the arguments that are at issue or in play today. The Court is not being asked today to verify the sufficiency of the evidence upholding Mr. Anselmo's conviction. Rather the question is whether Mr. Anselmo presented a rationale for the reasonable possibility that he would not have been convicted or prosecuted if exculpatory evidence had been obtained through genetic testing. That's the issue today.

And what is at stake here is the possibility that Mr. Anselmo is actually innocent. I would submit that that outweighs any burden to the State. I didn't hear any harm that the State would suffer if this testing were to go forward. The challenges in putting on a new trial are more appropriately evaluated in connection with a motion for new trial, not necessarily this petition. Those challenges, interestingly, do not change whether Mr. Anselmo had filed his petition in 2013 versus 2018. I would submit the laches argument simply does not apply here. There is simply no difference between having the

petition filed in 2013 versus 20188 here.

And going back to the very beginning of the State's argument, just to clear up something about the alleged misrepresentation in the petition. The petition does not misrepresent that Dr. Laubsher's (phonetic), I'm probably butchering that, testimony. The petition states that Dr. Laubsher opined that the contributor of the semen was either sterile or had received a vasectomy based on lack of sperm in the semen sample. That is true. That is something the doctor did opine. Did he enter additional opinions as well? Yes, he did. But this is the relevant opinion on which Mr. Anselmo relies, his good-faith reliance on specific facts to show a rationale that he, there's a reasonable possibility he would not have been convicted had this testing taken place.

And the next sentence that counsel referred to on page 5 of the petition, at the time of trial Mr. Anselmo's seminal fluid was examined, and the presence of sperm was identified in the sample, meaning that Mr. Anselmo could not have been the source of sterile semen found in Miss Hiler. That is not a statement attributable to the doctor. That is part of the rationale supporting the reasonable possibility that Mr. Anselmo may not have been convicted had this genetic material been tested. That is not a misrepresentation of what the doctor opined to at the trial. It's just simply part of the rationale that Mr. Anselmo is required by statute to present to this Court.

We are not, we are also not arguing that Mr. Anselmo only has a duty to present facts in his favor. He has a duty to present specific facts that support his rationale for a reasonable possibility that there is, that he would not have been convicted had the testing occurred.

And Mr. Anselmo has presented the rationale. He has established that there is the possibility of exculpatory evidence that could be admitted in a new trial, after of course a motion for a new trial under the statute. Just because Mr. Anselmo had some exculpatory evidence presented at trial does not mean that he is precluded from presenting the ultimate exculpatory evidence, DNA evidence. And here we have that highest form of exculpatory evidence, DNA evidence.

THE COURT: And it does not match.

MS. GAMBEE: Correct, of course, which is what we are asking for. We are asking for the testing so we can get through this gate to see if the DNA evidence matches Mr. Anselmo. Because if it doesn't, that would be the ultimate exculpatory evidence. And that is the best evidence in this case, not the circumstantial evidence that was also presented at trial.

And we are not talking about just semen here. We are talking about other biological material, blood, fingernails, hair. We are talking about epithelial cells and skin cells that contain genetic material. And if Mr. Anselmo does not match the material on the pantyhose, the material on the purse, the

material under the fingernails, the hair found in the car, and the semen, that is certainly a basis to conclude that there's a reasonable possibility that had that 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 Mr. Anselmo, that also goes to Mr. Anselmo's defense that there was another person who committed these crimes, there was another person in the area who committed this crime, and specifically another person who had sex with the victim, which again calls into question Mr. Anselmo's confession on which the State relied heavily at trial. Mr. Anselmo confessed to also having sex with the victim, and if he did not, if that is proven to be false, that calls into question the entire confession that he made, in addition to the other circumstances that were laid out in the petition.

I'm not going to go through every single recitation of the fact that the State went through at the underlying trial, because I think that is more appropriate for a motion for new trial. But interestingly, the burden is not even as high as a reasonable likelihood of success on the merits, which is required for injunctive relief or anything like that. It's a reasonable possibility that Mr. Anselmo would not have been prosecuted. And here we are talking about DNA evidence, which was simply not available at all in any form in this 1972 conviction of Mr. Anselmo. Had a jury been presented with DNA evidence that

Mr. Anselmo did not match any of these samples, that there were multiple samples of DNA collected in this case, and that Mr. Anselmo does not match any of them, that certainly would have been relevant to their consideration.

And as far as the parole board statements, I think that we have adequately covered that. But these statements are something that happen in a lot of these cases where there is circumstantial evidence, there wasn't the ability for DNA testing, and in fact many of the defendants that take advantage of these statutory schemes for DNA testing do have false confessions in their underlying trials. And in those cases, DNA evidence has still been shown to exonerate those defendants. Just because the defendant made a false confession, just because the defendant made a statement in an attempt to obtain parole, it does not preclude other defendants from getting relief under these types of statutory --

MS. CATE: Your Honor, I have to object to the Court's consideration of any general other defendants type of evidence. I mean the Court's considering whether to dismiss the petition on the basis of the petition in the record, and I think the case law related to post-conviction petitions and what the Court needs to consider related to the sufficiency of those is based on the record and the petitions themselves, not some form of citation to hearsay or other alleged evidence. The Court can't rely on other alleged evidence.

THE COURT: I asked specifically if any of that was Nevada cases. I understand your broad statements. I consider them argument, and I'm going to give them the weight I deem appropriate. I absolutely understand your concern. I was frankly expecting to hear an objection before. But because it is in that footnote, and I asked you about it, I'm going to allow, but I'm going to give it the weight that I deem appropriate.

So I think you can move on.

MS. GAMBEE: More relevantly, Your Honor, that's not a factor that's listed in the statute. There is no preclusion on a defendant who has a false confession or who made statements to a parole board for bringing a petition under this statute in Nevada.

The most important consideration here, Your Honor, is that a man's potential ability to prove his innocence is on the line, and there's simply no harm to the State in allowing the testing of the genetic material. All of the arguments that have been raised by the State today really go to the next step after the testing of the genetic material, a motion for new trial. They are simply not relevant to the inquiry of whether to test genetic material that exists, that is still stored within the crime lab, or within the evidence vault, from the 1970s that can now be tested and have conclusive DNA results available to determine whether there's a reasonable probability or possibility that the defendant may not have been convicted.

Because there's no harm to the State, because all of the statutory requirements have been met with the petition, Mr. Anselmo requests that you grant the petition and order that the genetic material be tested.

THE COURT: One additional part of Miss Cate's argument that I would like to address is the concept that in a case where it's more than five years, that they do not have to show any prejudice, but rather they can assert laches, and then the burden shifts to Mr. Anselmo because it is a rebuttable presumption.

MS. GAMBEE: Your Honor, I didn't see that in the State's response, and so I wasn't prepared to address that specific argument today. I'm not sure what authority the State was relying on in that there is a burden shifting scheme --

THE COURT: Well, it's a rebuttable presumption. So the presumption is that if five years, this is what was relayed, in post-conviction matters if five years has passed, the State can assert laches. And that's a rebuttable presumption, so it would move to the opposing party to rebut the presumption of laches.

MS. GAMBEE: What was the case, Your Honor?

THE COURT: She did not indicate any. She identified the legal theory, but did not identify an actual case, which I'm going to address with both of you in a moment. Okay?

MS. GAMBEE: Okay. I'm not aware of any authority that suggests that, but even in the event there is a rebuttable

presumption and the burden shifts to Mr. Anselmo, Mr. Anselmo has an interest in being able to present the exculpatory evidence that was not available at the time of trial. If that were the case that after five years no defendant could pursue a petition under this statute, then effectively the statute would be rendered useless after five years. I mean there is a possibility for defendants to move under this statutory scheme even if there was genetic material that was available and it wasn't tested at the time of trial. But all of the defendants who have already been convicted and are sitting incarcerated or out on parole or what have you would have no relief under this statute.

It just seems that that would be something that the legislature would have put in the statute if they had intended there to be some kind of limitation, outer limitation on the time frame that a person convicted of a felony can bring a petition under that statute.

MS. CATE: Your Honor, I did want to state one thing. I did cite the statute in my response.

THE COURT: For the laches argument?

MS. CATE: Yes, Your Honor. That's on page 18.

THE COURT: Let me just look.

MS. CATE: It's lines 21 through 23.

THE COURT: So you cited the NRS 34.800, subsection 2, allowing the State to proves laches in response to petitions challenging the validity of a judgment or sentence if a five-year

delay, and this relates to post-conviction.

MS. CATE: It does. And I would note that the petition is titled a post-conviction petition.

THE COURT: Right. Actually, I should have recalled that, because I went back and looked at the name of their petition right after I read that.

MS. GAMBEE: Your Honor, that statute applies to a petition challenging the validity of a judgment of sentence. But this statute does not challenge the validity of the judgment. It provides a scheme by which we can test the genetic material. The procedural motion that would challenge the validity of that judgment would be the motion for new trial, so we are not at that point yet, arguably would be the motion for a new trial, and we are not at that point yet.

But in any event this statute is, yeah, this is challenging a sentence or a judgment. And that's not what we have here. What we have here is a petition for testing of evidence that is still available, still in existence, and it was not tested at the time of the trial. I would say if this even applies, which I dispute that it does, it would apply at a later date, not today.

THE COURT: So you are indicating although it was identified as a post-conviction petition, that NRS 34.800, 2, does not apply.

MS. GAMBEE: I would have to take another look at it,

but that's my understanding.

THE COURT: Okay. Thank you. Thank you, counsel, very much for answering my questions. Obviously on the one hand I respect the seriousness of this case. I have to balance it on what rights are afforded to a petitioner and recognizing that this was a very serious crime that he was convicted of.

What I would like you to do is, as a result of my questions and some of the points that I have focused on, if you have or you want to provide any more authority, I'm going to give you 10 days to provide supplemental authority. You don't have to. I just think I asked both of you some questions that I don't want to foreclose you from providing it. Why don't I do that 14 days. That's more consistent. We will do 14 days.

And then I want within, how much time would you need to prepare, each side to prepare a proposed order?

MS. CATE: Your Honor, may I clarify. Is that after we submit the briefs or just from today's date?

THE COURT: Either one. I mean you may choose not to submit anything. I just don't want to foreclose it, because I think a couple of my questions gave pause to both sides. So if you want to supplement, it's fine with me.

I'm sure you recognize I'm going to do some more of my own research. But I also was looking at the court schedule coming up in the next month. And I think that what I would like, and I'm going to tell you in advance, I rarely use it outright if

you provide me a proposed order, but you would provide the proposed order denying or dismissing, however you determine that you want to; you would draft a proposed order granting. So then, and I want them emailed to my assistant.

But I just thought in an abundance of fairness to both sides, because of a couple of my questions, that if you want to provide any authorities, you may, but you don't have to. There's not going to be any, I'm not going to make a determination either way based on whether you choose to stand with what you provided to me. So you have 14 days if you wish to provide any supplemental authority.

In addition, I just was asking generally, because I know everyone's schedules, certainly, I'm sure in all of your offices you are very busy, I want a very specific order. So how long do you think you might need, Miss Cate?

