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

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NRAP 26.1 DISCLOSURE

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

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

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ARGUMENT

I. INTRODUCTION

Remarkably, after nearly fifty years, the State has in its possession physical evidence which is capable of DNA testing in the case of the 1972 murder conviction of Appellant Michael Anselmo. What's more, this is a case where DNA testing of physical evidence could call into question Michael's murder conviction. Yet the State has opposed, and the district court denied, DNA testing. Michael is entitled to DNA-testing of the genetic material that could not be tested at the time of his trial, and such genetic marker analysis does not prejudice the State in the slightest.

Requests for DNA testing are denied if they do not meet technical requirements imposed by statute or if there is simply no doubt about the identity of the perpetrator (such as with the defenses of consent and self-defense). But this is a case where there ***is*** doubt about the identity of the perpetrator and therefore there is value to DNA testing of physical evidence. Further, this a case where the technical requirements of the statute were satisfied. Michael met the statutory requirements for his Petition, and the identity of the perpetrator is in dispute (Michael did not assert a self-defense theory). No physical DNA evidence linked Michael to the crime. Now, after being branded a murderer for nearly fifty years, Michael has an opportunity that did not exist at the time of his trial—the

opportunity to present DNA evidence that may exonerate him and could even identify the true murderer.

The State opposes the testing of the physical evidence because it argues that the jury that convicted Michael did not find his defense compelling. But whether the jury found the original defense compelling is not the threshold inquiry for DNA testing. Nor is the inquiry whether the jury already rejected other ***non-DNA*** exculpatory evidence, the erroneous ground on which the district court dismissed the Petition here. Rather, the threshold inquiry is whether the results of the DNA testing, assuming they are favorable to Michael, would provide a "reasonable possibility" that Michael "would not have been prosecuted or convicted," had those results been obtained at the time of trial. It is improper for the State to preclude a defendant from presenting DNA evidence of third-party guilt simply because the State believes the evidence against the defendant strongly supports a guilty verdict.[1] Michael has demonstrated that, had exculpatory DNA evidence been obtained at the time of trial, there is a reasonable possibility that he would not have been prosecuted (as the investigators would have had another lead to follow to identify another suspect) or convicted (as the jury may have found a reasonable

[1] *See State v. Demarco*, 904 A.2d 797, 807 (N. J. Super. 2006) (holding that "a state cannot preclude a defendant from presenting [DNA] evidence of third-party guilt simply because the evidence against him strongly supports a guilty verdict").

doubt as to the prosecution's version of events, if circumstantial evidence had been supported by exculpatory DNA evidence). Without such DNA evidence, the jury was presented only with circumstantial evidence, competing narratives, and Michael's own "confession," which he later explained was false. DNA evidence contradicting the false confession would have likely placed doubt in the minds of jurors. DNA evidence bolstering Michael's other exculpatory evidence introduced at trial may have placed doubt in the minds of jurors. DNA evidence identifying another person at the scene of the crime may have placed doubt in the minds of jurors and/or may have precluded prosecution at all, if such evidence led investigators to other suspects. Because there is a reasonable possibility the evidence would have affected the result of trial or prosecution of Michael, the evidence should be tested now.

The remaining arguments made by the State essentially weigh whether Michael should be entitled to a new trial, even though this is not the phase of proceedings before the Court. This appeal concerns the threshold inquiry of whether the evidence should be tested. If the DNA results match Michael, the inquiry ends. But if those DNA results are favorable to Michael, Michael's conviction will still not immediately be overturned. Rather, Michael will be permitted to file a motion for new trial based on the exculpatory results. Argument concerning the propriety of a new trial are not relevant now, including arguments

weighing Michael's initial defense sans DNA evidence against the narrative that ultimately supported the jury's verdict. To accept the State's arguments that DNA testing should be denied because Michael's original defense, sans DNA testing, was not accepted by the original jury would eviscerate the right to DNA testing established by the Nevada Legislature. It would also deny justice to countless others, like Michael, who would be forced to jump over a judicially imposed higher hurdle than that set by the Legislature. This Court should reverse and order the DNA testing of the physical evidence identified in the Petition.

