

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

IAN CHRISTOPHER HELD,)	
)	
Appellant,)	Case No. 83549
)	
vs.)	
)	
THE STATE OF NEVADA,)	
)	
Respondent.)	
_____)	

Appeal from Jury Verdict and Conviction
Second Judicial District Court of the State of Nevada
The Honorable David Hardy

APPELLANT'S JOINT APPENDIX – VOLUME X

MARC PICKER
Washoe County Alternate Public Defender

CHRISTOPHER HICKS
Washoe County District Attorney

MELISSA ROSENTHAL
Deputy Alternate Public Defender

JENNIFER NOBLE
Deputy District Attorney

350 S. Center St., 6th Floor
RENO, NEVADA 89501

1 South Sierra St., 4th Floor
RENO, NEVADA 89501

ATTORNEYS FOR APPELLANT

ATTORNEYS FOR RESPONDENT

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1 THE COURT: Have you maintained any relationship
2 with her since high school?

3 JUROR Stevenson: No. And I apologize. I didn't
4 realize when I just heard the names yesterday, but I saw
5 her mannerisms and heard the voice and I knew it was her,
6 so I thought I better mentioned it.

7 THE COURT: How many times -- in how many
8 different classes was she your teacher?

9 JUROR Stevenson: Just one English class and I
10 don't even remember if I was a freshman or sophomore.

11 THE COURT: Forgive me, but that was how long ago.

12 JUROR Stevenson: It was a while, 40-ish years.

13 THE COURT: 40-ish years?

14 JUROR Stevenson: Maybe 38. I graduated in '87.

15 THE COURT: During that time that she was your
16 teacher, did you develop any out-of-classroom personal
17 relationship with her, such as mentoring or
18 extracurricular activities.

19 JUROR Stevenson: No.

20 THE COURT: Have you seen her or spoken to her
21 since --

22 JUROR Stevenson: No.

23 THE COURT: -- she was your teacher?

24 JUROR Stevenson: No.

1 THE COURT: The most important question that is
2 governed by your own self-disclosures and honest
3 conscience is whether your familiarity with her would
4 influence the way you view this case. Meaning, could you
5 find that the State had not met its burden of proof, if
6 it did not, regardless of Mrs. Merrill, or would that
7 knowledge or familiarity with Mrs. Merrill cause you to
8 tilt in favor of the State as she is a complaining
9 witness?

10 JUROR Stevenson: I was thinking about that during
11 the process and I feel like I can still be fair and just
12 follow what is expected of me and based on the facts that
13 are presented.

14 THE COURT: Okay. Counsel, any questions?

15 MR. GRAHAM: No, your Honor. I think the
16 questions were very thorough. Thank you.

17 MS. ROSENTHAL: None, your Honor. Thank you.

18 THE COURT: Thank you. I know it's uncomfortable
19 to be segregated from the jury. Just return long enough
20 for me to bring them all in.

21 JUROR Stevenson: Okay. Thank you.

22 (Juror exited courtroom.)

23 MS. ROSENTHAL: Your Honor, I do have one other
24 thing I'd like to address about the jury, please.

1 THE COURT: Yes.

2 MS. ROSENTHAL: I would like to renew my objection
3 to moving forward -- further this afternoon for a couple
4 of reasons. One, I think that it's important to present
5 the renewal and I think it's important to know the
6 court's ruling on that prior to having the officers that
7 are related to that testify. And I believe that the
8 officers that are left will go in excess of the time
9 frame suggested by the court. And since we are ahead of
10 schedule, I believe it's still appropriate -- we're going
11 to continue tomorrow regardless. It is already 3:40 in
12 the afternoon, I'd ask that the court release the jury
13 for the day and have them come back in the morning.

14 THE COURT: Have you been fully heard?

15 MS. ROSENTHAL: Yes.

16 THE COURT: Your request is denied.

17 The jury, please.

18 (At 3:38 p.m., jury entered courtroom.)

19 THE COURT: If you'll be seated, please?

20 Ladies and gentlemen, I anticipate that our trial
21 day will end somewhere around 4:20, at which time you'll
22 be excused for the evening.

23 To the State, you may call your next witness.

24 MR. DELONG: Thank you, your Honor.

1 At this time, the State would like to call
2 Detective Kenneth Fye.

3 (Witness sworn.)

4 THE COURT: Detective, if you are comfortable you
5 may lower your mask while you testify. It is your
6 choice.

7 THE WITNESS: Thank you, your Honor.

8 THE COURT: The State may begin.

9 MR. DELONG: Thank you.

10

11

KENNETH FYE

12

13 called as a witness on behalf of the State,
14 having been duly sworn, testified as follows:

15

16

+++ DIRECT EXAMINATION +++

17 BY MR. DELONG:

18 **Q** Good afternoon, Detective Fye. Can you please
19 spell and state your name for the record?

20 **A** My name is Kenneth Fye; K-E-N-N-E-T-H, Fye, F-Y-E.

21 **Q** What is your current job?

22 **A** I'm a detective for the Sparks Police Department.

23 **Q** How long have you held this position?

24 **A** I've been a detective for six years, and I've been

1 employed by the police department for nine years.

2 **Q** Were you involved in an investigation of an Ian
3 Held in September of 2020?

4 **A** Yes, I was.

5 **Q** And how did you first come in -- how did you first
6 learn or get involved in the investigation?

7 **A** Okay. A residential burglary occurred on
8 September 21st, and Reno Police Officer Trail went and
9 took that report. He had identified a potential suspect
10 for that case, and generally a marked -- a regular
11 uniform patrolman will take that initial report and then
12 forward that information on to a detective to do the
13 follow-up, so he made me aware of that case after he took
14 it.

15 **Q** So you end up then taking over that case?

16 **A** Correct.

17 **Q** And what did you initially do with your
18 investigation?

19 **A** So he made me aware of a suspect that he thought
20 was potentially responsible for the report; that was Ian
21 Held. So I just began looking into Ian Held, and my unit
22 began conducting surveillance on Mr. Held at that time.

23 **Q** So based on your investigation, did you come to
24 learn who Ian Held is?

1 **A** I did.

2 **Q** Are you able to identify Ian Held?

3 **A** Yes, I am.

4 **Q** Can you point to him and identify an article of
5 clothing?

6 **A** Yes. He's got on a blue shirt and glasses.

7 MR. DELONG: Your Honor, may the record reflect
8 that the defendant has been identified?

9 THE COURT: Yes.

10 BY MR. DELONG:

11 **Q** And so in connection with your investigation, did
12 you figure out where he resided?

13 **A** Yes, I did.

14 **Q** Where was that?

15 **A** It was at 1455 Keystone Avenue, Space 81.

16 **Q** And did you conduct any surveillance during your
17 investigation?

18 **A** Yes, I did.

19 **Q** What did that entail?

20 **A** It entailed both surveillance on his residence,
21 which that's an RV trailer park. He was residing in a
22 fifth-wheel trailer at that location, and he was also
23 driving a vehicle, so we did mobile surveillance on him
24 in the vehicle as well.

1 **Q** How did you conduct that mobile surveillance?

2 **A** We did it in unmarked police vehicles and followed
3 him around.

4 **Q** Was there any other -- how were you able to follow
5 him around?

6 **A** So it was on September 23rd we placed a tracking
7 device on the vehicle, followed him both using that and
8 then also direct surveillance, which would be just us
9 literally following him around in those unmarked
10 vehicles.

11 **Q** Can you describe the vehicle in greater detail?

12 **A** Yes. It was a red Jeep Cherokee. It had some
13 modifications done to it, like a lift kit with large
14 off-road tires on it.