MS. CATE: Just, I'm not sure.

THE COURT: Do you want to do it after?

MS. CATE: Well, I can do it, I think maybe if I just submit it based on, I submit a proposed order and my post-hearing brief on the same day. I think that makes sense. Then it's consistent with what the State's argued, I guess.

THE COURT: I'm requiring simultaneous. I'm not going to go to the back and forth. So why don't you both do that, then. Fourteen days, if that gives you enough time, you will do any supplemental authorities. I'm not looking for a big

document. There's some things I asked specifically if you have any, I want the authority. I just want you to have the opportunity to provide that to me, because I think some of my questions may not have been anticipated. So in fairness to both sides I'm going to allow you to do that.

On the same date you will provide a proposed order. There's no requirement that you circulate that proposed order to the other side. I'm going to take your orders, review them, and then utilize that information to draft my order. And some of the reasons why, frankly, I feel as though I can allow additional time is just the very essence of how much time has gone by in this case. I think it's very important to get this right, because I'm sure that there may be a request for relief if anyone is unhappy with what the ultimate decision is.

I would also like a written waiver confirming what was represented to the Court as officers of the court that Mr. Anselmo knowingly waived his opportunity to be here and the consequences that might result from the arguments and the petition. But I would like that to be submitted in writing as well.

MR. SMITH: Your Honor, would you like that for future hearings, that we obtain a waiver from our client every time we attend a hearing?

THE COURT: Well, I don't know if there's, I don't know if there's going to be more hearings. We will see after I make

my decision. But I think it's wise. I understand what the State is saying, that in their experience that nonappearances sometimes result in sequential filings with regard to second guessing what counsel did or did not. It's a simple document. I just think that if you can get a waiver for this hearing, we can address waivers in the future. You can discuss with him, he's not going to be two days or how many days into his job, and he's not wanting to lose his job. I mean that's what I heard from you. But I definitely heard what the State's concerns were, and I think it's an easy resolution.

MR. SMITH: Thank very much, Your Honor.

(3:05 p.m., proceedings concluded.)

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STATE OF NEVADA)
) ss
COUNTY OF WASHOE)

I, LESLEY A. CLARKSON, Official Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, DO HEREBY CERTIFY:

That I was present in Department No. 6 of the within-entitled Court on Tuesday, February 25, 2020, and took stenotype notes of the proceedings entitled herein and thereafter transcribed them into typewriting as herein appears;

That the foregoing transcript is a full, true and correct transcription of my stenotype notes of said hearing.

Dated this 27th day of February, 2020.

/s/ Lesley A. Clarkson

Lesley A. Clarkson, CCR #182

EXHIBIT 2

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fifth Session
May 6, 2009

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:25 a.m. on Wednesday, May 6, 2009, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Terry Care, Chair
Senator Valerie Wiener, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Mike McGinness
Senator Maurice E. Washington
Senator Mark E. Amodei

GUEST LEGISLATORS PRESENT:

Assemblyman Bernie Anderson, Assembly District No. 31
Assemblyman John C. Carpenter, Assembly District No. 33
Assemblyman William Horne, Assembly District No. 34
Assemblyman Richard McArthur, Assembly District No. 4
Assemblyman Harvey J. Munford, Assembly District No. 6

STAFF MEMBERS PRESENT:

Nick Anthony, Deputy Legislative Counsel
Linda J. Eissmann, Committee Policy Analyst
Bradley A. Wilkinson, Chief Deputy Legislative Counsel
Judith Anker-Nissen, Committee Secretary

OTHERS PRESENT:

Gail J. Anderson, Administrator, Real Estate Division, Department of Business and Industry

Barry Smith, Executive Director, Nevada Press Association, Inc.
Bill Uffelman, President and CEO, Nevada Bankers Association
Randy Robison, Nevada Credit Union League
John Radocha
Michael Buckley, Chair, Commission for Common-Interest Communities and Condominium Hotels, Real Estate Division, Department of Business and Industry
Florence Jones
Ben Graham, Administrative Office of the Courts
Connie S. Bisbee, M.S., Chair, State Board of Parole Commissioners
Teresa Werner
Lee Rowland, American Civil Liberties Union of Nevada
Patricia Hines
Lucy Flores, External Affairs and Development Specialist, Office of the Vice President for Diversity and Inclusion, University of Nevada, Las Vegas
Katie Monroe, Executive Director, Rocky Mountain Innocence Center
Sam Bateman, Nevada District Attorneys Association
Jason Frierson, Office of the Public Defender, Clark County
Orrin Johnson, Office of the Public Defender, Washoe County
Tonja Brown, Advocate for the Innocent
Ron Titus, Director and State Court Administrator, Administrative Office of the Courts
Tray Abney, Director, Government Relations, Reno-Sparks Chamber of Commerce
Mark Woods, Deputy Chief, Northern Command, Division of Parole and Probation, Department of Public Safety

CHAIR CARE:
I will open the hearing on Assembly Bill (A.B.) 207.

ASSEMBLY BILL 207 (1st Reprint): Makes various changes concerning common-interest communities. (BDR 10-694)

ASSEMBLYMAN JOHN C. CARPENTER (Assembly District No. 33):
I am here to introduce A.B. 207, which makes a number of changes to the requirements pertaining to common-interest communities. Section 1 exempts a rural agricultural, residential common-interest community from paying the $3 fee as required pursuant to chapter 116.31155 of the *Nevada Revised Statutes* (NRS) regarding the Office of the Ombudsman.

The Spring Creek Association was exempt from this fee for many years. During the 2005 Legislative Session, the law was changed. Spring Creek Association requests the $3 fee be eliminated.

The next change requested in A.B. 207 is to NRS 116.31083. The requirements of this section are expensive to comply with. The cost of mailing a notice to each property owner would be over $2,500 in postage alone. Spring Creek Association does comply with the Open Meeting Law, is more economical and resident friendly. George Taylor of the Attorney General's Office requested I clarify the status to reflect that a rural agricultural residential common-interest community was a public body in reference to the ability of the Attorney General to enforce the Open Meeting Law. This change is found on page 7, section 2, subsection 3, paragraph (b), lines 10 through 12. Nevada Revised Statute 116.31152 speaks to reserve studies. Spring Creek Association has no problem in complying with this section. However, small associations in rural Nevada in those counties with a population under 45,000 have a difficult time complying because of the cost of hiring a reserve study specialist. Often, the only common element the small communities have is a road with two or three culverts.

The amendment provides a small association use an engineer or contractor to do a specific reserve study. I have a friendly amendment (Exhibit C), which I delivered to the Committee yesterday. This friendly amendment has been proposed by Gail Anderson of the Real Estate Division of the Department of Business and Industry. It provides if one of these associations did want to use the service of the Office of the Ombudsman, they would have to pay the fee.

CHAIR CARE:
Thank you, Mr. Carpenter. Ms. Eissmann or Mr. Wilkinson, can you tell us what has happened with Senator Dean A. Rhoads' bill?

LINDA J. EISSMANN (Committee Policy Analyst):
Mr. Chair, I looked that up this morning. It was heard in Assembly Committee on Judiciary on April 17, but no action has been taken.

CHAIR CARE:
That bill contains what is section 1 of this bill. I do not recall if it had the language in section 2, which would be consistent with what is contained in section 1. Mr. Carpenter, from the Real Estate Division standpoint, if such a

rural association wanted to be a member, it could be a member for purposes of Office of the Ombudsman's purview?

ASSEMBLYMAN CARPENTER:
That is true. If they wanted to use the services of the Office of the Ombudsman, they would have to pay the fee.

GAIL J. ANDERSON (Administrator, Real Estate Division, Department of Business and Industry):
I appreciate Assemblyman Carpenter's willingness to accept the friendly amendment from the Real Estate Division (Exhibit D). Rural residential communities have utilized the services of the program of the Office of the Ombudsman. There are seven registered and of those seven, three have utilized their services. It could be clarified they could pay the fees and remain active in the program should they choose. I also wanted to set forth on the record if they do not pay the fees and are not utilizing the services of the Office of the Ombudsman, they still have the Alternative Dispute Resolution Program under NRS 38 which is facilitated by the Office of the Ombudsman. They pay a separate filing fee and could utilize those services, which do not preclude them.

I also wanted to put on the record,

> that if an association is exempt, that they would not be able to utilize the services. If they contact us or file an affidavit and we look up and find that they're exempt from registration by their choice, then we would decline to allow them to go through the process of conferencing and investigation.

CHAIR CARE:
Anyone have any questions for Ms. Anderson?

BARRY SMITH (Executive Director, Nevada Press Association, Inc.):
I am here to support the clarification that places these small communities under the Open Meeting Law.

CHAIR CARE:
As I recall, Assemblyman Carpenter, the testimony was confused as to what happened in the last minutes of the last Session. These associations were thrown within the shadow of the Office of the Ombudsman when that was not intended. It was the other issue making it a public body.

ASSEMBLYMAN CARPENTER:
I do not know what happened, but I missed where they were required to pay the fee and so did Senator Rhoads. We did not know it until after the Session was over. That is why we are back to ask they not have to pay the fee. Spring Creek Association has not used the Office of the Ombudsman. When they are under the Open Meeting Law, they operate quite well, as well as the county commissioners and the city council. They agree they need to comply with the Open Meeting Law and do.

SENATOR WIENER:
Was the provision for 20 or fewer units also in Senator Rhoads' bill as part of the definition of communities that wanted to reach 20 or fewer units?

ASSEMBLYMAN CARPENTER:
The only thing in Senator Rhoads' bill is where they ask the fee not be paid.

SENATOR WIENER MOVED TO AMEND AND DO PASS AS AMENDED A.B. 207.

SENATOR PARKS SECONDED THE MOTION.

THE MOTION PASSED. (SENATOR AMODEI ABSTAINED FROM THE VOTE.)

* * * * *

CHAIR CARE:
I will open the hearing on A.B. 361.

ASSEMBLY BILL 361 (1st Reprint): Makes changes relating to common-interest communities. (BDR 10-940)

ASSEMBLYMAN RICHARD MCARTHUR (Assembly District No. 4):
Assembly Bill 361 is another homeowners' association (HOA) bill. It is about foreclosed or vacant property in common-interest communities. The intent of this bill is to do two things. It is to get the lending institutions and HOAs together early on in the foreclosure process of the vacancy situation and have the lending institutions provide contact information to the HOAs, their addresses and telephone numbers, and the departments that handle residential mortgages.

The second thing this bill does is assure the HOAs can maintain the exterior of the foreclosed or vacant properties without liability for trespass. Those are the two main points of the bill. If you like, Mr. Chair, we can open the bill and I can go through the pertinent paragraphs and answer any questions.

CHAIR CARE:
Yes. Generally, not dwelling on the specifics too much, just a general idea of how the bill would work.

ASSEMBLYMAN MCARTHUR:
Page 2, section 1, subsection 1, sets out that lending institutions need to contact the HOAs. Subsection 2 says once the default process is started, which leads to the foreclosure, the unit owner has been notified, they have had a chance for a hearing to fix any problems and nothing has been done, then the association can enter the grounds, whether vacant or not, and maintain the exterior. It also says the HOA can maintain it but does not have to if they do not have the money or for some reason they cannot.