II. RESPONSE TO THE STATE'S STATEMENT OF THE CASE AND STATEMENT OF FACTS

Before both the district court and this Court, the State has emphasized that Michael did not cite to the trial record to support his factual assertions in his Petition.[2] Nevada law does not require recitation to the trial record in the Petition; rather, Nevada law requires that a petition 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). The State implies that the district court only initially accepted Michael's

[2] App.Vol.6 1041, n.2; Ans. Br. at 2, n.2.

representations of the facts.[3] But the district court heard argument that Michael relied on "particular facts" as permitted by statute, understood that he was arguing whether there is a reasonably possibility that he would not have been convicted based on those particular facts, and did not subsequently find that he in any way misrepresented the trial record.[4]

The State also incorrectly asserts that the district court "did not find or conclude that Anselmo satisfied his burden to demonstrate a reasonable probability existed that he would not have been prosecuted or convicted."[5] But the district court ***did*** initially find that "Mr. Anselmo set forth a rationale why a reasonable possibility exists he would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis."[6] While the district court later distanced itself from its prior ruling,[7] the fact remains that the district court found Michael set forth a reasonable possibility why he would not have been convicted or prosecuted, which is all that is required by statute. NRS 176.09183(1)(c)(1). The district court's later abrupt about-face on this issue illustrates its error.

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[3] *See* Ans. Br. at 2, n.2.

[4] *See* App.Vol.8 1297:11-1300:21, 1307:9-17; *see generally* App.Vol.8 1647-653.

[5] Ans. Br. at 2, n.2.

[6] App.Vol.5 961.

[7] App.Vol.8 1650, n.1.

The district court initially found persuasive that at trial, one possible explanation given of why the semen found in the victim contained no sperm was that the individual may have been sterile or recently had a vasectomy, neither of which applied to Michael.[8] This is not to say that it was the only explanation for the lack of sperm in the sample. As the State pointed out, testimony at trial posited that another explanation could be that the sperm in the sample had degenerated, but the district court's reliance on the jury's acceptance of the degenerative explanation as opposed to the former is the wrong line of inquiry.

The district court's duty in evaluating the petition is to look at the facts presented at trial ***combined with exculpatory DNA evidence***. NRS 176.0918(3)(b); NRS 176.09183(1)(c)(1). The statute requires determination of whether there is a reasonable possibility "that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis." *Id.* Thus, the district court must assume the DNA results would be exculpatory. Applied here, the district court was bound to (1) assume that the DNA found in the semen, once tested, ***would not match Michael's DNA***, and then (2) analyze whether a reasonable possibility exists that Michael would not have been convicted with this specific DNA exculpatory evidence. The State flips this

[8] App.Vol.5 961; App.Vol.8 1650, n.1.

statutory standard on its head by asserting that the inquiry is whether other exculpatory evidence was already presented at trial.

Here, the district court merely concludes that the exculpatory information already presented at trial—that the sperm ***could have been*** from a sterile individual—was rejected by the jury. But the district court ignores that exculpatory DNA evidence, excluding Michael as the contributor of the sperm and possibly matching someone else, would create a reasonable possibility that the jury would conclude otherwise—that the semen did ***not*** come from Michael.

In fact, throughout the Order, the district court commits the same error with respect to other exculpatory evidence—that the jury heard other exculpatory evidence at trial and rejected it.[9] The district court did not conduct the inquiry with which it is charged, that is, analyzing Michael's rationale and the record as if exculpatory DNA evidence had also been presented at trial. Nowhere in the Order does the district court analyze whether exculpatory DNA evidence identifying another individual at the scene of the crime (or even all the DNA evidence matching one specific individual—a new suspect) could have impacted the result of the investigation or trial.[10]

[9] App.Vol.8 1650-52.

[10] *See generally* App.Vol.8 1647-653.