15 **Q** You said you placed a tracker on the vehicle. How
16 does that tracker work? Please explain for us.

17 **A** Yes. Similar to like a Find My iPhone or a cell
18 phone tracking device that uses cell phone tower data,
19 GPS data. It's just a small device that would go on the
20 vehicle and it links to the tracking company system, and
21 you basically just pull up a map and you can see where
22 it's at all times.

23 **Q** Were you able to utilize this data while you were
24 following Mr. Held or the red Jeep?

1 **A** Yes.

2 **Q** Let me show you these for a second.

3 So I'm showing you what's been marked as proposed
4 Exhibits 47 and 48. Have you seen these images before?

5 **A** Yes, I have.

6 **Q** Did you create these images?

7 **A** No, they were created by the tracker system, but I
8 printed them from the system.

9 **Q** So you utilized -- -- pardon me. You utilized
10 information from the tracking system to print this
11 information?

12 **A** Correct.

13 **Q** Can you describe in greater detail how you create
14 those images?

15 **A** Yeah. So it's really a basic system. You just
16 put in a time frame or a time and date that you want to
17 review the historical data, so it compiles the data as
18 long as the tracker is active. So I just put in the
19 dates that the tracker was on the red Jeep and I just
20 click Go. Then it will create this map which just shows
21 a trail everywhere that the vehicle goes, and it shows
22 you exactly where it was at. It also has the time and
23 date, then the speed the tracker was traveling at.

24 **Q** Those two images, are those showing the same date?

1 **A** Yes, they are.

2 **Q** What date was that?

3 **A** This is September 24th, 2020.

4 **Q** And were you also surveilling the vehicle during
5 that time?

6 **A** Yes.

7 **Q** So did you see the information -- the tracking
8 information in realtime on your phone during that date?

9 **A** Yes.

10 MR. DELONG: Your Honor, at this time the State
11 moves for admission of proposed Exhibits 47 and 48.

12 MS. ROSENTHAL: No objection.

13 THE COURT: 47 and 48 are admitted, Ms. Clerk.
14 (Exhibits 47 and 48 were admitted.)

15 MR. DELONG: Permission to publish, your Honor?

16 THE COURT: Yes.

17 MR. DELONG: Thank you.

18 BY MR. DELONG:

19 **Q** So I think I'm going to have to zoom in a little
20 bit here. Maybe we'll start with the timestamps.

21 So can you describe what we're looking at here?

22 **A** Yeah.

23 **Q** Pardon me. I apologize. We are looking at
24 Exhibit 47.

1 **A** So each one of the little orange dots is an orange
2 circle with an arrow that shows the direction of the
3 tracker moving. So what I've done is I've just clicked
4 on two of the arrows to show the information that is
5 available for those dots.

6 So the top one shows the date, 9/24/2020. The
7 time is 1431 hours, that's military time for 2:31 p.m.
8 The location at that time was 3402 Socrates Drive --

9 THE COURT: Slow down, please.

10 THE WITNESS: My apologies.

11 THE COURT: That's all right. It's been a long
12 day for our reporter.

13 THE WITNESS: Okay. The speed for the tracker at
14 that time was 17 miles per hour.

15 The bottom one, pretty much the same thing. Date,
16 time, the location, and at that time it was traveling at
17 43 miles per hour.

18 BY MR. DELONG:

19 **Q** Now, are you able to tell, is the top one pointed
20 what would be north on this map?

21 **A** Yes. Correct. So that's --

22 **Q** And the bottom one, is that traveling south then?

23 **A** Yes, it is.

24 **Q** So what do these two timestamps on this image show

1 you or tell you?

2 **A** It shows a difference of approximately 45 minutes.

3 **Q** I'm going to zoom out real quick. Can you
4 describe this area here?

5 **A** Yeah. This is a residential neighborhood. It's
6 just north of the university. Socrates is the main road,
7 I believe, that joins with McCarran, North McCarran, and
8 goes up into that residential neighborhood.

9 **Q** So I don't mean to quiz you, but I'm going to see
10 if we can do this. I'm going to zoom in and see.

11 Can you tell, those are the -- are there arrows
12 pointing north in this?

13 **A** It's both. You can kind of see on the right
14 there, those arrows are pointed up. And then they kind
15 of get crossed at the top of the screen, but on the
16 bottom of the screen you can see arrows pointed down
17 south.

18 **Q** So focusing on the arrows headed north, what
19 street are we on?

20 **A** Socrates.

21 **Q** Do the arrows continue to head north as we move up
22 Socrates?

23 **A** Yes.

24 **Q** And I know there's some stamps on top of that, but

1 are we still on Socrates at this point?

2 A Correct.

3 Q And then it looks like it turns off to the right
4 to another street. Do you know what that is?

5 A I can see on the map North University Park Loop.
6 And then it turns right, which would be like a southeast
7 turn onto University Green Drive.

8 Q Then we're still going down University Green
9 Drive?

10 A Correct.

11 Q And then where does the Jeep end up?

12 A So you can see how it turns to the right while
13 we're looking at it onto University Park Loop, and then
14 you can see a pretty long line between an orange dot and
15 a green dot. So the green dot is -- shows when the
16 tracker goes mobile. So the tracker is set up to give
17 updates every three seconds, so if you stop the tracker,
18 even at a stoplight, it will go to sleep if not moving
19 for three seconds or longer. And then once it goes
20 mobile again, it will give you that green dot.

21 So what this is indicating is that when he turned
22 right on University Park Loop on that orange dot, he
23 stopped there for a moment of time, and then when he
24 began traveling again would be that green dot, is when

1 the tracker checked back in.

2 Q So you're saying he stopped on that far right
3 arrow in this -- in the zoomed image here?

4 A Correct.

5 Q Do you know where that is in proximity to 920
6 University Park Loop?

7 A From reviewing this, I believe that's right in
8 between 910 and 920 University Park Loop.

9 MR. DELONG: Mr. Graham, can you point to the
10 house below the dot on the right?

11 BY MR. DELONG:

12 Q Do you know the address of that house?

13 A 910.

14 Q Do you know -- the one to the right, do you know
15 that address?

16 A 920.

17 Q So that's 920 University Park Loop?

18 A Yes.

19 Q Do you know who lives there?

20 A Yes. Mr. and Mrs. Merrill.

21 Q So were you able to tell from this image how long
22 the red Jeep was in this loop that we sort of traced
23 around?

24 A Yes. This particular image, it shows that

1 45-minute time lap. But if you also click on that stop
2 and start point that I just talked about, that's also
3 about a 45-minute gap. So it looked like he was stopped
4 around that 910 South University Park Loop 45 minutes and
5 accelerated away or drove away to where that green dot
6 is.

7 Q So when these tracking points are being recorded,
8 were you sitting in your office?

9 A When -- sorry?

10 Q When they were recorded realtime, when the Jeep
11 was there.

12 A When these were being recorded, I was actually
13 monitoring it through a phone application. Then I later
14 created these images at my office.

15 Q So you were looking at these tracking points being
16 created realtime on your phone?

17 A Yes.

18 Q Where were you looking at your phone?

19 A So we were on a different task at that time when
20 we observed that the tracker was going into a residential
21 neighborhood. Being that he was suspected of committing
22 a residential burglary, that's when we started to make
23 our way over to this area.