Section 1, subsection 2, paragraph (a), line 21 goes through the things you should do in maintaining the exterior—landscaping, standing water, health and safety issues. The intent of the bill is to maintain the exterior. This is not a green light for HOAs to put in new landscaping, $1,000 palm trees, etc. It is just to maintain it.

Section 1, subsection 3 is the same as subsection 2 except for vacant property where someone has walked away. On page 3, section 1, subsection 7, two points are set out in statutes in another place but pertinent to this bill. That is why it is here. It states if you buy a home in a foreclosure process, you have to maintain the exterior of the home. People seem to think if you buy something in foreclosure, you do not have to abide by the governing documents. The other point is the units cannot be removed from the HOA. People also thought if you buy a home in foreclosure, you do not have to be part of the HOA.

Section 1, subsection 8 says the association can enter the grounds and is not liable for trespass. Section 1, subsection 9, gives the definition of the word "vacant." We make a distinction between someone who has walked away from the unit and someone who does not live there, but it is a second home and they have paid their dues, their assessments are up and the exterior is maintained.

CHAIR CARE:
The language may already exist in other provisions of NRS, but page 2, section 1, subsection 2, paragraph (b), subparagraph (3), lines 31 and 32 say "Results in blighting or deterioration of the unit or surrounding area." When we get into case law of eminent domain that causes this, is there a particular statute that tells us what "blight or deterioration" means? It is subjective to some degree.

ASSEMBLYMAN MCARTHUR:
The exact wording was taken out of a bill used in North Las Vegas. I do not know if we have it in statute, but some of that wording was taken out of a bill that used it for quite awhile, and it seemed to work for them.

CHAIR CARE:
In the same section, subparagraph 4 says "adversely affects the use and enjoyment of nearby units." That could be a guy next door who says, I am losing sleep because I do not like the way the place looks next door.

ASSEMBLYMAN MCARTHUR:
Though subjective that wording was left in to cover any problems that may come up.

CHAIR CARE:
On page 3, section 1, subsection 9, line 31, is the definition of "vacant." This may exist elsewhere, but one of the components of that is "which appears unoccupied." People go on vacation, you know it is unoccupied.

ASSEMBLYMAN MCARTHUR:
That is why we have the definition. If someone has walked away from the unit or owns it as a second home and it appears unoccupied, it covers both cases. Paragraph (b) on line 33 further clarifies that. It does not include something that looks like it is unoccupied, which may be a second home.

CHAIR CARE:
On page 6, section 3, subsection 2, subparagraph (c), the lien language focuses on single-family detached dwellings.

ASSEMBLYMAN MCARTHUR:
That was changed in the amendment. I am not sure why, when the wording is technical. An HOA can include high-rise condominiums. If you go to common-interest communities, it refers to the single-family detached dwellings. That was probably added to coincide with the wording on page 1 where my original bill had HOAs, and they changed to common-interest communities. Those are common-interest communities; that is why the wording was changed.

CHAIR CARE:
We had A.B. 204, and I am looking at a note indicating the amendment was added to avoid conflict with federal laws. I recall some connection to the Federal National Mortgage Association (Fannie Mae).

ASSEMBLY BILL 204 (1st Reprint): Revises provisions relating to common-interest communities. (BDR 10-920)

ASSEMBLYMAN MCARTHUR:
There were some Fannie Mae and lookback problems when you went further than the six-month lookback. That was part of complying with those laws.

SENATOR WIENER:
Mr. Chair, to respond to your question about subjective determination, on page 2, line 33, "adversely affects the use and enjoyment." An abandoned or vacant property does not always have to be sight, it could be odor or something deteriorating on the premises which would ... you might not see it, but you can smell its presence.

Assemblyman McArthur, on page 3, section 1, subsection 9, paragraph (c), it says "has failed to pay assessments for more than 30 days." When does the clock start ticking on the 30 days? Is it on the date due or within a 10-day grace period?

ASSEMBLYMAN MCARTHUR:
I would assume right at the beginning when it is due.

SENATOR PARKS:
I also saw 30 days and thought it seemed a fairly short period of time. A 60-day period would be more appropriate.

ASSEMBLYMAN MCARTHUR:
I agree with you, but that 30 days was not in my original bill. I would be happy to make it 60 days.

SENATOR PARKS:
Mr. Chair, I would say if we are looking at an amendment, we may want to address that.

CHAIR CARE:
That is fine. Thank you, Senator Parks. Any additional questions?

BILL UFFELMAN (President and CEO, Nevada Bankers Association):
I am in support of the bill. In the fall, Assemblyman McArthur and I talked about the problem. I suggested the lender has no right of entry until after the foreclosure sale, at which time the lender, for better or worse, winds up being the winner. I suggested this remedy was perhaps the way to deal with these things. As he has noted, we do not want to view this as a license for the association to make it the most pristine house on the block.

The questions you had regarding what is blight or deterioration were good ones. I suspect when you see it, you will know it. Over the weekend, there was a story in the paper that relates to the concept of affecting the enjoyment. A colony of bees had moved onto a property. The next-door neighbor was allergic to bee stings, and the roses in her yard drew the bees. The neighbors, out of their own pockets, had the bees removed. Those situations hopefully will be remedied under this bill. Some members asked why we have to notify them that we have filed the notice of default with the election to sell when it is a public document. I have suggested they might want to go along to get along. There are technical issues, but everybody is going to have to roll with this to make it work.

You are correct in the reference to the single-family designation. If you are in a condominium, their obligation includes the maintenance of the exterior and the common grounds. All those things are supposed to be recovered from their fees, whereas this special assessment is relative to the single-family homes and would carry into the foreclosure and be an obligation to be paid, unlike A.B. 204, the extension and lookback. Extending the 30 days to 60 days makes sense.

RANDY ROBISON (Nevada Credit Union League):
We signed in opposed, but are in complete support of the bill. Assemblyman McArthur did meet with our group before the Session and talked about how to get a situation where lending institutions and HOAs were talking about the issue much sooner in the process. However, many of the Committee members have already spoken to some of our concerns with the way the bill has been crafted?

Our issue is not with maintenance, maintaining a property, the landscaping, that type of thing. It is to the HOA's benefit as well as to the eventual owner to have that done in terms of market value and appraisal. That is not our issue. We are concerned it is crafted too broadly, particularly when we are talking about who bears the responsibility for cost recovery and those issues. A few points other Committee members have spoken to in section 1, subsection 2, paragraph (b), subparagraphs (3) and (4), lines 31 through 33, are subjective, although we understand what they are trying to get at. That might be too broad for our comfort.

CHAIR CARE:
The testimony was this language may already exist elsewhere in statute or local ordinance in North Las Vegas.

ASSEMBLYMAN MCARTHUR:
Yes. That is what I remember. I am not sure that is in our statute.

CHAIR CARE:
Since Senator Parks proposed an amendment, rather than doing anything today, this goes on work session—if we can verify the language is elsewhere in law.

MR. ROBISON:
One of our other considerations is further clarifying the limit to the application of the authority the HOA has to maintain. Perhaps that might be done by a high-dollar cap on allowable expenditures. Another way to do that may be to require documentation that shows when the costs were incurred and what they were incurred for, so when you present an order for payment, the payee has a record of those expenses.

On page 3, section 1, subsection 9, is the definition of "vacant." We were concerned about the broadness and subjectivity of the definition in terms of

subsection 9, paragraph (a), "Which appears unoccupied." We also had the 30-day concern on paragraph (c). I will use a personal example. When I come to the Legislative Session, I bring my family with me, shut down the house, turn off the lights, and we are gone for four and one-half to five months. The way we are situated in our HOA, we have one neighbor. The other side is open space all around us. At night, if you are driving by on a regular basis, it could appear the house is vacant. However, we go home a few times a Session to pull weeds. We are paid up on our assessments, but there seems to be some wiggle room that may be tightened up.

Those are our concerns. We support the concept of the bill. Assembly members have mentioned the air play between this and A.B. 204. I apologize and thank Assemblyman McArthur; he did meet with us before this Session. We spent time with him last week on some of our concerns. Comments he made in his testimony helped in terms of clarifying the intent. We did want to get on the record with those further concerns.

CHAIR CARE:
You had the same discussion on the Assembly side?

MR. ROBISON:
Unfortunately, we did not. We came to this party a little late, and I will take full responsibility for not getting over to the other side.

CHAIR CARE:
You are here representing the Nevada Credit Union League, and I do not think of credit unions as home lenders or getting in the business of refinancing homes. What is the role of credit unions when it comes to HOAs and foreclosure?

MR. ROBISON:
A significant portion of our portfolios do home mortgages. With all of the mortgage and foreclosure discussions occurring the last several months, our position is we did not do some of the risky, questionable lending on the front end because our structure does not allow us to in terms of risk or portfolio assets. Our problem as the economy has further deteriorated is many members are now losing their jobs and having difficulty paying their mortgage. In credit union land, if you miss your mortgage payment, the first time you miss it you are likely to get a call from a kind customer service representative at one of our institutions who says, hey, we see you missed your payment, is everything

okay, is there something we can do to help, has your situation changed? If so, come in and talk about it—as opposed to other institutions that may take three months before it is even flagged, and then there is another lag time to address the situation.

We do not have a problem with the intent of the bill, as we typically do that already. We know much sooner than most when one of our members is in what is going to be financial trouble. If they have to walk away from a home and we go through the foreclosure process, we already go in and start to maintain the property and the landscape. We do not like to be in the lawn-cutting business, but we figure out a way to get it done.

To answer your question, Mr. Chair, there is limited application and impact to credit unions because of our size and structure. Sometimes, that is more magnified than in other, larger financial institutions.

SENATOR WASHINGTON:
You mentioned one of your concerns about the bill is either hard-copy documentation of the cost incurred or a cap. Which would your association prefer?

MR. ROBISON:
As the League was looking at the bill, the hard-dollar cap was what they saw first. As they discussed it more, it became clear that may not work in all situations because different HOAs have varied levels of assessments and requirements in the covenants, conditions and restrictions (CC&Rs). An alternative or perhaps a conjunctive measure would be reporting when that order for costs is presented. You could sit down and have a discussion about what was done to the lawn that died. Some of this other stuff may have been beyond the scope of what we were talking about.

SENATOR WASHINGTON:
Would you want that documentation of incurred costs before the services are rendered or after?

MR. ROBISON:
We are talking in terms of after the order is issued because we do not want to limit the association in maintaining the minimums according to the CC&Rs. But

trying to balance the interests of maintaining versus getting beyond the scope of minimum maintenance may help us trim some of that cost.

ASSEMBLYMAN MCARTHUR:
I will say that we are both the same on the intent of this bill to just maintain, not add anything on. The whole idea of this bill is to make sure we get the HOAs, the lending institutions and real estate people comfortable. It looks like most of our interests are covered, but if there is something they would like to see tightened up, I would be happy to do so if we amend it anyway.

CHAIR CARE:
Mr. Robison, if you have anything, please share it with Assemblyman McArthur.