Respecting the Statement of Facts, Michael's factual recitation is not inconsistent with and is fully supported by the trial record.[11] The State asks this Court to disregard Michael's recitation of facts because it is inconsistent with the jury's verdict, but this is precisely the mistake made by the district court.[12] The court's duty is to analyze a situation admittedly at odds with the jury verdict because the analysis is of a yet-proven hypothetical: that exculpatory DNA evidence had been obtained and presented to the jury. The State's citation to *McNair v. State*, 108 Nev. 53, 825 P.2d 571 (1992), dealing with a direct appeal of a jury's verdict, is entirely inapplicable to this hypothetical, statutory analysis. It is impossible for the district court to accept only the facts accepted by the jury, as the district court lacks knowledge of which precise facts the jury accepted or rejected in making the verdict. Further, doing so would ignore entirely its statutorily-mandated duty to analyze the reasonable possibility that a defendant would ***not*** have been convicted had exculpatory DNA evidence been obtained and presented in tandem with the other evidence (all the evidence, not just that which the State deems favorable to its own case) presented at trial.

This is exactly the error that occurred here. The district court improperly turned its attention to whether substantial evidence supported the verdict, that is,

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[11] *See generally* Op. Br.

[12] Ans. Br. at 6, n.3.

whether the exculpatory evidence already introduced at trial was sufficiently overcome by the other evidence presented at trial such to support the jury's verdict. The district court should have examined the record within the context of an alternate, hypothetical universe—one in which the jury was also presented with exculpatory DNA evidence for each piece of physical evidence Michael identified in his Petition.

For example, the district court must consider the possible outcome if the jury heard not only the two explanations for lack of sperm in the semen sample presented at trial (sterility or degeneration of sperm), but also exculpatory DNA evidence (excluding Michael and/or identifying someone else as the contributor). Similarly, the district court must consider the impact on the verdict if explanations of the DNA evidence found at and around the scene of the crime (hairs in the car, genetic material on the pantyhose and purse, genetic material under the victim's fingernails,) were not the only evidence heard at trial, but also exculpatory DNA evidence (either excluding Michael and/or identifying another individual at the scene of the crime). The district court failed to apply the proper statutory standard when reviewing and dismissing Michael's Petition.

III. MICHAEL DEMONSTRATED A REASONABLE POSSIBILITY HE WOULD NOT HAVE BEEN PROSECUTED OR CONVICTED HAD EXCULPATORY DNA EVIDENCE BEEN OBTAINED.

The district court was persuaded by the State's contortion of the analysis required by statute and determined that because ***other*** exculpatory evidence was presented to the jury on the issues Michael now identifies, genetic marker testing to obtain exculpatory ***DNA*** evidence on those same issues is not warranted. This is not the proper inquiry. Nevada law requires the district court to order ("shall order") genetic market analysis if (a) the evidence to be analyzed exists; (b) the evidence was not previously subjected to genetic market analysis; and (c) 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." NRS 176.09183(1)(c)(1) (emphasis added). Both the district court and the State make the critical error of conflating whether the jury verdict was entered despite other non-DNA exculpatory evidence presented at trial with whether the jury verdict may have been different had ***DNA*** exculpatory evidence also been presented at trial.

A. The District Court Must Evaluate the Record as if Exculpatory DNA Evidence had also Been Available.

Michael does not suggest "that he was entitled to genetic marker analysis simply by virtue of filing a petition that appeared to comply with procedural

requirements of NRS 176.0918."[13] Rather, once a petitioner has met his/her statutory burden, the Court must order genetic marker testing. NRS 176.09183(1) ("The court ***shall*** order a genetic marker analysis, after considering the information contained in the petition pursuant to subsection 3 of NRS 176.0918 and any other evidence, if the court finds that…") (emphasis added). In his Opening Brief, Michael clarifies that the issue in this appeal is not whether he failed to meet one of the procedural statutory requirements.[14] The sole disputed issue is whether there is a reasonable possibility that Michael would not have been prosecuted or convicted had exculpatory results been obtained through a genetic marker analysis of the evidence identified in his Petition.[15] There is such reasonable possibility in this case.

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[13] Ans. Br. at 28.