24 Q So you made your way over to this University Park

1 Loop area?

2 A Yes.

3 Q And is this time frame consistent with your
4 experience on that day for how long he was there?

5 A Yes, accurate.

6 Q Taking a look at State's Exhibit 48, is this --
7 these are still showing the same data points; is that
8 correct?

9 A Correct.

10 Q But this is just a map showing streets and not the
11 overhead satellite data; is that correct?

12 A Correct.

13 Q Do all these data points consistently show the
14 same information that we were looking at in the last map?

15 A Yes.

16 Q So that's then that green dot where the vehicle
17 would have started moving again?

18 A Correct.

19 Q And the far right dot, orange dot, would be where
20 it stopped for some period of time?

21 A Correct.

22 Q Now, you discussed his residence being a trailer.
23 I believe you stated it was 1455 West Fourth Street?

24 A Correct.

1 **Q** I'm showing you what's been marked as State's
2 Exhibit 35. I'm going to zoom out for a second.

3 Is that the address you're referring to?

4 **A** Yes.

5 **Q** Is that the trailer you're referring to?

6 **A** Yes.

7 **Q** So is it your understanding that's his residence?

8 **A** Correct.

9 **Q** So when you were in the University Park Loop area,
10 what did you observe?

11 **A** So by the time that I got there was at the time
12 that it was leaving the area and so I wasn't able to see
13 into the Jeep, but I saw the Jeep leaving at a high rate
14 of speed.

15 **Q** You couldn't see who was in it?

16 **A** Correct.

17 **Q** But you saw -- where were you when you saw the
18 Jeep leaving at a high rate of speed?

19 **A** I was in the area of McCarran and Socrates.

20 **Q** So were you on McCarran or Socrates?

21 **A** I was on Socrates.

22 **Q** And so does that mean he passed by you?

23 **A** Correct.

24 **Q** So can you just describe how you conducted your

1 surveillance in that area on that day?

2 **A** So, like I said, we were watching the tracker at
3 that time because we had seen that Ian was driving the
4 Jeep previously, he was kind of just doing regular things
5 that didn't look suspicious or like criminal activities,
6 so we were on a different task at that time.

7 And then when we saw it going into that
8 neighborhood, we thought that was suspicious and we
9 headed that direction. And Detective Tindell was
10 actually the first in the area to set up. So when the
11 vehicle went up and it stopped on South University Park
12 Loop, he was set up pretty closely on Socrates. And so
13 he was watching out for the vehicle while I was making my
14 way into the area.

15 Just shortly after I got into the area of Socrates
16 and McCarran was the time that the vehicle was leaving.

17 **Q** So after this occurred, what did you do next in
18 your investigation?

19 **A** So Detective Tindell, he actually went up and
20 checked the area to see if a burglary had occurred, if we
21 could see any signs of that, and he wasn't -- he didn't
22 see anything obvious at that time. So we went -- we
23 followed the Jeep for a little bit. It went back to
24 Ian's residence at the trailer park, and then later we

1 were notified that an attempted residential burglary
2 happened in the area where the vehicle was stopped.

3 **Q** And do you know where that residential burglary
4 occurred?

5 **A** Yeah, that was 920 South University Park Loop.

6 **Q** So that was the Merrills'?

7 **A** Correct.

8 **Q** And did you -- do you know what officers responded
9 there?

10 **A** Officer Akin, I believe.

11 **Q** Did you review the information from his report?

12 **A** Yes.

13 **Q** What did you do next in your investigation?

14 **A** So after we were made aware of that, we continued
15 to just conduct surveillance on Ian until September 28.
16 At that time, the Jeep went missing and the tracker
17 wasn't responding anymore, which meant that it was
18 possibly located and broken, is what we believed. So we
19 really had no way of tracking Ian and we knew that he had
20 gotten rental cars in the past and we didn't have any
21 other operable vehicles identified, so it became too hard
22 to conduct surveillance. We didn't want anyone else to
23 be victimized so we decided to place him under arrest on
24 September 28.

1 **Q** So you made a determination that probable cause
2 existed?

3 **A** Correct.

4 **Q** What occurred on September 28?

5 **A** So September 28 we were at his trailer park. I
6 was in a position we call the eye, so that means I had
7 direct surveillance on his trailer. So I was in a common
8 area in the trailer park. The trailer park is shaped in
9 a horseshoe shape --

10 THE COURT: Hold on, please. You have a very
11 quick cadence.

12 THE WITNESS: Okay.

13 THE COURT: That's okay. I hope that this doesn't
14 sound critical, but I really need you to slow down.

15 THE WITNESS: I understand. Sorry. Sorry.

16 So the trailer park is a horseshoe shape and in
17 the center of it is a common area, and I was set up in
18 the common area. I was not in a vehicle. I was just
19 dressed in regular civilian clothes and standing in that
20 open area, and I was conducting surveillance on his
21 trailer.

22 BY MR. DELONG:

23 **Q** That's the trailer we're looking at right here,
24 which is Exhibit 35?

1 **A** Correct.

2 **Q** Were you able to see the entrance of the trailer
3 from where you were?

4 **A** Yes. At the time that I was watching it, you can
5 see that there's an SUV kind of parked in between the
6 truck and the trailer that was there, but the U-Haul
7 truck was not there. So from my point of view, I was
8 able to see the entrance.

9 **Q** So you've got eyes on the entrance, what happens
10 next?

11 **A** So I see that -- I'm able to determine that both
12 Mr. Held and his girlfriend, who was identified as
13 Annabelle Bush, were both in the trailer. So I observed
14 them both going in and out of the trailer several times.
15 It was basically our plan to place them under arrest
16 whatever we had an opportunity to do so.

17 But you never know when people are going to run or
18 what they are going to do when contacted by police so we
19 were worried about just driving up and having him retreat
20 back into the trailer and have some type of like
21 barricaded person or just be stuck in a situation.

22 **Q** Let me slow you down for a second, literally and
23 figuratively.

24 You've got eyes on the entrance and you see them

1 enter and leave. What were they doing?

2 **A** Primarily Ian was working on this vehicle right
3 here. I think that this vehicle, the red vehicle, was
4 inoperable at the time, so he would walk out and work on
5 the vehicle for a short amount of time and then go back
6 into the trailer.

7 **Q** Now, were they bringing large items in and out of
8 the trailer, did you see any of that?

9 **A** They were not.

10 **Q** Did you have good enough view to see if they were
11 bringing items in?

12 **A** Yes, I had a very good view.

13 **Q** You didn't see any?

14 **A** Correct.

15 **Q** So going a little more slowly, what happened next?

16 **A** So I watched them for about two hours waiting for
17 them to leave the trailer or get a distance far enough
18 away from it to where other detectives could come up and
19 contact them. And that didn't happen.

20 So the manager of the RV park assisted us. She
21 just called Ian and told him that he had some mail that
22 was waiting for him in the trailer. So he came out of
23 the trailer with Ms. Bush, they walked far enough away
24 from the trailer park to where they were contacted by

1 other detectives and placed under arrest.

2 Q So at that point you still have eyes on the door;
3 is that correct?

4 A Correct.

5 Q And did you ever lose sight of that door then
6 after that?

7 A I did not. So when they walked away, I was giving
8 that information just through phone to the other
9 detectives, letting them know which direction they were
10 walking and everything so that they could be contacted.
11 And then I just stayed in that contact area and
12 maintained a visual on that trailer.

13 Q So then at some point did you learn that he was
14 arrested or detained?

15 A Yes.

16 Q Then what happened?

17 A So I continued to hold that position until
18 Detective Catalano came. He came and he parked his
19 vehicle pretty much where that U-Haul truck is. Then he
20 took over watching that trailer while I went to the Reno
21 Police Department to conduct an interview.