SENATOR COPENING:
Assemblyman McArthur, regarding subsection 9 where you talk about the vacancy, is there a period when somebody walks away in which the HOA could enter the property, but the banking institution will not have known that person has walked away yet?

ASSEMBLYMAN MCARTHUR:
Usually the HOAs are the first to know if somebody has just walked away. They know that their assessments and dues have not been paid and the place is deteriorating. It may have been deteriorating several months before they walked away. The problem has always been the lending institutions do not know about it, and there has been no way for them to get together. Hopefully, this way the HOAs and lending institutions will get together and talk about it, even though the lending institutions have not started paperwork for the default process.

SENATOR COPENING:
If an HOA enters the home, perhaps because of a broken window and they need to enter the premises, or they need to deal with the landscape, who assumes liability should something happen to that property? For example, a fire starts in the house or a sprinkler system breaks. Who actually has the liability for that home during that time?

ASSEMBLYMAN MCARTHUR:
The unit owner still owns the property. All this bill does is let the HOAs go on the property and maintain the property. If there is some major damage, someone

still owns it. But the whole problem is they walk away, you cannot find them and the lending institutions may not be aware of it.

SENATOR COPENING:
If an injury happens on that premises, even though that person has walked away and the HOA has chosen to go onto that property, it is still the responsibility of the owner of that home, even though they did not give permission?

ASSEMBLYMAN MCARTHUR:
That is my understanding. They can go on the property to maintain it, not for anything else.

MR. UFFELMAN:
Normally, an insurance clause in your mortgage says you will maintain an insurance policy as the owner of the property. If you defaulted on the loan and defaulted on your insurance payments too, the mortgage company has a right to purchase insurance to insure the property even though they have not gone into default during the 90-day period. There is a presumption that somebody related to the property is maintaining insurance. Whether that is 912 percent of the time, we cannot guarantee that, but the property insurance requirement is built into a mortgage.

CHAIR CARE:
Let us go to Las Vegas. Mr. Radocha, you had wanted to say a few words about A.B. 361, and Mr. Buckley, you will follow Mr. Radocha.

JOHN RADOCHA:
I am a homeowner. I know you have heard enough about good and bad boards, and the most precious commodity of the homeowner is his home, but I want to reference page 3, section 2, subsection 1, paragraph (a) and line 42. I believe this has taken the homeowner's bill of rights from him. It is like giving these guys a blank check on a board. Yes, they let you speak at a board meeting if you have an association meeting, but it is like a kangaroo court. I have seen people speak and I have seen people going through papers not even paying attention. I would like to know if that provision could be stricken from this bill because it gives them the right to do whatever they want. Where do we get the vote? This is what is bothering me. It does not say put it on a ballot.

The association CC&Rs say there will be no campers or trailers seen above the walls. A guy comes in, he gets on the board and the next thing you know there are campers and trailers above the walls. There is a rule no diesel trucks, and all of a sudden a guy comes in, he gets on the board, and the next thing you know there it is, and they say, oh no, that has been changed, that has been amended.

We the people do not have a say. Everything is up to the board, and if they can get enough people at a meeting to go along with them, they say it passes. A lot of the time the president will say, I am in favor of this, anybody else? The board puts up their hands and, by golly, it passes. I do not think that is fair. I would like for homeowners to have more voting power. This bill says do any and all of the following: adopt and amend bylaws, rules and regulations. I think this should be stricken.

CHAIR CARE:
We had about a half dozen common-interest communities (CIC) or HOA bills, and we have an equal amount coming over from the Assembly. The passage you have cited in NRS 116.3102 is existing law; it is in here because it has to be. The proposal is to change a subsection to that section but not that particular language. I need you to understand that.

Your proposal would be, if the Committee had appetite, to strike from the statutes a provision you have cited, "adopt and amend bylaws, rules and regulations." Is that correct?

MR. RADOCHA:
That is correct. You could leave it in, but you need to give homeowners a provision to vote. Some boards take advantage of this. That is a big loophole. I cited some examples. Another example is they want to change something. The board people will knock on doors and say, we want you to do this, and if you do not do it, four or five days later you get a letter that says you have some three-inch weeds or you have a grease spot on your driveway. They can come up with any thing they want and you are powerless. Let the people vote on what they want to do. That is all I want to see.

CHAIR CARE:
Thank you. I am sorry you did not get to testify on A.B. 207.

MR. RADOCHA:
May I ask a question on A.B. 207? Is some of this stuff going to come up later?

CHAIR CARE:
There are other bills coming. Whatever Website you are consulting, keep watching; there will be others.

Mr. Buckley, you have heard the proposed amendment from Senator Parks as to the person holding the security interest providing the association—it would be 60 days as opposed to 30 days—and then the comments from Mr. Robison. You probably had prepared testimony, but you may want to comment anyway.

MICHAEL BUCKLEY (Chair, Commission for Common-Interest Communities and Condominium Hotels, Real Estate Division, Department of Business and Industry):
I have worked with Assemblyman McArthur on the language in the bill and did not have any prepared testimony, but I would make four points for the benefit of the Committee.

The first thing is—if you look at page 2, section 1, subsection 2, paragraph (b), line 25 and then subparagraph (4), line 32—to notice the word "and." All four of those things have to be present. It is not if you are blighted or if you adversely affect, it is all of those things. That is the way the bill is written.

You will also see on page 3, subsection 9, paragraph (b), line 35 the word "and." It is not only that it is unoccupied, but it is not maintained and the assessments are not paid. So it is all three of those things. That may address some concerns of the Senators and the people who spoke.

The other thing is in reference to Mr. Robison's concerns. The association would use the standards in the community to maintain the property. It would naturally defer to whatever standards, so it would not be something out of the ordinary. If it was provided, it would be in accordance with the standards. That is what the association would do anyway.

As far as records and what money is spent, the association has to maintain records of what it spends. Under NRS 116.31175 and NRS 116.31177, unit owners are entitled to look at those records. Concerns about seeing how much the association spends are already built into NRS 116.

For an explanation on page 6, section 3, subsection 2, paragraph (c), line 7 with regard to single-family detached dwelling, yes, the issue was that Fannie Mae and Federal Home Mortgage Corporation (Freddie Mac) guidelines prohibit a superpriority lien from going beyond six months. The thought was that a single-family detached home would not be a condominium. But A.B. 204 was changed to refer to the federal regulations instead. That would be a good change in section 1, subsection 6.

Lastly, this is more a question for perhaps Assemblyman McArthur. The intent in section 1, subsection 7 is even though people may say because you acquire property at a foreclosure sale, you take free and clear of the governing documents, that is not the case. Once the property is sold to an owner, the unit is subject to the governing documents until the governing documents are amended, the community terminated or whatever. Subsection 7 creates a problem because in one sense it states what is in the law, but then it says the person would maintain the unit in accordance with the governing documents. There are many other obligations under the governing documents. The question is whether the intent of subsection 7 was to state what is already the case—which probably makes it unnecessary—or to create a statutory duty, which would be a reason to keep it in and probably change it. The person is bound by the governing documents, and it cannot be removed except in accordance with the governing documents.

I suppose a related issue is the bill states the association has a lien. The question arises what is the remedy for that lien? Is it just a lien that the association would sue on, or is it something that could be foreclosed as an assessment lien? The beginning of the bill references following a procedure for fines and providing that an association cannot foreclose for a fine but can foreclose on an assessment. There should be some clarity in the bill as what is the remedy for the lien, whether it can be included as an assessment to be foreclosed or exactly what would happen.

Those were my comments. I passed some technical comments on to Assemblyman McArthur and the bill drafter.

CHAIR CARE:
You are working with Assemblyman McArthur, and we are not going to put this bill on for work session until next week. I note the amendment that came out of the Assembly made six changes. This is a work in progress; we want to get it

right. Mr. Buckley, if you continue discussions with Assemblyman McArthur, then we can get something for the work session detailing the concerns and possible resolutions.

MR. BUCKLEY:
Happy to do so.

ASSEMBLYMAN MCARTHUR:
Yes. I deferred a lot to Mr. Buckley in his technical changes. The changes we made before is clarifying language, and he made the bill technically and legally stronger.

FLORENCE JONES:
I wear many hats in this situation. I am on a board of directors in Utah, and my primary home is in two homeowners' associations in Las Vegas. I would like to thank the Senator from my district, Allison Copening. I appreciate the work you and Assemblyman McArthur are doing. Both of you represent the area of my primary home in Sun City Summerlin.

To the gentleman who is concerned about having homeowner rights, the bylaws and the CC&Rs give us an annual meeting where homeowners have a great deal to say. The board of directors meeting is for business. In the one I sit on, homeowners may submit in writing whatever they may want to have addressed and be given a time through this venue under the Open Meeting Law statute. However, at the homeowners' annual meeting, the homeowners have a time to transact the business of the homeowners' association. He needs to look back to his bylaws and find out when his annual meeting is, gather his neighbors together and get whatever he wants accomplished done.

The bill as it stands is a work in progress, and I concur with the 60-day amendment that Senator Parks has suggested. I am concerned that formal mail needs to be directed to the homeowner, such as a certified registered letter with a return receipt, so there has been proper notice by the association and we do not have people taking over.

I get to my primary residence once every six months, but I have a lighting system that comes on at dusk and goes off at dawn. My courtyard is covered with sprinklers and I have people who do my landscaping. I could see where this might be misused if there are not some tight controls.

There will be a workshop next. I want to relate to this Committee that one of the realtors who I participate with on my other board has asked me to put on the record that there is some issue going on right now with foreclosures in the Las Vegas area where we have attorneys who have created their own collection agencies. They are picking up the ball from the HOA and running with it. When a home is put on the block for foreclosure, in addition to assessments, huge fees running $5,000 to $10,000 are now added to the price of the foreclosed home the realtors are dealing with. They are trying to get people into these homes or back onto the market and homes that are a blight back into use. There is a great deal of concern among the realtors of the Las Vegas area. I do not know if this is going on in other areas. I am thankful we are having the workshop because I have alerted the folks in Las Vegas who are concerned. They are in the process of e-mailing Assemblyman McArthur.

This is a great step in getting the language and protection for our neighborhoods in this time of people being forced to move on. But those of us who are left behind want to be sure our absence is not misunderstood. Even though our bills are paid, we might not be there for long periods of time. Assemblyman McArthur spoke to that clearly; some of us have more than one residence in this wonderful time of retirement.

CHAIR CARE:
I remind everyone this is Assemblyman McArthur's bill and will remain so. We will close the hearing on A.B. 361.

Earlier, when Senators Copening, McGinness and I met as a Subcommittee, we asked Chair Dennis Neilander of the State Gaming Control Board about the amendment from the Assembly for Senate Bill (S.B.) 83.

SENATE BILL 83 (2nd Reprint): Makes various changes relating to the regulation of gaming. (BDR 41-311)

The three of us meeting as a Subcommittee recommended we concur with the Assembly amendment. The amendment was in section 19 of the bill: They had added the language in the bill saying an heir to an interest regulated by the Gaming authorities would have one year to submit the application for compliance to get a license. The Probate Section of the Nevada State Bar was concerned that under certain circumstances, one year may not be sufficient, so

the amendment is to add the language "or within such later period as the Chairman of the Board determines in his sole and absolute discretion."