[14] There has been no prior genetic testing or opportunity for testing to have been done at trial; nor was any of the information required by statute missing from Michael's Petition. *See generally* App.Vol.5 946-952, Op. Br. at 37-38. The evidence identified in the Petition is indeed in the custody or control of the State and capable of being tested. App.Vol.5 993-1009; App.Vol.6 1040-059.

[15] The State cites to legislative history documents to dispute its straw man argument that Michael's contentions need not be accepted as true. Because Michael does not contend his statement of facts need be accepted as true, such arguments need not be rebutted here. However, it is important to note that the district court did ***not*** disregard Michael's contentions of fact as misrepresentations, but merely found other evidence in the trial record to be more persuasive, while ignoring how exculpatory DNA evidence may have altered the verdict. *Supra* n. 4.

The district court's duty on a petition for DNA analysis is not to give deference to the jury verdict and only grant DNA petitions where the jury verdict is supported by weak evidence. *See Huffman v. State*, 837 So. 2d 1147, 1149 (Fla. 2d DCA 2003) (holding that despite "significant circumstantial evidence of [defendant's guilt] presented at trial," post-conviction DNA testing was appropriate when the identity of the perpetrator was at issue); *Demarco*, 904 A.2d at 807 (holding that "a state cannot preclude a defendant from presenting [DNA] evidence of third-party guilt simply because the evidence against him strongly supports a guilty verdict"). Rather, the district court's job is to look beyond the jury verdict to assess a hypothetical situation where the jury also heard exculpatory DNA evidence. *See State v. Gates*, 840 S.E.2d 437,456 (Ga. 2020) ("although the State presented strong evidence of [petitioner's] guilt, [petitioner] could have much more effectively countered such evidence had he also been able to present the newly discovered DNA evidence."). The problem in this case is that the district court conducted only half of the inquiry required of it. The district court did indeed analyze the evidence from trial presented in Michael's Petition, along with the State's presentation of its version of the case from the trial record. The State contends the district court "reviewed the trial record and found, in part, that Anselmo's counsel presented exculpatory evidence during trial on the issues that

Anselmo raises now."[16] This is error; the district court concluded that other non-DNA exculpatory evidence supporting Michael's defense was presented to the jury and rejected. But nowhere in the statutory scheme is the district court directed to weigh whether there was other non-DNA exculpatory evidence presented at trial. Rather, the question is whether DNA exculpatory evidence would have affected the result or the decision to prosecute.

Critically, the district court did not analyze whatsoever how the addition of DNA exculpatory evidence at trial could have impacted the jury's evaluation of that DNA and other evidence at trial.[17] The availability of exculpatory DNA evidence would make facts and testimony the jury initially rejected more credible. The State points out inconsistencies in various pieces of testimony from trial, by which the district court was ultimately persuaded. However, the State ignores, for example, the possibility that the physical evidence available to be tested may match one other individual, and that such exculpatory DNA evidence may have led investigators at the time to investigate a new lead leading to discovery of a different perpetrator. Or, DNA evidence may have cast doubt upon testimony the jury accepted as credible in its absence. ***Not once*** does the State address the

[16] Ans. Br. at 27.

[17] App.Vol.8 1650-53 (noting other exculpatory evidence presented at trial, but not considering how exculpatory DNA evidence would impact the prosecution or conviction).

possibility that DNA evidence could identify another individual present the night of the crime with his/her DNA all over the physical evidence, and the effect this could have had on the prosecution or conviction of Michael.[18] Michael correctly contends that if this were the case, Michael may not have been prosecuted or convicted. ***This is all that is necessary for a petitioner to be entitled to DNA testing***.