22 Q Did any other detectives have eyes on the trailer
23 at that time?

24 A Yes. Right after Detective Catalano arrived,

1 Detective Bailey also arrived and assisted him.

2 Q Okay. So then they've now started covering the
3 trailer and watching the entrance, what are you doing?

4 A So I leave at that time and I go to the Reno
5 Police Department.

6 Q And you conduct an interview at that time; is that
7 right?

8 A Correct.

9 Q Who was that with?

10 A That was with Annabelle Bush.

11 Q Do you know where Annabelle Bush was residing?

12 A She was also, according to her, residing at this
13 trailer.

14 Q So what occurred after that interview?

15 A After that interview, I came back to the trailer
16 and I brought Annabelle Bush with me. It was determined
17 that -- backing up a little bit to the South University
18 Park Loop, Annabelle -- Detective Tindell determined that
19 they were both in the vehicle so we had probable cause to
20 arrest them, placed them under arrest. I conducted that
21 interview with Annabelle Bush, determined that she wasn't
22 going to be under arrest. So I brought her back here to
23 her residence to gather some of her personal belongings
24 so that she could be on her way. And then it was my

1 intention to get a search warrant for the trailer.

2 Q So where was she going to go?

3 A On the way to the trailer, she made a phone call
4 to her brother and just asked to be picked up. It was my
5 understanding she was going to go to the brother's house
6 or go with the brother.

7 Q So the intention was for her to get some personal
8 property from that trailer?

9 A Correct.

10 Q And did that occur?

11 A Eventually, yes.

12 Q What happened?

13 A So we brought her back to the trailer. I passed
14 her on to -- so I go back. It was my intention to tow
15 the trailer. That would be our normal practice, would be
16 to close up all the sides, seal the doors, and we bring
17 that to a secured lot at the police station. Then the
18 next day, because this is getting into evening hours,
19 after court hours, the next day I would apply for the
20 warrant to search it in hopes to recover stolen property
21 out of it.

22 When we got here, you can see it somewhat in the
23 picture, there's a lot of like the hook-ups from the
24 trailer were really done haphazardly, there was a lot of

1 property stored underneath it, and the trailer had really
2 tires in poor condition, so we weren't able to tow it. I
3 made the determination that I would do a telephonic
4 warrant.

5 Q Let's stop for a second. You mentioned a warrant.
6 So you're going to apply for a warrant to have the right
7 to search this trailer; is that correct?

8 A Correct.

9 Q Okay. Then what happened?

10 A So I pass Ms. Bush on to Detective Catalano and
11 Detective Bailey, and they're going to basically
12 supervise her or allow her to go into the trailer to grab
13 her personal belongings so that she can go, while I
14 gather my information and everything like that and call a
15 judge for that warrant.

16 Q So is it your understanding, did she go into the
17 trailer?

18 A Yes.

19 Q And did she retrieve any personal property?

20 A She did not.

21 Q How long was she in the trailer?

22 A Only a couple of minutes, maybe one or
23 two minutes.

24 Q Is it your understanding that -- did she remove

1 anything from the trailer at that time?

2 A No.

3 Q Did she have any opportunity to bring anything in
4 before she entered the trailer?

5 A She did not.

6 Q So at that point you're applying for the warrant;
7 right?

8 A Correct.

9 Q And was the warrant granted?

10 A Yes, it was.

11 Q And then what happened?

12 A So the search warrant was executed. It was -- the
13 trailer was searched by Detective Tindell and Detective
14 Catalano, and Detective Bailey assisted them with that.

15 Q Kind of jumping to the future a little bit --
16 well, let's just -- very narrow question -- was any
17 stolen property identified when that warrant was
18 executed?

19 A Yes.

20 Q Was any stolen property returned to any victims
21 afterwards?

22 A Yes. The one item that was located in the trailer
23 was a combination electric tool set that was a drill and
24 a saw, that was collected from the trailer and later

1 return to the victim.

2 Q Who was the victim?

3 A Mr. McCulloch.

4 Q Did you participate in returning those items?

5 A Yes, I did.

6 Q So I'm showing you State's Exhibit 29, kind of
7 zoomed in right now. Is that the case for the drills
8 you're referring to?

9 A Yes, it is.

10 Q Then is this the drill set you're referring to?

11 A Yes.

12 Q Now, you were present when this was returned to
13 Allen McCulloch?

14 A Correct.

15 Q Did he indicate that he owned these?

16 A Yes, he did.

17 Q What happened?

18 A So I was in contact with him over the phone, I
19 knew that this was an item listed as stolen, was a RYOBI
20 drill and saw tool set, so I called him on the phone and
21 I asked him to describe it to me. And he gave me a
22 description of it as being a hand -- you know, a handheld
23 saw and drill in a gray case, all in one encompassing
24 box. Then he gave me a specific detail of one piece. He

1 said there's one loose drill bit in the case with it that
2 he frequently uses, and I was able to locate or found
3 that in the box with the tools. And basically everything
4 that he described to be me was spot on with this tool
5 set.

6 **Q** I'm going to zoom in right here. Is that the
7 drill bit you're referring to right in the center there?

8 **A** Yes.

9 **Q** Okay. Did you have any concerns that it wasn't
10 his property when you returned it to him?

11 **A** No, I had no concern with that.

12 MR. DELONG: Thank you. No further questions at
13 this time, your Honor.

14 THE COURT: Ladies and gentlemen of the jury, that
15 concludes our trial day. During this recess, you are not
16 to converse amongst yourselves or with anyone else on any
17 subject connected with this trial. You will not read,
18 watch or listen to any report of or commentary on the
19 trial by any person connected with this case or by any
20 medium of information, including without limitation the
21 newspaper, television, internet or radio.

22 You are further admonished not to form or express
23 any opinion on any subject connected with this trial
24 until the case is finally submitted to you.

1 Please return to the jury deliberation room for
2 entry into the courtroom at 10:00 a.m. tomorrow morning.
3 That's later than I expected but that's what our trial
4 schedule contemplates. We will have a very abbreviated
5 lunch, maybe as short as 30 minutes. So if you can,
6 accommodate your own food needs. I suspect we'll go hard
7 until about this time tomorrow.

8 You are not to conduct any form of independent
9 research or investigation in this case.

10 With that, ladies and gentlemen, we will stand for
11 our jury. See you tomorrow morning at 10:00.

12 (At 4:05 p.m., jury exited courtroom.)

13 Let's all take a couple of minutes. I'll see you
14 all at 4:15. Does that give you enough time? Let's do
15 4:20.

16 (Recess taken.)

17 THE COURT: Be seated, please.

18 Does the defense wish to be heard?

19 MS. ROSENTHAL: Yes, your Honor.

20 Your Honor, at this time the defense renews its
21 motion to suppress based off the best evidence rule and
22 subsequently requesting a mistrial be declared in this
23 case, for the following reasons.

24 Due process requires the State to preserve

1 material evidence. I'll note for the record, I'm not
2 citing any new cases outside of the original motion.

3 Evidence in this matter that was returned to the
4 owner is clearly material and that it forms the basis for
5 some of the State's charges against Mr. Held. In order
6 to establish the due process violation resulting from the
7 State's loss or destruction of evidence, the defendant
8 must demonstrate either that the State lost or destroyed
9 the evidence in bad faith or that the loss unduly
10 prejudiced the defendant's case and the evidence
11 possessed exculpatory value that was apparent before the
12 evidence was destroyed, or in this case returned.

13 I'm going to focus on that No. 2. Based on the
14 testimony of Allen McCulloch at trial, it is apparent
15 there is an exculpatory value that was not able to be
16 examined by defense given the items returned.
17 Mr. McCulloch testified at trial that he marks the
18 batteries of the tools he owns with the date. Whether or
19 not this insignia was present on the drill that was
20 seized and returned is unknown.