Based on his comments this morning, it is our recommendation that we concur.

SENATOR WIENER MOVED TO CONCUR WITH ASSEMBLY AMENDMENT NO. 572 TO S.B. 83.

SENATOR PARKS SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

* * * * *

CHAIR CARE:
I will open the hearing on A.B. 117.

ASSEMBLY BILL 117 (1st Reprint): Makes various changes relating to parole hearings. (BDR 16-630)

BEN GRAHAM (Administrative Office of the Courts):
I am here as a supporter of many items from the Advisory Commission on the Administration of Justice Study. One of the important items the committees have worked on over the years is to try to eliminate the bureaucratic red tape that delays sensible actions. Assembly Bill 117 is an effort to address some of those. I have the privilege to be with the Director of the Board who is the expert on this.

The important thing we want to do is make sure everyone knows nobody is being left out of the loop. There will still be notices to the police, victims, if there are victims, and to the rest of the law enforcement community.

Many of these people awaiting release—for lack of better terms we call them victimless crimes—are in for narcotics and other violations. This is an effort to expedite the release of these folks, not only to benefit those who are eligible for parole but for a significant economic benefit to the State.

CHAIR CARE:
How does this bill mirror the bill we heard earlier? There was some concern, as I recall, that an expedited hearing might require additional work.

MR. GRAHAM:
I believe that was the State Board of Parole Commissioners. I am not certain.

CONNIE S. BISBEE, M.S. (Chair, State Board of Parole Commissioners):
You can see in A.B. 117 that three sections have been deleted. They were great ideas, but they had a fiscal impact, so we pulled them. What you are left with is the request to make two changes.

Under section 4, subsection 9, the Board and Commission ask that the State Board of Parole Commissioners grant parole without a meeting pursuant to NRS 213.133. What is imperative about this is the word "grant." In example, throughout the years, the Department of Corrections or the Pardons Board has asked the Parole Board to look at a particular group of people to see if they could be expedited out of the criminal justice system.

The way it currently reads, we cannot do that without all of the noticing normally required of a hearing, which means if we notice that we are going to see these 200 people and not consider 100 of them, we would not be complying with the law. This allows us to grant people without all of the same noticing that would normally happen. The folks who would not qualify at any point under this are those who have victims or those who require a major panel of the Board to see. As Mr. Graham said, these are folks who, for whatever reason, may be eligible to go out on parole. They are not a risk; they committed low-level crimes. There is no victim involved, and it would allow the Board to say these are good candidates, we have put all of the tools toward them and we want to grant them. It does expedite the process of getting them out of the Department of Corrections.

Along the same lines in section 5, subsection 8, beginning on line 28, we are asking that a singular member of the board, or a person who has been designated as a case hearing representative, may also review qualified candidates and make a recommendation to the full Board. This provision would not include those who meet the three-panel crimes—those are sex offenders, habitual criminals and those who have life sentences. They would never come under this provision. These would have to be seen by a full panel of the Board.

What this does is allow for those low-level folks as long as there is nobody objecting. There is not a victim to notify; law enforcement has no objection to us considering them without a formal hearing and releasing them. This expedites those folks who are low-risk out of the system quicker than doing it in the traditional, full-blown noticing and formal-hearing manner.

SENATOR WIENER:
The notice provision on page 4, section 5, subsection 8, paragraph (d), lines 38 through 41, is to law enforcement and if there has been no objection, a 30-day notice period. I am big on when things start and how long they run. In that 30-day notice period, does that time frame start upon your sending out a notice or upon an anticipated receipt of notice? It could be a small window and somebody might say, wait a minute, I have something to add and the person does not make the 30-day window. When does it start and stop?

MS. BISBEE:
Several weeks in advance, before they are put on an agenda, an eligibility list goes out to all law enforcement. That is when the time date starts. A perfect example is when the Department of Corrections converted their program, there were some burps in it. We would hear from a victim who was never notified who should have been notified. A hearing has been held, the person has been granted and they are going to head out the door in four weeks. The victim calls and says, wait a minute, I was not properly noticed, I did not get enough time, and I would like to have input. We stop the release at that point and reconvene with a hearing. The same thing would happen if you had a party who had an objection or concern and for whatever the reason the noticing did not go properly. We would handle it in that same way. The noticing has not seemed to be a problem with the eligibility lists because we do have a lot of response from law enforcement. In seven years, I can only recall one time where law enforcement said, wait, we wanted to make comment and did not have the opportunity. That is what we did; we held the release until a formal hearing could be held.

SENATOR WIENER:
What we are looking at is an expedited efficiency with all criteria met. Is this a practice that is being instituted or has been instituted in other states? Do we have a track record on the success? Are these communities that have had no problem with this? Do we have any history?

MS. BISBEE:
I could not answer specifically to that. We are one of the few states that sees everybody 100 percent in person. Texas is a perfect example. With the Country's largest population of inmates, they never see the inmates unless there is some specific reason that a commissioner or member of the board wants to see them. In the past when we saw them in absentia, we did a study. It did not change the grant rate; we did not seem to have a major problem with that.

SENATOR COPENING:
Ms. Bisbee, can you run me through the noticing process? Who do you notice and how do you notice?

MS. BISBEE:
The eligibility list comes out about six weeks in advance. The list is like one of those old wide computer sheets and may be as many as 20 pages. The list, with entries listed by county, is sent to all of the law enforcement agencies in the State for review. Then, they are able to respond.

The same procedure is followed for somebody who wishes to be told of any action coming up with a particular inmate. As a citizen, you could contact the Board and say you want to know when an inmate comes up for hearings and be noticed. Typically, that is about 30 days in advance and sent directly to your home address. By law, victims are notified long before this, but they have to be notified at least five days prior to a hearing. I would be guessing as to the other agencies the list goes to, but I know it goes to all law enforcement.

SENATOR WIENER:
Does law enforcement include the prosecuting attorney's office and public defender if that is appropriate?

MS. BISBEE:
It does.

MR. GRAHAM:
Some of the larger district attorneys' offices, and I assume the smaller, too, have a deputy, generally a senior deputy, who is assigned to review those coming up for consideration. It is a major operation. Very seldom does the office weigh in. Over the years, we have made sure the victims are notified. Clark, Washoe, and even some of the rural counties have victim-witness centers. We

have people who deal with victims. We have expanded letting victims know when somebody is going to get out of prison, when an appeal is being heard in the Nevada Supreme Court and when that decision comes out. A high percentage of people we are dealing with are not robbery or sexual assault victims. We are talking about 100 to 200 notices every month or so, but they mostly relate to victimless crimes where you do not have a sexual assault, robbery or battery with a deadly weapon victim.

SENATOR PARKS:
I see that sections 1, 2 and 3 were deleted by amendment. In looking at the amendment, these sections were deleted from statute. I am trying to clarify if they were deleted from the bill but not from statute. Am I correct?

MS. BISBEE:
Yes. They were suggestions out of the Advisory Commission on some other process issues, but when it came down to it, the one alone cost as much as $250,000 a year. We can get along without it.

SENATOR PARKS:
Thank you. I know we put a lot of effort two years ago into these sections, so that is my concern. They do stay as they are?

MS. BISBEE:
They stay as they are. Actually, they are working very well.

CHAIR CARE:
No more questions of this panel. I will close the hearing on A.B. 117 and open the hearing on A.B. 481.

ASSEMBLY BILL 481 (1st Reprint): Revises provisions relating to certain crimes involving firearms, ammunition or explosives. (BDR 15-1155)

ASSEMBLYMAN BERNIE ANDERSON (Assembly District No. 31):
I will read from my testimony (Exhibit E).

SENATOR WIENER:
The bill does not have an effective date. If we close this gap, reconstruct where we have something effective, does this have retroactive applications?

CHAIR CARE:
Ex post facto usually does not apply to criminal aspects.

ASSEMBLYMAN ANDERSON:
Senator Wiener, it is like in my classroom. When I make a rule, I cannot penalize the kid for chewing gum yesterday if it was not a rule today, but I can penalize him tomorrow.

NICK ANTHONY (Deputy Legislative Counsel):
I have nothing further to add. The Chair did an excellent job. I can answer any technical questions the Committee may have.

CHAIR CARE:
This bill is a necessity. The Nevada Supreme Court does not always say this, but this may be a case with the implication that they are inviting the Legislature to come up with a definition, and that is why we have this.

MR. ANTHONY:
Yes. That is the case. If the Legislature chooses to act, they can clarify the definition of "fugitive from justice." To add for the record, this definition was closely modeled after federal law, so we think it is fairly tight.

SENATOR WIENER MOVED TO DO PASS A.B. 481.

SENATOR COPENING SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

* * * * *

CHAIR CARE:
I will reopen the hearing on A.B. 117. Mr. Graham made mention of an amendment proposed by Assemblyman Harvey Munford (Exhibit F), containing provisions from A.B. 424. Assemblyman Munford is not here, but somebody may wish to address this. I do not want to get into stories about somebody should have been granted parole and was not. I agree with Senator Wiener, she used the word "efficiency." This bill is entitled to bring expedited efficiency to the system. That is the intent. Anybody is free to testify.

ASSEMBLY BILL 424: Makes various changes to provisions concerning parole. (BDR 16-1037)

SENATOR MCGINNESS:
Has the fiscal note been removed with the removal of those other sections?

CHAIR CARE:
That was the testimony, three deletions, which obviated the fiscal note.

TERESA WERNER:
You have my handout (Exhibit G) so I will not belabor. My biggest concern is low-risk offenders. I get a lot of feedback from inmates who are repeatedly denied parole even though they are low-risk offenders based on their original crimes.

I have heartburn about "low-level crimes." Low-level crimes have the highest recidivism rate and are never victimless. Would you want a drug offender living next door to you? I personally would not sleep well or enjoy my home if I knew a "meth head" or a low-level repeat offender criminal was living next door.

My point is, these low-level offenders are usually drug users or thieves and tend to have other associations with these types of people who visit their homes. As a homeowner, I believe it is a cancer to our society to dismiss these as victimless crimes or low-level crimes.

I want to point out again that I strongly feel this bill should encourage the Parole Board to grant parole to low-level offenders, regardless of their crime. They have been eligible for parole, as per the judge's sentence, and if they have earned a low-risk offense rating, they have earned it.

In my handout, Exhibit G, almost half of the people on this list, and these are just the people I know about, and probably hundreds more are going to consecutive sentences. They are not getting out. Granting them parole does not mean they are leaving prison. My concern is, in the case of Mr. Stockmeier, when you are denied five times even though you are a low-risk offender, one tends to think that no matter what I do, I am never going to get out of prison. Ninety-five percent of these people get out of prison. As a member of society, I do not want somebody getting out of prison with an attitude that no matter what I do, it is not going to matter. I want somebody getting out of

prison who says, if I do well, I am going to be okay and rewarded. I would like to encourage the Parole Board in any way and, if possible, grant parole to low-risk offenders.

CHAIR CARE:
You are offering proposed amendments? Are we to take your handouts, Exhibit G, as proposed amendments to the bill?