Nor did the district court analyze how exculpatory DNA evidence, such as DNA evidence identifying another suspect at the scene of the crime, could have impacted the investigation or eventual prosecution of Michael.[19] The State entirely ignores the possibility that Michael might not have been prosecuted or convicted had DNA evidence matched another person, and the district court simply determined that the evidence supporting the conviction was sufficient. This is not the proper inquiry on a DNA petition, but rather applies in a direct appeal of a conviction. This is not a direct appeal of Michael's conviction, but the only findings and conclusions drawn by the district court have to do with which non-

[18] The closest the State gets is noting how unlikely it is that the evidence would match John Soares. Ans. Br. at 49-52. The State argues in passing that the jury heard evidence "that tended to exclude Anselmo as the perpetrator and they convicted him anyway," Ans. Br. at 52, but as the State notes, what the jury actually heard was the mere possibility that physical evidence could match Michael or someone else, not DNA evidence conclusively establishing one or the other. *See* App.Vol.3 391-92, 403-04.

[19] *Id.*

DNA exculpatory evidence was already presented at trial,[20] not how exculpatory DNA evidence could have affected that verdict.

B. The Reasonable Possibility Standard Is a Lesser Standard than Reasonable Probability and Includes a "Real Possibility" that Evidence Would have Affected the Result.

As an initial matter, the State apparently takes issue with Michael's reliance on "non-binding" precedent from other jurisdictions than Nevada, but this Court routinely relies on persuasive authority from other jurisdictions. *See, e.g.*, *Moore v. State*, 136 Nev. Adv. Op. 71, 475 P.3d 33, 37 (Nev. 2020) (finding California law persuasive in consideration of Nevada criminal lewdness statute and finding "the district court did not err in referencing it") *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 581, 216 P.3d 793, 796 (2009) ("Having considered persuasive authority from other jurisdictions, we conclude…"); *Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co.*, 124 Nev. 319, 323, 184 P.3d 390, 393 (2008) ("in accordance with our precedent and consistent with persuasive authority from other jurisdictions, we conclude that…"). In any event, the parties appear to agree as to how the "reasonable possibility" standard should be interpreted. For instance, the "State agrees that in Nevada a reasonable probability standard is a higher standard of proof than reasonable possibility."[21] And the State agrees that the reasonable

[20] App.Vol.8 1650-53.

[21] Ans. Br. at 35; Op. Br. at 37.

possibility standard in the context of *Brady* claims is applicable here, in that there "must be a real possibility that the evidence would have affected the result."[22]

C. Michael Has Satisfied the Reasonable Possibility Standard.

Michael's citation to persuasive authority in other jurisdictions analyzing whether a petitioner had met the more stringent reasonable probability standard are more relevant to this Court's inquiry than the State's citation of Nevada *Brady* cases. The reason is simple. To state the obvious, DNA evidence is unique; it is persuasive in a way that simple inferences from conflicting witness testimony are not. This is the reason for genetic marker testing statutes in the first place.[23] The State's comparison to *Wade v. State*, 115 Nev. 290, 296, 986 P.2d 438, 442 (1999), illustrates just how different DNA exculpatory evidence and other exculpatory *Brady* material really are. In *Wade*, the defendant wanted the complete confidential informant file, but the Court was persuaded that despite not having the file, defense counsel was able to effectively cross-examine the witness and there was no reasonable possibility the outcome of the trial would have been different. *Id.* But here, the same is not true of the exculpatory DNA evidence that Michael seeks.

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[22] Ans. Br. at 37; Op. Br. at 37.

[23] *See* App.Vol.7 1487-492.

With respect to just the semen sample, the State focuses on the two explanations for lack of sperm in the sample, based on the only defense that was available to Michael at the time of trial—that Michael's semen sample undoubtedly contained sperm.[24] The State concludes that "the jury heard exculpatory information related to the seminal fluid sample and convicted Anselmo anyway."[25] The district court came to more or less the same conclusion.[26] But neither the State nor the district court considered that exculpatory DNA evidence, for example, DNA evidence that excludes Michael or positively identifies another person as the contributor of the semen, may have affected the jury's analysis in a manner completely different than two competing explanations for why Michael may or may not have been the contributor. That is, DNA evidence can provide an answer to a degree of scientific certainty about the identity of the contributor that the two explanations for lack of sperm in the sample cannot. It can exclude or identify a person as the contributor. This type of evidence is unique and more persuasive than two competing explanations for why a person may or may not be the contributor. And there is no provision in the statute permitting a court to preclude genetic marker analysis on the grounds that

[24] Ans. Br. at 41.