21 The RYOBI drill that was returned was prior to
22 this testimony being elicited, and it was prior to any
23 examination provided to the defense. Mr. McCulloch
24 himself indicated there was nothing unique about the

1 RYOBI set, the set was generic. The drill bit that was
2 found was generic. Any markings were not present nor
3 visible. In fact, to this day he does not know if those
4 markings are on that set that was returned to him.

5 The four photos taken by officers do not reflect
6 any unique aspect of this drill. Mr. McCulloch could not
7 be sure that the drill returned is his drill. He, like
8 the police, jumped to the conclusion that this was in
9 fact the drill taken from the McCulloch residence.

10 Further, Mr. McCulloch testified the drill
11 returned was in a different condition than he remembered.
12 The drill returned was cleaner than his drill, another
13 reason to believe that the drill returned was not the
14 same drill taken from the McCulloch residence.

15 We do not have that drill to be able to assess,
16 because it was returned prior to any possible
17 investigation by the defense. And prior to being able to
18 show the jury the drill and for Mr. McCulloch to properly
19 be examined about the drill and its contents and how he
20 identified it as his. By the returning the item of
21 evidence to the owner, the State has effectively negated
22 any possibility to cross-examine Mr. McCulloch of the
23 property and how he identified the items as his.

24 Having the drill itself, we could have asked

1 Mr. McCulloch about the dates that he testified to, he
2 could have pointed to specifically how he knew it was
3 his. However, the reason he said he knew it was his, was
4 a generic drill bit, and he could not point to any date
5 or insignia on the photos that were taken. Because of
6 this action by law enforcement, it has denied Mr. Held
7 the right to due process and should lead not only to the
8 suppression of these items of evidence but dismissal to
9 the counts related to these items.

10 In addition, this court should declare a mistrial
11 because the photographs of the drill have been already
12 been admitted into evidence and presented to the jury in
13 this case.

14 Thank you.

15 THE COURT: Thank you.

16 To the State.

17 MR. DELONG: Thank you, your Honor.

18 MS. ROSENTHAL: I'd like to please stay, not to
19 the State. I thought you said, "Please stay," not "to
20 the State."

21 THE COURT: Oh, no. I lean back sometimes and
22 I've been asked not to.

23 To the State.

24 MR. DELONG: Thank you, your Honor.

1 This is not a best evidence analysis. The best
2 evidence rule is the rule of evidence that's been
3 whittled down to really focus just on summaries of either
4 recordings or written statements that cause concern that
5 the summary is the best evidence for the jury to be
6 reviewing. This is a constitutional issue, which I
7 believe the court has identified, concerning due process.
8 And the standards the court has announced are clear,
9 clearly established standards regarding the preservation
10 of evidence and the duties upon the State.

11 As the court noted, it's -- there are two
12 disjunctive reasons for determining that the loss or
13 destruction of evidence, which I still stand that these
14 weren't lost or destroyed, they were returned to the
15 victims, but under the preservation analysis there are
16 two reasons to determine that due process was violated.

17 The first is bad faith. We don't have that here.
18 That hasn't been argued. That's not established. What
19 we're only focussing on is the second reason. And that
20 second reason, your Honor, which is that the loss unduly
21 prejudiced the defendant's case and the evidence
22 possesses an exculpatory value that was apparent before
23 the evidence was destroyed has two very specific
24 elements.

1 I'm going to be citing to cases that were not
2 included in my opposition brief, your Honor, because I
3 think those two elements have to be considered,
4 particularly in the procedural process that we find
5 ourselves in right now, because we've begun the trial and
6 the jury has heard the evidence.

7 First, I'm going to turn to *State vs. Scafidi*, 131
8 Nevada 1351. It's a 2019 case. Quote:

9 "To demonstrate undue prejudice --

10 Which I will note is the first element of this
11 reason to find due process has been violated --

12 -- a defendant must show that it could
13 be reasonably anticipated that the
14 evidence sought would be exculpatory and
15 material to his defense that when
16 evaluated in the context of the entire
17 record the lost evidence creates a
18 reasonable doubt that was not otherwise
19 present."

20 The entire record has to be examined. We don't
21 have that yet. A pause in the case to argue this motion
22 to consider this motion, to consider a mistrial even
23 would prevent the court from reviewing the entire record.
24 It would prevent the court on appeal from reviewing the

1 entire record to determine if undo prejudice has actually
2 been established, which based on the evidence that we
3 heard before this court, the State submits does not exist
4 and will not be shown based on what is expected to be
5 brought out during testimony in front of the jurors, your
6 Honor.

7 Now, getting back to the second element of this
8 reason for determining that due process was not met, in
9 *State v. Banks*, 130 Nevada 1249 --

10 THE COURT: 130.

11 MR. DELONG: 130 Nevada 1249, it's a 2014 case,
12 the court in *Banks* stated:

13 Further, when a defendant can only show
14 that the lost evidence would have aided
15 in the impeachment of a witness or would
16 not have established the defendant's
17 innocence, then the defendant has failed
18 to show the exculpatory nature of the
19 evidence regardless of whether the
20 evidence may have been helpful to his
21 defense.

22 This is a due process standard that is very narrow
23 and specifically defined. This isn't, *Could it help us*,
24 *Do we hope it would help us if we had that evidence to*

1 *better examine this witness?* This standard really has
2 been created for evidence that would have established
3 innocence. We're taking about things like DNA and
4 fingerprints, which are not applicable in this case
5 because the items complained about, the saw and the
6 drill, were located in the defendant's residence so it
7 would be anticipated that his DNA and fingerprints would
8 be on it.

9 So that hasn't been a part of the analysis. They
10 simply have not established actual exculpatory nature
11 that would have created innocence. Even if the drill and
12 the saw were excluded, we still have Mr. Held, at least a
13 description that might match him being in the area of the
14 residence, close to the time of the burglary. We have a
15 vehicle that was rented in his name in the area of the
16 burglary at the time. Then we have that vehicle
17 photographed in front of his residence. And then we have
18 admissions, your Honor.

19 When all of the records examined, this is not a
20 piece of evidence that would have established his
21 innocence; therefore, this is not a due process
22 violation. This standard was not created to allow for
23 fishing expeditions or, as some of the case law
24 indicates, a hope that we might get something we need.

1 It's a very high standard that you have to establish this
2 defendant would have been innocent.

3 The seminal case in Nevada concerning this issue
4 is the destruction of blood evidence that was destroyed
5 after a year. I believe that was a DUI case. That's not
6 what we're dealing with here, your Honor. So the State
7 submits that it's not appropriate to grant this motion.
8 The trial should proceed, no curative action is
9 appropriate, and no suppression absolutely is
10 appropriate, your Honor.

11 THE COURT: Thank you, counsel.

12 While I listen to the rebuttal arguments, Mr. Law
13 Clerk, would you go grab the hard volumes of the Nevada
14 Reports, Volumes 130 and 131? If they're multi-volumed,
15 they'll be on the second part of each of the cited cases
16 coming after page 1000, 130 and 131.

17 MS. ROSENTHAL: Thank you, your Honor.

18 Your Honor, in rebuttal, the evidence or the
19 insignia or lack thereof is completely exculpatory in
20 this matter. Mr. McCulloch stated he dated his tools.
21 Whether or not that is there are or not is exculpatory,
22 and in this case there is nothing on there showing that
23 the date was there, so it would be exculpatory.

24 THE COURT: I want to ask about that testimony.

1 You just summarized the testimony as a firm
2 declaration by this witness and I heard it a little less
3 firm.

4 I heard that it is his custom, his practice to
5 write the date that he purchased the battery on the
6 battery, but I did not hear him say in every instance,
7 including this, that was done. Do you agree or disagree?