MS. WERNER:
Yes.

CHAIR CARE:
Did you discuss it with the proponents of the bill?

MS. WERNER:
No. I did not. I did not get a chance to.

CHAIR CARE:
You are free to do that. We have 27 days to go. You may want to discuss it with Mr. Graham and Ms. Bisbee. But we will go ahead and put it in the binder for the work session we will have on the bill.

MS. WERNER:
Wonderful.

CHAIR CARE:
Questions from the Committee?

LEE ROWLAND (American Civil Liberties Union of Nevada):
The bill is a great one. We are here in full support. It finds the creative solution between increasing efficiency without reducing due-process protections for those involved in the parole system. From our point of view at the American Civil Liberties Union (ACLU), that is a win-win situation because we are processing people faster. We are allowing the Parole Board to do its job more efficiently. We are also not reducing the protections wherein Nevada has chosen to give people the right to attend those hearings, which is the right policy choice. This bill strikes that delicate balance without creating those complications.

MS. JONES:
I am here in support of A.B. 117 with amendments. I would first like to speak to the one proposed by Assemblyman Munford Exhibit F. I am not going to read it, but I do want to point to the explanation on the fourth line, "unless they have exhibited that they are a threat to society." I call your attention to the highlighted additional information that Assemblyman Munford and I have discussed on pages 2 and 3, that under section 7, and on the next page, where it is time to clarify and put an objective state to that term "threat to society." I see Category C, D and E folks—even though held by the Department of Corrections (DOC) as minimum security prisoners that the DOC says are not a threat to society—are coming to the Parole Board. Some of them are two and four years under minimum security with the Department of Corrections, and now they are stamped by the Parole Board as a threat to society and denied parole. They are low-level Category C, D and E. I want to be clear this does not affect my family at all. We do not fall in this category and never will. I am speaking to this because I am a taxpayer and a concerned citizen of the State.

CHAIR CARE:
The bill was A.B. 424. I imagine this bill is here because that bill died in some fashion on the Assembly side.

MS. JONES:
Yes. It did.

CHAIR CARE:
There would be a reason for that. I do not want to review and rehash the work of the Assembly, but I am willing to let Assemblyman Munford explain this. If you can address the bill itself, please do.

MS. JONES:
The caveat to society is we will revisit it because that is used by the Parole Board to maintain folks in prison up to the expiration of their sentence rather than being paroled on a 12-month parole tag. I have spoken to this many times. It is the only sensible way to release these high recidivism-rate people.

The additional proposed amendment deals with work presented previously. I am not positive it only speaks to A.B. 117. I have submitted it in writing, so I just ask that if there is a workshop, it is reviewed. Senator Parks is familiar with this work and may answer any questions that might come up in the Committee.

SENATOR WIENER:
I have heard reference to workshop, and what we are talking about is a work session, which is different than the concept of a workshop. When we go to work session, we do not generally take witnesses; we process the information that has been presented, as it is being presented here today. Then, when we go into work session, we are prepared to vote. If we are not, then we move it to the next session. I do not want to mislead that it would be full-blown and everybody comes to the table because that is not what we do in work session.

MS. JONES:
Thank you, Senator Wiener, for that clarification. I would ask that the work proposed through Assemblyman Munford be considered by the Committee as you are reviewing all presented to you.

CHAIR CARE:
Assemblyman Munford is present. I know this is short notice, but we are looking at A.B. 117. As a member of the Legislature, we extend to you the courtesy of your thoughts that apparently did not go that far on the bill you had on the Assembly side. Was it for A.B. 424?

ASSEMBLYMAN HARVEY J. MUNFORD (Assembly District No. 6):
Yes. It was A.B. 424. I want to add some amendments. It was primarily focusing on the Parole Board being more efficient and conscious of low-level crimes when they came up for hearing. It seems as though they have not placed much concern in terms of giving them the opportunity to be released. They tend to not look at when the crime was committed, the age the inmates were at the time and the nature of their crimes. Some of the low-level crimes should be given more consideration as to the nature of the crimes and the chance of recidivism.

Sometimes the Board has a tendency to be more hesitant and not take into account the inmates' records while incarcerated, and often they have good records and did things that were expected to make them eligible. The Board tends to overlook those things.

We need to watch the Parole Boards in their judgment and consideration of cases. They should concentrate more, as my bill indicated, on Category A and B crimes, not so much the lower-level Category C, D, E and F crimes. They tend to spend more time with those than they do with the more severe crimes.

CHAIR CARE:
We do not have the benefit of all of the testimony in the Assembly Committee on the bill. We will put your language in the binder for work session. I cannot guarantee you anything is going to happen. It is a bill requested by the Assembly Committee on Corrections, Parole, and Probation and comes out of the interim study.

ASSEMBLYMAN MUNFORD:
Before I came into the room, I overheard someone testify who made some good points. They would be concerned about an offender living next door, and they also felt if offenders are constantly turned down or revoked at their hearing and not getting the chance to get paroled, they develop a certain attitude.

CHAIR CARE:
I think it was Ms. Werner. We have her handout, Exhibit G.

SENATOR WIENER:
I am seeing it would require mandatory release for the Category C, D or E. One of the issues raised earlier was concurrent and consecutive. Let us say the person was sentenced based on minimum sentence guidelines under the truth in sentencing, convicted for four consecutive Category D offenses. With a mandatory release after the first, how do you envision the other three—not concurrent but consecutive?

ASSEMBLYMAN MUNFORD:
You mean they have to serve the other three still remaining? That is a tough question.

SENATOR WIENER:
The concurrent is easy but the consecutive ...

ASSEMBLYMAN MUNFORD:
The concurrent is easy. If they are paroled on one, then they have two more left. That is difficult and depends on the nature of the two left.

SENATOR WIENER:
But that is not here. I do not know the logistics of a mandatory release based on minimum sentence requirement if it is consecutive.

ASSEMBLYMAN MUNFORD:
I do not know whether you can revert back to the decision in the case, what the judge determined, what sentence should have been rendered.

SENATOR WIENER:
That gives discretion back to the Parole Board.

ASSEMBLYMAN MUNFORD:
Sometimes, the Parole Board has a tendency to retry a case, and they are not supposed to retry a case. They are to look at the record of the inmate in terms of his incarceration period—his behavior, attitude and accomplishments—that leads up to eligibility for parole. They should look more at that.

SENATOR WIENER:
You said to go back to the record. If the court said four consecutives, that would have been the judicial point. Maybe counsel can help us determine how this would be.

ASSEMBLYMAN MUNFORD:
I know how they should be judged and how they should be looked at, and those are the remaining two charges.

SENATOR WIENER:
But we elect those judges to make those decisions. I am just curious because there is a big difference between the two.

ASSEMBLYMAN MUNFORD:
Yes, there is.

CHAIR CARE:
The bill A.B. 117 makes various changes relating to parole hearings. I allowed Mr. Munford to come in and explain his amendment, which contains provisions from A.B. 424. He has done that. I do not have any additional questions. We are going to have a hearing on A.B. 117; I do not need any additional testimony on A.B. 424. We will include your amendment in the binder.

ASSEMBLYMAN MUNFORD:
Even when my bill was presented previously, it did not get the consideration or merit deserved. I appreciate your giving me this opportunity to consider these amendments.

PATRICIA HINES:
I find it difficult to be here today. I have not seen Assemblyman Munford's or Florence Jones's amendments. I do not feel I can speak to it. I have a list of amendments I would like to hand in for A.B. 117 (Exhibit H) consideration at the work session.

I also have a handout (Exhibit I) from a father of a gentleman who talks about something that I am concerned about. As I look through what Assemblyman Munford and Ms. Jones put through, most of their proposed amendment comes from two things in Legislative Counsel Bureau File No. RO18-08, effective June 16, 2008. Not many of you know what RO18-08 was, the big problem that it was and the problem it has made for families, inmates and staff.

Rocky Sandlin did a good job on RO18-08 so you would understand it, Exhibit I. He is asking you to repeal a part of the *Nevada Administrative Code*.

CHAIR CARE:
We will close the hearing on A.B. 117. We will take that up sometime next week. I will open the hearing on A.B. 179.

ASSEMBLY BILL 179 (1st Reprint): Revises provisions governing postconviction genetic marker analysis. (BDR 14-869)

ASSEMBLYMAN WILLIAM HORNE (Assembly District No. 34):
I will read from my testimony (Exhibit J).

Ms. Munroe or Ms. Flores is going to show a brief video (Exhibit K, original is on file in the Research Library) on exactly what the Innocence Project does and persons who have been exonerated through this testing. I ask for this Committee's indulgence and will be more than happy to answer any questions.

LUCY FLORES (External Affairs and Development Specialist, Office of the Vice President for Diversity and Inclusion, University of Nevada, Las Vegas):
As Assemblyman Horne said, it is profile of exonerees. Unfortunately, we were not able to have any exonerees present with us.

In addition to all of the other interests that surround wrongful convictions, this is just one of the victims in a wrongful-conviction setting, the person who is wrongfully convicted. In addition to the video, we included a publication *200 Exonerated* (Exhibit L, original is on file in the Research Library). I urge the Committee to look at it. It is comprised of brief profiles of the first 200 DNA exonerations that highlight the human factor and the fact that this is only one victim in a complex situation. Katie Monroe can go through the mechanics of the bill and more on exonerations.

CHAIR CARE:
That is fine. Ms. Munroe, when I read the bill, one of the things that occurred to me is that it is not uncommon for prisoners to file appeal after appeal, etc. When I read this, I was thinking we may see petition after petition. The court has a lot of discretion because Assemblyman Horne strikes the language "shall" from law so it is completely discretionary by the court. The court could look at it, say it is not interested and that is it, end of discussion.

KATIE MONROE (Executive Director, Rocky Mountain Innocence Center):
I will address that. Rocky Mountain Innocence Center is the regional Innocence Project which covers the states of Nevada, Utah and Wyoming. You were just introduced to three exonerees from Texas in the video. There are now 238 exonerees, innocent people in prison who were exonerated by DNA evidence; the 238th exoneration was just this week. These 238 prisoners spent an average of 12 years in prison each, some as many as 38, some fewer than 12 but collectively almost 3,000 years in prison.

The DNA evidence has been critical in establishing that our criminal justice system can make mistakes and sometimes send an innocent person to prison while the actual perpetrator remains on the street to commit more crimes.

Important to the discussion is that postconviction DNA testing is not only important to innocent people in prison, it is also important to the rest of us. It is important to crime victims who clearly deserve that the criminal justice system

gets it right. It is important to law enforcement officials who want to do the best job they can, and it is important to taxpayers because there is a huge downside of imprisoning the wrong person. No one wins when an innocent person goes to prison. The crime victim has been deprived of both closure and justice, and the law enforcement officials have failed to get the true perpetrator off the streets. The public's faith in our criminal justice system is weakened, and the taxpayers are burdened with prosecuting and imprisoning the wrong person.