[25] *Id.*

[26] App.Vol.8 1650-52.

other, non-DNA exculpatory evidence was already presented; the issue is whether exculpatory DNA evidence has a reasonable possibility of making a difference.

The district court and the State make similar mistakes in disregarding the value exculpatory DNA evidence could have had on the case.[27] Both concluded that because Michael was not convicted on a felony murder theory, Michael could have been convicted with or without exculpatory evidence relating to the semen found in the victim. But if the totality of the physical evidence, including the semen, excluded Michael, this could certainly have influenced the ultimate verdict of murder. And if the physical evidence matched another individual, that would support the reasonable possibility that Michael would not have been prosecuted or convicted.

In the same fashion, the State itemizes each piece of evidence Michael seeks to be tested (hairs in the car, material on the pantyhose and purse, and material under the victim's fingernails) to posit that even if one of the pieces of evidence matched someone else, the jury still could have convicted Michael.[28] The district

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[27] The State incorrectly states that the district court accepted Michael's "false representation" and then "reversed course after reviewing the trial record because Anselmo's factual assertions were not accurate." Ans. Br. at 41, n. 14. The district court never found that Michael's factual assertions were not accurate. App.Vol.8 1650-51. Rather, the district court at hearing acknowledged that Michael need only rely in good faith on particular facts. *Supra* n. 4; NRS 176.0918(3).

[28] Ans. Br. at 49.

court merely found that non-DNA exculpatory evidence as to these pieces of evidence was already offered and it did not change the verdict. And, of course, this again flips the inquiry on its head. The inquiry is whether the existing exculpatory evidence taken together with the ***DNA*** exculpatory evidence could create a reasonable possibility that Michael would not have been prosecuted or convicted. The district court failed to even consider the possibility that all the physical evidence—semen, hairs, material on pantyhose and purse, material under the victim's fingernails—could match another person and produce another suspect.[29]

The State essentially contends that because DNA evidence cannot exclude Michael as a possible perpetrator, the evidence should not be tested. But this is not the law in Nevada, and testing has been permitted in Nevada in this circumstance. In *State v. LaPena*, Case No. 059791 (included within the Addendum to the Opening Brief), LaPena petitioned to have hair removed from the victim's hands and fingernail clippings tested to demonstrate that her husband, not LaPena, was the second perpetrator. The prosecution argued that the jury already heard that her husband may have been involved and rejected this possibility, but the district court disagreed because DNA evidence could have substantially undermined other

[29] *See* App.Vol.8 1650-53.

witness testimony and, therefore, the State's case. Identification of another suspect could likewise have resulted in Michael not being prosecuted or convicted. In fact, it is reasonable to determine that DNA evidence ***would have*** made a difference to the jury in a case where no other physical evidence linked Michael to the crime.

In similar fashion, the State focuses on whether a confession should be considered involuntary without the benefit of additional exculpatory DNA evidence. The question is not whether the jury considered the possibility that the confession was involuntary despite strenuous arguments of counsel,[30] but whether exculpatory DNA evidence calling into question key parts of the confession could lend credence to the defense that the confession was false.

Michael does not ask the Court to disregard his "confession."[31] Rather, the Court should consider the entirety of the evidence surrounding Michael's "confession," including testimony adduced at trial suggesting that Michael's confession was involuntary and false.[32] DNA evidence contradicting various "facts" in Michael's confession could have swayed the jury to conclude Michael's confession was indeed false. The only determination for now is whether there is a reasonable possibility that exculpatory DNA evidence could have changed the

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[30] Ans. Br. at 45-46.

[31] Ans. Br. at 45.

[32] *See* Op. Br. at 17-23.

jury's view of Michael's confession. This has been true in other cases where a defendant initially confessed and later obtained DNA evidence contradicting the confession.[33] And it could have here.