8 MS. ROSENTHAL: I would agree, but I think it goes
9 to habit and the nature of similar testimony allowed,
10 that it tends -- it's the tendency for habit. He didn't
11 say he wasn't sure. He just said, it was not present in
12 the photos that were taken and he hadn't looked at his
13 drill to see -- he had not looked at the drill that was
14 returned to see if it was on there or not.

15 THE COURT: I'm just -- go ahead.

16 MS. ROSENTHAL: Thank you.

17 This instance is not able to be cured because
18 there has not been a chain of custody established. It's
19 not like we can get the drill back now and present -- or
20 complete anything on it. Mr. DeLong mentioned DNA and/or
21 fingerprints related to Mr. Held being on there, but what
22 could have been done was DNA or fingerprints to see if
23 Mr. McCulloch's fingerprints were on there to prove
24 ownership. So just the same as it was in Mr. Held's

1 residence, if Mr. McCulloch was the previous owner it
2 would be reasonable to think that some of that from him
3 would be on there. But we have not been able and the
4 defense will not be able to complete that because the
5 item was returned to Mr. McCulloch prior to any
6 examination.

7 Mr. DeLong argued that there was identification of
8 Mr. Held at the residence on Whisper Rock, and that is
9 not the testimony. There was a description of somebody
10 with shaggy hair. There was no identification by any of
11 the witnesses that Mr. Held was there.

12 THE COURT: But we will soon have evidence from
13 the officer that Mr. Held admitted being there.

14 MS. ROSENTHAL: That has not been elicited at this
15 point, your Honor, but --

16 THE COURT: Continue.

17 MS. ROSENTHAL: -- I think, again, that goes to
18 the playing of the interview and what that determines.

19 And the last point was that no admissions have
20 been presented. Officer Fye was not the one that
21 interviewed him and did not testify to that.

22 Your Honor, I believe that there's no remedy that
23 this court can grant given the circumstances other than a
24 mistrial in this case. And I think that the evidence

1 should be suppressed. There's no other cure for the
2 return and the exculpatory nature of the item. There was
3 no other evidence linking Mr. Held -- no other alleged
4 stolen items found in Mr. Held's trailer other than this
5 drill. No wine. No DVDs. Nothing else associated with
6 the McCulloch residence other than the drill. The drill
7 was returned based on off of minimal identification.

8 THE COURT: And the U-Haul truck.

9 MS. ROSENTHAL: A U-Haul truck being parked on a
10 public street legally, leased to Mr. Held, but being able
11 to be driven by anyone Mr. Held gave permission to.

12 THE COURT: I understand it's circumstantial. We
13 can convict in the state of Nevada based upon
14 circumstance. But as you're reciting --

15 MS. ROSENTHAL: I understand.

16 THE COURT: -- the evidence connecting the State's
17 charge to Mr. Held, I want to be clear that there is more
18 than just the drill.

19 MS. ROSENTHAL: And I think it's been apparent
20 that the drill should be suppressed and the State can
21 pursue its case against Mr. Held without the drill,
22 without -- because it was returned. And if they think
23 that they have a strong enough case based off the other
24 evidence, then they should pursue it in that manner. But

1 the drill should not be included because it was returned
2 and it's not able to be examined by Mr. Held and his due
3 process rights are being infringed at this time.

4 THE COURT: Thank you. Please pause. I want to
5 read these decisions.

6 (Pause in proceedings.)

7 Your reference to 131, 1351, is just a string cite
8 in the back of the published volume that refers to
9 unpublished decisions. Your cite 130, 1249 the same.
10 That's okay, you're on the fly, no criticism, but I can't
11 read them because they're not in these volumes. If you
12 will recite again the names, I'll have the law clerk
13 print them. I understand they're unpublished decisions
14 at this point.

15 MR. DELONG: It does appear that I was citing
16 unpublished decisions.

17 THE COURT: Unpublished?

18 MR. DELONG: Yes, your Honor.

19 THE COURT: That's fine. I'm allowed to review
20 them by way of appellate rule now, but I need you to
21 recite the citation so that the law clerk can grab them
22 off Westlaw.

23 MR. DELONG: I apologize.

24 THE COURT: They're just in a string spreadsheet

1 here is all.

2 MR. DELONG: Yes.

3 THE COURT: Please print off copies for the
4 defense at the same time.

5 MR. DELONG: 214 Westlaw --

6 THE COURT: While I await those -- go ahead.

7 MR. DELONG: I'm getting the second case, your
8 Honor.

9 This one, 2015, Westlaw 224695. This is *State vs.*
10 *Scafidi*, S-C-A-F-I-D-I.

11 THE COURT: I will reserve my decision until after
12 I have reviewed those decisions, and the defense has an
13 opportunity to review them, but I am going to begin
14 disclosing some of my analysis as the predicate for a
15 decision I will make. It's interesting, while I have an
16 idea of what my conclusion will be, I have not yet
17 finally settled.

18 When the motion to suppress came in, it cited on
19 page -- it's not paginated -- the second-to-the-last
20 page, last paragraph, it cited the standard of law in
21 quotations, and the quoted reference was *State v. Hall*,
22 105 Nevada 7, 1989. I looked at *State v. Hall* and
23 confirmed that the cited cases were accurate. I didn't
24 have any reason to disbelieve counsel but I just have

1 this habit of doing that, so I had been reciting that
2 standard throughout these proceedings.

3 But I disagree with the State's attorney when he
4 stood and began that there is a clearly established
5 standard, because when I start examining each of those
6 decisions within that string citation, some uncertainties
7 arise.

8 The first cited decision -- let me say more.

9 As a trial judge, I accept Nevada appellate
10 decisional authority strictly, regardless of whether I
11 agree or disagree, and I pause when that decisional
12 authority could be in conflict with United States Supreme
13 Court jurisprudence. Nevada is not required to follow
14 United States Supreme Court jurisprudence when
15 interpreting federal law.

16 For example, the standard to dismiss in civil
17 actions under *Twombly*, a United States Supreme Court
18 decision, is expressly not approved by the Nevada Supreme
19 Court; therefore, I always follow the Nevada Supreme
20 Court and not the United States Supreme Court. However,
21 as a trial judge, I don't have that same discretion when
22 the United States Supreme Court interprets the United
23 States Constitution.

24 If there's a conflict between the Nevada Supreme

1 Court and the United States Supreme Court, I am
2 befuddled. I'm not exactly sure what to do. I want to
3 honor my state Supreme Court but I have a duty to follow
4 the United States Supreme Court. I'm about to point out
5 an inconsistency between Nevada Supreme Court decisional
6 authority and the United States Supreme Court.

7 I'm going to accept this and not read it while I'm
8 talking, and I'll give you a chance to review it after my
9 talking so you can focus on what I say. We've just been
10 handed the two decisions.

11 The first case cited by *State v. Hall* is
12 *Trombetta*. It is a 1984 decision from the United States
13 Supreme Court. It's authored by Justice Marshall. It
14 examined the absence of biological evidence in DUI
15 prosecutions, and *Trombetta* says what *Trombetta* says. It
16 establishes the baseline for my analysis and it suggests
17 two things.

18 Regarding bad faith, was there a destruction of
19 evidence calculated to circumvent due process. Here, the
20 answer is no -- or this court's conclusion is there's no
21 such evidence. Second, should law enforcement preserve
22 evidence that, quote, "might be expected to play a role
23 in the suspect's defense," close quote. Now, I believe
24 that *Trombetta* on its own would support the defense

1 position. It might not be the persuasive decision but it
2 is supportive of the defense position.