Sixty Minutes just covered the story of two people we had hoped to have here today who can tell this story much better than I, Jennifer Thompson Cannino and Ronald Cotton of North Carolina. Jennifer Thompson Cannino is a rape victim from North Carolina. She was brutally and tragically raped while she was a college student. Through the course of her rape she made it her goal to survive the ordeal and memorize the face of her attacker. Nonetheless, she sadly ended up identifying the wrong person. Ronald Cotton, who was an innocent young man in the community, was identified by Jennifer and went to prison. Jennifer's actual perpetrator, Bobby Pool, went on to rape other women in Jennifer's apartment complex and the community. Only 11 years later, Ronald was able to get access to DNA testing and prove his innocence. That testing also proved Bobby Pool was, in fact, the rapist. Mr. Cotton and Ms. Cannino now present on this issue. They just published a book together, and if you ever have an opportunity to learn their story, I would encourage that. It really underscores the importance of postconviction DNA testing for crime victims as well, as long as we are talking about a credible claim of innocence.

The Rocky Mountain Innocence Center has a strict screening process. We get approximately 200 requests for help each year. Of those 200 requests, there is a thorough vetting process by which we ultimately choose about 10 or maybe 15 of those cases to investigate. We start from scratch and do a thorough investigation to see whether mistakes were made at any place in the process and where there is a credible and provable claim of innocence. Only in those cases would we petition a court for DNA testing, or go back to court for any other reason. We ultimately end up helping two or three of those 200 that initially come to us for help.

Partly in answer to your question, Mr. Chair, a vetting process happens on the front end of these cases. Secondly, this is always very important to note, DNA is biological evidence available for DNA testing but actually available in fewer

than 10 percent of all criminal cases. That is because most criminal cases do not involve a crime where biological evidence, like blood, saliva or semen is left at the crime scene. In about 50 percent of the cases, the evidence is not collected or preserved and therefore not available say 5, 10 or 15 years later to be tested. In the world of criminal convictions, you are looking at a minority of cases eligible for DNA testing.

The third part is that with all DNA testing, including the DNA testing statutes like the bill you have before you today, measures are in place to weed out frivolous claims of innocence or frivolous requests for testing. I want to talk about those. Assembly Bill 179 provides an opportunity for prisoners in Nevada with claims of innocence to ask for DNA testing. If the results of that testing are exculpatory, then they make a motion for a new trial, so it is actually a two-step process. The third step would be a new trial in which DNA evidence is available to the jury, unlike the first time around. It is limited to Category A and B felonies, not all criminal convictions. It requires the prisoner make allegations as to the evidence they want to have tested, the type of testing they want to have done and how they see that testing would actually corroborate their innocence.

The courts have full discretion to dismiss a petition if they see the petition is meritless; they also have the discretion to appoint counsel in cases that have merit. This is something we worked on with Mr. Bateman and others. It was not in the original bill, but both Utah and Wyoming have these components to discourage guilty prisoners from seeking DNA testing. This is in paragraphs 9 and 13: if the results come back inculpatory and the DNA testing results show the prisoner made a false claim and was guilty, then those results are given to the Parole Board. The results are available, and if the prisoner were to go forward with any other appeals, this would certainly harm the basis for those appeals. The prisoner bears the costs in the event the results implicate him. That is something we stress with our clients. No matter what work we have put into the investigation, we say, if we ask for testing, you need to understand that if these tests implicate you, it will harm you in going forward in all aspects of your case.

Finally, another important piece of this bill is it requires victim notification; the original bill did not. That was something we thought important because we work closely with crime victims. This process is important to them. They need to be involved, and we are sensitive to that.

CHAIR CARE:
Ms. Monroe, as you envision it, does the prisoner know there is a type of genetic marker analysis that was not available at the time? They have a library, but I am thinking about the availability of information they need in order to put together a petition.

MS. MONROE:
Whether the prisoner would have access to this information is something that comes up a lot. In cases we investigate, we often locate the physical evidence and determine if it can be tested and the inmate understands the testing that needs to be done. You are right, a prisoner might seek testing without the assistance of an investigator and attorney. That is why they have to allege they believe, to the best of their knowledge, the state still possesses the evidence and this type of testing can be done. Lack of knowledge does not preclude them from making the request.

SENATOR WIENER:
On the victim notification, from your experience in other locations, what kind of reaction do you get? Do you get feedback, or what kind of response do you get from victims upon notification of this request for the petition?

MS. MONROE:
We always request that the district attorney's office reach out to the victim. We find, unless we have a relationship with victims separately, the notification should come from the district attorney's office. However, I can speak to a couple of direct experiences with crime victims. We have DNA testing happening in a case in Las Vegas that we were able to secure outside the course of the statute, although that was difficult. The case involved a murder. The victim's family's reaction was: if the evidence exists and it can be tested and put this question to rest, then by all means, let us test.

Clearly, this is a difficult thing to ask of crime victims. It breaks my heart. It is the most troublesome part of my work, asking them to revisit it. But in a case where the physical evidence still exists, is testable and can put to rest this question, it is as important for them as it is for the prisoner claiming innocence. If the crime victims we work with in our Innocence Project were here today, they would tell you how important it was for them to know the wrong person was in prison.

In 50 percent of the 238 exonerations, we have identified the actual perpetrator. The same biological evidence that exonerated the innocent prisoner was put in a database to find the perpetrator. If that can be done in the end, what is delivered to the crime victim is a true service.

SENATOR WIENER:
Earlier, you stated you give notice to those who seek the petition for testing that if it is inculpatory, the offender pays and the evidence goes on the record. Given that, of those who have requested testing and notification, do you have a sense of how many have withdrawn their request?

MS. MONROE:
I do not. I can answer this. It is a separate question but may get to what you are asking. The National Innocence Project, which exclusively does DNA testing, has a different standard than we do. Their standard is if the evidence exists and is testable, they ask for the testing without any independent background investigation of their own. But their experience has been that for 50 percent of the people who ask for DNA testing, the results implicate them. I know that at the Rocky Mountain Innocence Center, we have had one case out of seven in which that has happened, and that person was mentally challenged. It was clear he had no understanding of involvement in a crime. The tests results implicated him, but when we spoke with him about it, he honestly believed he would be exculpated and wanted to go forward with the testing.

When we talk about this, we feel it is a win-win situation for the State and puts the answer to rest. If the test results come back inculpatory in a case where we believe a prisoner is innocent, that is not good news. But, it does give the question of guilt scientific finality. The victim has that closure as well, whatever the results.

CHAIR CARE:
You have somebody in prison convicted of a Category A felony, his matter is on appeal, meanwhile the court allows this test. The Nevada Supreme Court finds incompetent counsel or something, so the appeal is successful. There could be a second trial, but now we have genetic marker that indicates he is not innocent. Can that be admitted to trial?

MS. MONROE:
Yes. It could be admitted to trial.

CHAIR CARE:
Thank you. Any other questions from the panel?

SENATOR PARKS:
What is the cost for a genetic marker analysis in general terms?

MS. MONROE:
The average cost on one rape kit for a straightforward DNA test from a rape crime is approximately $875. On average, there tends to be more than one test is run, and we find the average test per case is about $2,000. There is information about that in the packet (Exhibit M) we gave to you. We can provide more in anticipation of the Assembly hearing. The Crime Laboratories in both Washoe and Clark Counties requested the National Innocence Project give them those numbers, producing a memorandum with those numbers and where those numbers come from. There are more elaborate types of DNA testing. If you are not testing fluids but bones or teeth using mitochondrial testing techniques, those tend to run approximately $10,000. That is not common, but it could be requested. Neither of the Nevada State Crime Laboratories has the ability to do mitochondrial; their testing is limited to biological fluids, so that kind of testing would have to go to a private laboratory.

It is important to mention in terms of numbers of petitions across the Country, that no state has experienced a flood of petitions. That is usually the question. South Carolina just passed a postconviction DNA testing. We now have 44 states with a postconviction DNA testing statute. The question is not do we provide the testing, it is how many requests are made.

In our neighboring states, Utah passed its statute in 2002, and we have had seven requests for DNA testing since 2002. Those are done in the State Crime Laboratory. In Wyoming, a DNA testing statute passed last year, and there have not been any requests yet. In Arizona, there have been just fewer than 25 since 2000. California has a huge population, more than 170,000 in prison. At one point in the first year, they had about 20 requests for testing per month, but now they have 1 or 2 per month, 12 to 15 per year. We do not anticipate that Nevada would experience anything different than other states. That information is also in the packet, Exhibit M. We are always available, as I am sure Mr. Bateman and others who have helped with the crafting of this bill, to provide more information or answer questions.

CHAIR CARE:
Assemblyman Horne and Senator Parks, the question as to the cost: there was a fiscal note on this, and I do not know if that applies only to the original bill or the bill as amended, but it was from the Department of Corrections.

ASSEMBLYMAN HORNE:
Yes. I have $234,060 for fiscal year (FY) 2010-2011, and $468,124 would affect future biennia. I did ask if there was a revised note since then, and there has not been. The Assembly Ways and Means Committee chose not to take this up.

MS. MONROE:
This fiscal note is based on a cost of $11,000 per case. That typically is far more than we see as the cost of these cases. And it is based on 20 requests per year, which, given the experience of the neighboring states, I do not imagine we will be facing.

There is a memorandum that speaks to the experience of other states, which we can make available to you if that would help.

SENATOR PARKS:
If I am reading this bill correctly, it is saying a petitioner must meet certain requirements in order to be eligible for having this test done. I presume the test would be done at the cost to the State. What if a person strongly felt they were innocent and if they had their DNA tested, they could use that in a petition they bring themselves—in other words, they pay the whole cost. Does this bill prohibit them from doing the test, since at this point they would be incarcerated and it would require the Department of Corrections to permit them to have such a test done?

MS. MONROE:
It certainly does not prohibit them. There is not a statute that permits DNA testing in the State of Nevada absent the limited statute that applies to prisoners on death row. The postconviction world is such that it is difficult to get back into court on a claim of innocence. Typically, after you have pleaded guilty and been convicted at trial, the question of guilt or innocence is over. You may bring direct appeals where you address limited issues with the way things played out at trial. Then under the habeas corpus appeal, which is more of a civil rights case, the first question would be whether they could get access to

the physical evidence. The physical evidence is usually still in the possession of the State, and you have no right to it. I guess you could petition the court, try to get the district attorney's office to agree to send the evidence to a private laboratory, but then the question would be how would you get back into court? The only avenue would be the statute that permits a motion for new trial based on new evidence, but that has a two-year time limit strictly construed by the courts in Nevada. It is unlikely that you could even get those results back into court.

This bill provides that framework. You would get the testing done, the results would come back, and then you would make the motion for a new trial. The two-year time limit would not apply because the new evidence is the result of the new testing. There would not be a mechanism by which they could get that evidence back into court unless they were still working within that two-year time limit.

CHAIR CARE:
Assemblyman Horne, that is close to a proposed amendment from Assemblyman Munford (Exhibit N). Have you had a chance to look at it?

ASSEMBLYMAN HORNE:
I have not—there is a proposed amendment to this bill?

CHAIR CARE:
Yes. We were given a handout. It is for your bill.