For example, Michael's false confession included an "admission" that he had sex with the victim.[34] DNA evidence identifying another man with whom Trudy had sex could have persuaded the jury that that sexual partner could have been Trudy's murderer and cast doubt on Michael's admission he had sex with her (and the rest of his confession). If the genetic material on the pantyhose were not a match to Michael, that would call into question Michael's "admission" that he strangled the victim with pantyhose. Other defense theories and explanations may also have been more believable considering the exculpatory DNA evidence. Exculpatory DNA evidence could cast doubt on statements made in Michael's confession, going to the credibility of that confession as a whole. Whether the confession was voluntary or involuntary, then, becomes more debatable where the confession does not fit with the physical evidence of the case. The district court did not make any findings as to this possibility.[35]

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[33] *Infra* n. 42.

[34] App.Vol.3 433-34.

[35] App.Vol.8 1650-53.

Amazingly, the State apparently prefers the court to presume whether the DNA evidence is likely to match John Soares or Michael[36] than simply order DNA testing. This reveals how frivolous the State's opposition to the Petition truly is.

First, the statute does not empower the court to draw conclusions about *whether* the DNA evidence would be exculpatory. The court is not permitted to speculate whether "it is far more likely that any genetic profile generated will point to" Michael or an unidentified third party.[37] Rather, the statute requires the court to assume the DNA evidence is exculpatory and analyze whether there is a reasonable possibility that such evidence would have affected the prosecution or conviction. NRS 176.0918(3)(b); NRS 176.09183(1)(c)(1). Nowhere in the statute is the court empowered to speculate as to the results of DNA testing.

Second, the two-step structure of the statute does not warrant the court guessing at the outcome of DNA testing. The Nevada Legislature split the inquiry into two steps: first, whether genetic marker analysis should be conducted, and second, whether a new trial is warranted. NRS 176.0918, 176.09183, 176.09187. The district court and the State collapsed these two steps into one.

Before the Court is merely the threshold inquiry of whether the DNA evidence should be tested. Properly separating two-step process—threshold testing

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[36] Ans. Br. at 51-52.

[37] Ans. Br. at 52.

inquiry from motion for new trial—should avoid the uncertainty present here with the State's complicated weighing of evidence against the threshold inquiry of whether a reasonable possibility exists that the petitioner would not have been prosecuted or convicted with the availability of exculpatory DNA evidence. The district court improperly blended the two inquiries, essentially concluding that Michael would not be entitled to a new trial even if the evidence were exculpatory, rather than analyzing whether Michael may not have been prosecuted or convicted had there been exculpatory DNA evidence.

This Court should not fall into the same trap laid for the district court by evaluating whether the evidence presented at trial was sufficient to support the verdict in light of the exculpatory non-DNA evidence already presented at trial. Rather, this Court should evaluate whether a reasonable possibility exists that Michael would not have been prosecuted or convicted had exculpatory DNA evidence been available.

IV. MICHAEL SHOULD NOT BE ESTOPPED FROM DNA TESTING OF PHYSICAL EVIDENCE.

The State calls for upholding the finality of conviction, even in the remarkable case where new scientific advances allowing for DNA testing of genetic material is available now and was not available 50 years ago. 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.[38] The State's claim that Michael's Petition should be denied simply because there is an interest in finality for cases where "50 years have passed since the conviction was obtained" are meritless and expressly at odds with the very purpose of genetic testing statutes.[39]

Nor should Michael's statements to the parole board estop him from genetic marker testing now. Importantly, the statute does not preclude those who have confessed to the crime for which they were accused or convicted from obtaining genetic marker analysis of physical evidence. And critically, "judicial estoppel should be applied only when a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage." *Marcuse v. Del Webb Cmtys., Inc.*, 123 Nev. 278, 288, 163 P.3d 462, 469 (2007) (quotations and citations omitted; alteration in original). The doctrine "does not preclude changes in position

[38] NRS 176.0918 does not place a statute of limitations on petitioners seeking 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* App.Vol.7 1279 (citing 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)).
[39] Ans. Br. at 52.

that are not intended to sabotage the judicial process." *Id.* (quotations and citations omitted).