3 *The City of Las Vegas vs. O'Donnell* is the next
4 decision in the string cite. It is entered the same year
5 as *Trombetta*, 1984. It is the same factual issue,
6 retention of biological evidence for DUI prosecutions,
7 and it cites *Trombetta*. So I have 1984 *Trombetta*. I
8 have 1984 *O'Donnell* -- I'm sorry, I don't know if I
9 conflated those. There is *Trombetta* from 1984 and the
10 *City of Las Vegas vs. O'Donnell* also 1984, examining the
11 issue as *Trombetta*, biological evidence, due process.

12 The next case cited is *Boggs vs. State*, 1979. So
13 it precedes *Trombetta* by five years. It is of limited
14 value to the court because it precedes *Trombetta*.

15 The seminal decision for me, which is cited by the
16 defense, *Arizona vs. Youngblood*, that modified *Trombetta*.
17 I'm going to quickly paraphrase *Arizona* and read directly
18 an excerpt from *Arizona*.

19 In the *Arizona* decision, Chief Justice Rehnquist
20 acknowledged *Brady* and its fundamental role in preserving
21 the due process clause, and said:

22 The failure to disclose exculpatory
23 evidence is examined with or without
24 fault.

1 In other words, it doesn't matter if it was good
2 faith or bad faith, the failure to disclose exculpatory
3 information. Then Chief Justice Rehnquist said:

4 But, in contrast, the failure to
5 preserve what might be exculpatory is
6 analyzed solely by fault without regard
7 to prejudice.

8 And the defense argument today relies upon
9 prejudice, so I have to ferret out whether there is even
10 a prejudice dimension to my decision. Remember, the
11 cases cited are 1984, 1979, all pre-date *Arizona vs.*
12 *Youngblood*, quoting directly from *Arizona vs. Youngblood*,
13 under the synopsis, which is not a formal holding but a
14 synopsis, Chief Justice Rehnquist held that:

15 The failure of the police to preserve
16 potentially useful evidence was not a
17 denial of due process absent a showing of
18 bad faith on the part of the police.

19 Then to the actual substance. It's important for
20 me to read this in its entirety because it is here that
21 Chief Justice Rehnquist distinguishes the *Trombetta*
22 decision. I'll go slow.

23 The Due Process Clause of the
24 Fourteenth Amendment as interpreted in

1 *Brady* makes the good or bad faith of the
2 State irrelevant when the State fails to
3 disclose to the defendant material
4 exculpatory evidence. But we think that
5 Due Process Clause requires a different
6 result when we deal with the failure of
7 the State to preserve evidentiary
8 material of which no more can be said
9 than it could have been subjected to
10 tests, the results of which might have
11 exonerated the defendant.

12 Part of the reason for the difference
13 of treatment is found in the observation
14 made in *Trombetta* --
15 Internal subquote.

16 Whatever potentially exculpatory
17 evidence is permanently lost, courts face
18 the treacherous task of defining the
19 import of materials whose contents are
20 unknown and very often disputed.
21 Close subquote.

22 Part of it stems from our unwillingness
23 to read the fundamental fairness
24 requirement of the Due Process Clause as

1 imposing on the police an
2 undifferentiated and absolute duty to
3 retain and to preserve all material that
4 might be of conceivable evidentiary
5 significance in a particular prosecution.
6 We think that requiring a defendant to
7 show bad faith on the part of the police
8 both limits the extent of the police's
9 obligation to preserve evidence to
10 reasonable bounds and confines it to that
11 class of cases where the interests of
12 justice most clearly require it,
13 specifically, those cases in which the
14 police themselves, by their conduct,
15 indicate that the evidence could form the
16 basis of exonerating the defendant.

17 We therefore hold that unless a
18 criminal defendant can show bad faith on
19 the part of the police, failure to
20 preserve potential useful evidence does
21 not constitute a denial of due process of
22 law.

23 *Arizona vs. Youngblood* has been cited more than
24 150 times since it was entered. It has not been modified

1 or supplanted by the United States Supreme Court. It
2 remains good law. It is in conflict with the Nevada
3 Supreme Court that repeats the conjunctive standard of
4 both bad faith and prejudice or exculpatory. It is
5 possible that the Nevada Supreme Court has conflated
6 those two distinct legal concepts identified by Justice
7 Rehnquist, the failure to disclose known exculpatory on
8 one hand versus the loss of what might have been
9 exculpatory. It's possible that the Nevada Supreme Court
10 has not parsed out that distinction.

11 And, antidotally, when I worked on the legal staff
12 on the Nevada Supreme Court more than 25 years ago, I was
13 tasked to determine where in the Nevada jurisprudence
14 such inconsistency existed. They do exist. It's for the
15 court to correct and not -- it is for the Nevada Supreme
16 Court to correct, not District Court Judge David Hardy.

17 But what I'm trying to reconcile, first, is
18 prejudice even an element of the argument? And it
19 appears that under *Youngblood* it is not. Let me assume
20 for a moment that it is and the Nevada Supreme Court
21 concludes that it is.

22 That exculpatory value must have been apparent
23 before the evidence was lost or destroyed. There must be
24 some indicator to hold the State responsible for its

1 choice. Let me read a couple of excerpts -- let me not
2 read a couple of experts.

3 I want to turn next to a theme that the State
4 argued, which is defining what could be exculpatory. I
5 acknowledge that the Nevada Supreme Court has cited this
6 same standard post-*Arizona vs. Youngblood*, and in the
7 2001 decision *Leonard*, the Nevada Supreme Court said the
8 defendant must show that, quote:

9 -- "it could be reasonably anticipated
10 that the evidence would be exculpatory
11 and material to the defense. It is not
12 sufficient to show a merely hoped-for
13 conclusion or that examination of the
14 evidence would be helpful in preparing a
15 defense."

16 I agree preliminarily when I read these two
17 decisions next with the State's description of what is
18 exculpatory regarding an innocence dimension

19 So, again, I'm going to give you a chance to
20 respond. It is my position at this time -- there are a
21 couple of responses. Under *Sheriff vs. Clark County* --
22 *Sheriff of Clark County vs. Warner*, 112 Nevada 1234, the
23 State choose to enter into a stipulation.

24 That the drill was returned to Mr. McCulloch

1 consistent with department policy and therefore there is
2 no evidence the battery returned to Mr. McCulloch bore a
3 handwritten note or date, there can be something like
4 that that the State may choose to join.

5 Alternatively, during cross-examination of the law
6 enforcement officers, the defense may and should inquire
7 if they were aware of the handwritten notes or date on
8 the battery. If so, there will be additional analysis
9 and argument in the direction the defense is urging me to
10 go. But, if not, it is probably ending the analysis that
11 the State did not know of such handwriting or other
12 notations. Alternatively, if there's not a stipulation,
13 if the inquiry with law enforcement is inadequate
14 according to the defense, I would entertain a curative
15 instruction. It must be grounded in law and I would do
16 so at the time of jury -- at the time of settling jury
17 instructions.

18 I initially began my analysis by just stating that
19 despoliation of evidence instructions that occur in civil
20 cases, that are grounded in our evidence code, and as I
21 indicated earlier, the seminal case is *Bass-Davis* but in
22 the *Higgs* decision, the Nevada Supreme Court specifically
23 rejected the *Bass-Davis* analysis and despoliation
24 instructions for criminal cases. So the defense would

1 have to tender a curative instruction that is somehow
2 consistent with law.

3 Mostly, I believe that this is not a violation of
4 the Due Process Clause, which is the highest standard of
5 inquiry and analysis for the court, but instead this
6 decision to return the evidence may create a fact
7 question relating to province and ownership that may,
8 according to the jury, be or not be an influence of a
9 reasonable doubt. I think this issue is more
10 appropriately argued to the jury as the State has failed
11 to meet its burden of proof because, according to the
12 defense, there is no connection based upon the evidence
13 that's been presented. I think that is the best way to
14 handle this.