ASSEMBLYMAN HORNE:
I do not have a problem with prisoners paying for their own testing. The question that arises is how, if the petition has been denied, does that prisoner force the authorities to give this material up for the testing?

CHAIR CARE:
We will defer to you, if you want to think about it.

ASSEMBLYMAN HORNE:
I will ask Ms. Monroe.

MS. MONROE:
Mr. Chair, we certainly would support this amendment, Exhibit N, but we need to ensure the language was such that the person could then go back to court and ask for a new trial. The second part of the process then needs to apply as well so the amendment ensures the person gets access to the evidence in the State's possession. Then they could make a motion for a new trial based on the result of testing they paid for themselves. I had not thought about how this would fit in with the mechanics of the bill, but we would not oppose prisoners seeking testing at their own expense.

CHAIR CARE:
You may want to get with Assemblyman Horne and craft the language to do that so you have those reassurances.

MS. MONROE:
Okay.

CHAIR CARE:
We will put this on for a work session.

SAM BATEMAN (Nevada District Attorneys Association):
We are in support of this bill. We worked with Assemblyman Horne and various parties, and we are in agreement with all of the language. I am available for any questions.

MS. ROWLAND:
I would like to add a hear, hear. I was also handed this proposed amendment, Exhibit N. We would certainly support it. I am heartened that the Innocence Project is willing to work with Assemblyman Horne to find some language. It is responsive to Senator Park's concern, which is a good one. Frankly, there may be instances where people are convinced of their innocence, and if they are willing to foot the bill, it does not increase the fiscal cost but provides more opportunity to get at that truth.

With respect to the procedure, it seems to me if somebody did get a positive test, it would be evidence of innocence that might open a statute of limitations for the purposes of a habeas corpus claim as would inserting this language. I am glad they will work on incorporating more appropriate language, but even this would give folks an opportunity.

From a civil liberties point of view, imprisoning the right people is the key to making sure our criminal justice system is indeed just. This is a great bill; we again thank the sponsor.

JASON FRIERSON (Office of the Public Defender, Clark County):
We support the bill.

CHAIR CARE:
You heard the amendment, the concept?

MR. FRIERSON:
We did, and we agree.

ORRIN JOHNSON (Office of the Public Defender, Washoe County):
Me, too.

TONJA BROWN (Advocate for the Innocent):
This was my idea, my amendment to this bill in the event the court denies the petitioner the genetic marker analysis. The petitioner may go forward with the testing without the court's permission by bearing the cost.

I may have a possible solution to the discussion on how the inmate would know what evidence is available. I suggest another amendment to this wherein the petitioner who requests DNA testing submit a letter in writing to the head of the evidence room in which the evidence is stored. Whether it is the courthouse or wherever it may be, ask for a copy of the index tracking sheet, chain of custody records and everything admitted into evidence during the trial. The petitioner will then have an idea as to what is available for DNA testing, and he can start from there. He must submit the request in writing to the district attorney, the court and the supervisor of the evidence room to notify them he intends to ask for DNA testing, and he is sending a letter of preservation in order to do this. At the same time, the petitioner should ask for copies of the evidence sheet, the exhibit sheets admitted into evidence and the index tracking cards to show where the evidence has gone since trial, not before but after. That should be included in this amendment

CHAIR CARE:
You will want to bring that up with Assemblyman Horne because he is the sponsor. We are going to defer to him. It is his bill, and his name is on the bill.

MS. BROWN:
On A.B. 117 which is closed …

CHAIR CARE:
We are not going to get into that.

MS. BROWN:
I realize that. Something in A.B. 117 should be rolled over into the work session for "the 118," which deals with the parole on innocence.

ASSEMBLY BILL 118: Revises provisions governing associations of self-insured employers. (BDR 53-695)

CHAIR CARE:
Because this is Assemblyman Horne's bill, you have to bring it up with him.

MS. BROWN:
Okay. I am speaking from personal experience. I have a loved one who was wrongfully convicted nearly 21 years ago. Prior to trial, we were told to have DNA testing conducted. It never got done. We have gone through the court system and been denied DNA testing. Now there seems to be problems, but that is beside the point.

Your documentary is wonderful. Wrongful convictions are happening on misidentification. In our instance, the victim positively identified him from a tainted photo lineup. This photo lineup can be found in exhibits through the Advisory Commission hearings of June 6, 2008, in which you will see the photo lineup. I have shown that photo lineup to 141 individuals who have positively identified this person without any knowledge of what he or the suspect looks like. We are still fighting his conviction, and this is one of the main reasons we need the DNA testing. It applies to everyone who maintains their innocence. A court can deny you, and they should not be able to. Let them pay for it at their own expense.

MS. JONES:
I want to support this bill. It is a marvelous piece of legislation. I am concerned that it not be limited to the courts and that the inmate may have the DNA testing done at his own expense whether or not the court approves it.

CHAIR CARE:
I will close the hearing on A.B. 179 and open the hearing on A.B. 271.

ASSEMBLY BILL 271 (1st Reprint): Makes various changes relating to the collection of fines, administrative assessments, fees and restitution owed by certain convicted persons. (BDR 14-903)

MR. GRAHAM:
We are dealing with a bill out of the Advisory Commission Study that showed tens of millions of dollars owed over the years, much of which could be collected for restitution, analysis fees and defense attorney fees. We discovered there is no coordinated effort to collect and work on this process.

Assembly Bill 271 is not an effort to take away from any entity that successfully collects fees but an effort by the Advisory Commission on behalf of the courts to help coordinate a collection process. We view this as enabling rather than anything that may start up immediately because of fiscal concerns. There is a discussion about administrative probation; when a person is off probation, the concept would be that a person who is capable of paying or had discussed paying would hear from either the Administrative Office of the Courts collection group or another collection effort. Ron Titus, Director of the Administrative Office of the Courts, is the numbers person. I am presenting the concept. I would coordinate and pull things together. Mr. Titus can present his view on this legislation.

RON TITUS (Director and State Court Administrator, Administrative Office of the Courts):
The intent of A.B. 271 is to provide broad authority and responsibility to the Administrative Office of the Courts to ensure collection of assessed fines, fees and restitution in the district courts for individuals convicted of gross misdemeanors and felonies.

The intent is to coordinate the various entities now collecting these fines—the district courts, occasionally the counties, the Department of Public Safety, Department of Corrections, and Parole and Probation—and make sure nothing falls through the cracks. The NRS does not assign responsibility for collection of any of these fines or fees except for restitution. Restitution is the only one that is assigned—to the Division of Parole and Probation.

The intent of the bill is to use existing collection efforts, not to replicate or replace those efforts in place. Parole and Probation has a large effort in collecting fines and fees.

This came to our attention last fall when Washoe County did an audit on the Second Judicial District and found $26 million in uncollected fines and fees not including restitution spread among the Public Defender, chemical analysis and DNA. We did a quick scan in Clark County, and the number is approximately $60 million, also not including restitution. Significant fines and fees should be collected. That is the purpose of the bill—to collect those fines and fees.

We plan on working with the State Controller who has great collection efforts in place. If the people can pay, we would like them to pay. If they cannot, then those debts should be written off. Business has a procedure for writing off bad debts; the courts do not. There are bad debts we are never going to collect.

SENATOR WIENER:
On page 5 of the bill under section 2, subsection 3, lines 27 through 31 provide the court can set a fixed time and if it is paid prior to that time certain, then you can proceed to dismiss it. What happens in between, from paying early or within the time frame and the bad debt, where you write it off? Is there an option to extend the time? In that fixed time, do you not want to give it another shot under certain circumstances?

MR. TITUS:
The intent is that it can be stopped early in any time period probationers pay the fine.

SENATOR WIENER:
This section says you can stop it early. But say within that fixed time you want to extend it. There is a provision to stop it if they pay early. There is no provision that under certain circumstances you would want to extend fixed time.

MR. TITUS:
I do not believe there is one. The intent is this follows a probation period of three, four or five years that extends for additional time set by the court. If we cannot collect it within that time, then the intent is to write it off.

SENATOR MCGINNESS:
Mr. Titus, on page 5, section 2, subsection 2, lines 22 to 23 say "During the period of administrative probation, the Office of Court Administrator shall supervise the person ... ." This like a court probation thing, so why is there no fiscal note?

MR. TITUS:
We have submitted a fiscal note, but we do not have it at this point. The supervision would entail checking with the person and verifying whether he can pay.

SENATOR MCGINNESS:
It is going to take some face time with that person.

MR. TITUS:
Correct.

SENATOR MCGINNESS:
This bill was introduced on March 9; in two months, we have not had a fiscal note yet?

MR. TITUS:
We submitted a fiscal note prior to it coming out of the Assembly side, and I do not know what the holdup is.

CHAIR CARE:
That being the case, I do not want the Committee to act on the bill until we know the fiscal impact. Everybody knows we are running out of time here—it is not your fault.

TRAY ABNEY (Director, Government Relations, Reno-Sparks Chamber of Commerce):
Prior to this Session, the Chamber released a list of long-term spending reforms that we think the Legislature needs to undertake. There has been a lot of publicity on the Public Employees' Retirement System, Public Employees' Benefits Program and the Spending and Government Efficiency (SAGE) Commission, but one of the things on that list we released is enhanced collection of uncollected fees and fines. We think this bill does that, and we support the concept behind it.

CHAIR CARE:
Thank you. Of course, that gets into collectability too. I can tell you from experience.

MR. FRIERSON:
We want to go on record in support of the bill.

CHAIR CARE:
Thank you.

MARK WOODS (Deputy Chief, Northern Command, Division of Parole and Probation, Department of Public Safety):
One of the problems the Division has with this is—we support the concept wholeheartedly—we are the ones who collect restitution. Right now, our system cannot talk to any other system regarding the monies. We can tell you what we collect and how much is owed, but we cannot talk to another system. In our current budget, we have only enough programming dollars for the next two years and cannot add anything new.

SENATOR WIENER:
Is restitution first? And then would there be a priority in repayment?

MR. WOODS:
We collect fines, fees and restitution while parolees are under our supervision. Restitution—making the victim whole—is our No. 1 priority.

SENATOR WIENER:
Is that statutorily defined?

MR. WOODS:
No. That is Division.

SENATOR WIENER:
That is policy.

CHAIR CARE:
You have a fiscal note on A.B. 271 (Exhibit O), $263,000 for FY 2009 -2010, $264,000 for FY 2010-2011, and then future biennia, zero? We do not know? Okay.

I will close the hearing on A.B. 271. Mr. Graham, regarding A.B. 117, you might be wondering how a bill that passed 41 to 0 could run into what it did this morning. I suggest you talk to Assemblyman Munford. We are not going to revisit or reopen the hearing on A.B. 424, but he has offered an amendment. As a member of the Legislature, he is welcome to do that.

Committee members, you should have the matrix (Exhibit P) Senator Amodei requested regarding where we are with all of the CIC and HOA bills. That came up in the hearing on A.B. 204.

The Committee is adjourned at 11:06 a.m.

RESPECTFULLY SUBMITTED:

_____
Judith Anker-Nissen,
Committee Secretary

APPROVED BY:

_____
Senator Terry Care, Chair

DATE: _____