Here, Michael is not attempting to take unfair advantage or sabotage the judicial process. Michael did express remorse for taking Trudy's life during his parole hearing and 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 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.[40] Some of these false confession cases resulted in the exoneration of the wrongfully convicted individuals.[41] A few of these exonerated

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[40] *See* App.Vol.8 1578-1644; Steven A Drizin & Richard A. Leo, *Article: The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891 (2004).

[41] 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

individuals even "confessed" to the parole board, were released, and then were later found innocent.[42] This Court should not estop Michael from DNA testing of the genetic material available and in the custody of the State based on the desperate statements made by an innocent man serving decades for a crime he did not commit.

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during police interrogation); John Duval (false confession during police interrogation and false confession to parole board). App.Vol.7 1281.

[42] 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 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). App.Vol.7 1281-82.

V. THE ORDER DENYING MOTION FOR ORDER TO SHOW CAUSE RESPECTING THE EVIDENCE INVENTORY SHOUD BE REVERSED.

NRS 176.09183(6) provides a right to appeal from an order dismissing the Petition. There is no dispute here that Michael appeals from the order dismissing the Petition and the intermediate Order Denying Motion for Order to Show Cause, not directly from the latter order.[43]

Without citing any legal authority whatsoever, the State suggests that the Court cannot review appeals from "discovery" or "an order related to inventories."[44] To the contrary, this Court routinely reviews intermediate orders properly appealed in the context of an appeal from a reviewable order. *State v. Corinblit*, 72 Nev. 202, 207, 298 P.2d 470, 472 (1956) (dissent acknowledging the "general theory of practice in both civil and criminal appeals" that "[i]ntermediate orders and proceedings not specifically made appealable by statute, may be reviewed only on appeal from the judgment."); *see also Lewis*, 124 Nev. at 135, 178 P.3d at 148 (noting that intermediate orders may be appealed also from the judgment of conviction); NRS 177.045 ("Upon the appeal, any decision of the

[43] An appeal directly from the intermediate order before entry of the order giving statutory right to appeal would have been improper as "[p]iecemeal review of intermediate orders," which does not allow the court to "review the matter with the benefit of a complete record." *State v. Lewis*, 124 Nev. 132, 136, 178 P.3d 146, 148 (2008). Here, the record is complete.

[44] Ans. Br. at 55.

court in an intermediate order or proceeding, forming a part of the record, may be reviewed."). Discovery orders are included within the intermediate orders reviewed in the context of an appeal from an appealable order. *See Franklin v. Eighth Judicial Dist. Court*, 85 Nev. 401, 403, 455 P.2d 919, 921 (1969). Therefore, this Court has jurisdiction to review the intermediate Order Denying Motion for Order to Show Cause.

NRS 176.0918(4)(c)(2) and the district court's order required the State to "prepare an inventory of all evidence relevant to the claims in the petition." This the State did not do. The State prepared an inventory of ***some*** of the evidence, but much of the inventory described the ***containers*** holding evidence and did not reveal the contents.[45] Michael (and the court) cannot determine which evidence should be tested without a description of the ***evidence***. That the State contends Michael had an opportunity to view evidence in the evidence room is inapposite, as the containers holding the evidence were not opened at that time either.

VI. CONCLUSION

For the reasons discussed above, this Court should reverse the denial of Michael's Petition and direct the district court to grant DNA testing because Michael demonstrated a reasonable possibility that he would not have been prosecuted or convicted if exculpatory genetic testing results had been obtained.

[45] App.Vol.5 998-1009.

This Court also should reverse the denial of Michael's motion for order to show cause because the inventory filed by the Washoe County Sheriff's Office was insufficient under NRS 176.0918(4)(c). The district court should be directed to also require an adequate inventory of the *evidence* in the possession or custody of the State, rather than just the evidence *containers*.

DATED this 29th day of March 2021.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains **6,985 words**.

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

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(a)(b) and 25(1)(d), I, the undersigned, hereby certify that I electronically filed the foregoing **APPELLANT'S REPLY BRIEF** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system on the 29th day of March 2021.

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

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