15 Now I want to read these two decisions. I will be
16 quiet while you read as well.

17 (Pause in proceedings.)

18 THE COURT: I'll simply say that I agree with the
19 State's rendition with the two decisions, and
20 particularly with the emphasis on *State v. Banks* in which
21 the Supreme Court -- in which the appellate court further
22 defined what could be prejudicial by reference to
23 establishing innocence, just state from whether the
24 evidence might simply hoped for.

1 With that, I'll hear from the defense.

2 MS. ROSENTHAL: Thank you, your Honor.

3 Focusing on the aspect of what could reasonably be
4 anticipated as exculpatory or material to the defendant's
5 case, the officers knew at the time it was returned that
6 this was the sole physical property linking Mr. Held to
7 the Whisper Rock case. It was reasonable to believe that
8 the defense would want to examine this piece of evidence
9 and, instead, they returned it. So I do think it is --
10 should be found reasonable that the officers would
11 anticipate that the defense would want to examine the
12 piece of evidence, speaking of that.

13 Speaking to the two cases cited by State, I think
14 they are distinguishable for a couple of reasons. One,
15 specifically in *Scafidi*, S-C-A-F-I-D-I, it relates to
16 a -- I want to find the exact part where I saw it --
17 excuse me. I believe it was in the *Banks* decision
18 related to the handwritten notes, that it relates to a --
19 on the last page specifically, when a defendant can show
20 only that the loss would have aided in the impeachment of
21 a witness, that is not what we have here. We're not
22 asking to have that. But would not have established
23 innocence, that's exactly what that drill could establish
24 is his innocence. It's not used for impeachment

1 necessarily.

2 THE COURT: How does it establish his innocence?

3 It's not as if it's like DNA.

4 MS. ROSENTHAL: We don't know, your Honor. We
5 don't have it to examine.

6 THE COURT: Just help me construct an environment
7 where that drill, all intended in favor of the defense,
8 everything you hoped that drill would reveal, how does it
9 establish innocence?

10 MS. ROSENTHAL: Mr. Merrill testified he marked
11 his things. We have no way to check whether those were
12 marked. And if they were not marked, then it would show
13 that it was not Mr. Merrill's -- excuse me --
14 Mr. McCulloch's drill to connect Mr. Held to that
15 location.

16 I would also note it's confusing to the court when
17 it's referenced that Mr. Held admits to the Somerset
18 area specifically. There was a charge for another
19 Somerset area case that was dismissed at preliminary
20 hearing in which Mr. Held's U-Haul was there and those
21 kind of things, and I would submit that it is unclear
22 from the interviews which Somerset area house is
23 specific, so I think --

24 THE COURT: Don't interrupt. You'll get a chance.

1 MS. ROSENTHAL: If the court is relying on some
2 sort of confession, I think the court needs to listen to
3 the entire interview before making its decision regarding
4 this specific suppression. I think it's -- the court
5 should consider anything outside of the drill being the
6 physical evidence against Mr. Held. Outside of what
7 everything else is, if the State wants to proceed with
8 everything else outside the drill, they should do that.
9 But the drill should be suppressed because it is -- it
10 could be exculpatory and we don't have a way to examine
11 it.

12 THE COURT: I'll just comment that I do watch the
13 trial and I don't find this testimony to be as
14 declarative and direct as the defense suggests. I
15 believe the witness testimony gives rise to a fact
16 question that neither I nor the defense are capable of
17 making. There is a possibility that he did write on this
18 battery. There's a possibility that he did not. I only
19 say that because I want to be sure there's a total review
20 of this proceeding.

21 And you didn't respond to my concern about *Arizona*
22 *vs. Youngblood*, which seems to suggest that this entire
23 argument is unnecessary if there's no bad faith.

24 MS. ROSENTHAL: I would point out, your Honor, in

1 the two cases cited by the State from 2014 when they
2 confirmed the two-sided evaluation.

3 THE COURT: Absolutely. I do agree with you. You
4 have accurately cited Nevada law as it contains those
5 dual elements.

6 MS. ROSENTHAL: Correct. And I just note even as
7 late as 2014 it's been confirmed.

8 THE COURT: I agree. And it's difficult for me to
9 reconcile that two-pronged analysis that predates *Arizona*
10 with the *Arizona* decision, and I have to define what
11 the --

12 MS. ROSENTHAL: And I would submit to the court
13 that this court should rule off its controlling authority
14 of the Nevada Supreme Court. And if the Nevada Supreme
15 Court needs to change its opinion, it could do so at a
16 future time, but this court should follow the precedent
17 of the Nevada Supreme Court ruling.

18 THE COURT: Thank you. It's probably good advice,
19 but we'll see if I listen my own inner voice.

20 Mr. DeLong, we always stand and object when
21 there's an evidentiary basis, not when we just disagree
22 with what's been said. This is your turn to disagree
23 with what's been said.

24 MS. ROSENTHAL: I have one more point, your Honor.

1 In both of those cases cited and reviewed, they
2 were granted an evidentiary hearing. So I would ask that
3 we be given that opportunity to examine all officers
4 specifically about the dates and things like that out of
5 the trial aspect, because I think it is important.

6 THE COURT: Anything from you before we close the
7 day?

8 MR. DELONG: If I may, your Honor, I just want to
9 clear up a couple of representations to the court.

10 THE COURT: I prefer to consider them
11 misrecollections, not misrepresentations.

12 MR. DELONG: Absolutely, your Honor.

13 My concern, though, is -- and this is made in an
14 offer of proof, because obviously we have no testimony as
15 to the potential residential burglary that was bound
16 over, but it allegedly occurred at 2615 Snow Partridge
17 Drive. Which, your Honor, I'm looking at a map of
18 northwest Reno. This is off of Robb Drive, near what
19 appears to be a park, and it is not indeed in the
20 Somerset area. I have concerns when representations are
21 made that these admissions aren't accurate. And, in
22 fact, I indicated during the opening this was the area.
23 That's what representations were made, the Somerset
24 area, when the admissions were made. That's the

1 testimony we expect to hear.

2 More importantly, though, your Honor -- I want to
3 make sure that I get the quote -- I know the court has
4 traversed this, but we are clearly in the realm of hope
5 at this point. Allen McCulloch did not say, "Yes, I date
6 all my tools all the time, "Yes, I dated these tools," or
7 even, "Yes, I saw dates on these tools." An evidentiary
8 hearing was permitted in this case on this very issue and
9 Mr. McCulloch was not called to the witness stand.

10 More importantly, my reading of the analysis of
11 the Supreme Court, the US Supreme Court and the Nevada
12 Supreme Court, is we have to focus on the apparent. If
13 we're looking at exculpatory value, it's the apparent
14 exculpatory value. That has not been demonstrated. No
15 witness -- and the court identified this -- no witness
16 has indicated that there was exculpatory value beyond
17 what they testified to. They didn't say, "I saw dates
18 and I didn't know what they were and I ignored them." In
19 fact, they were asked, "Did you -- is there anything
20 unique about these," and they said, "No." Their apparent
21 understanding of what was there was testified to before
22 this court.

23 So what we literally are in is the hope that maybe
24 these drill bits could have been exculpatory, which does

1 not meet the standards that have been described today by
2 this court and the case law we've read regarding the Due
3 Process Clause, your Honor.

4 The one thing I would leave with, and this was
5 quoted by the State. I know it's a Nevada Supreme Court
6 opinion, but these were entered after the *Hall* decision,
7 and it indicates that:

8 The defendant must show that it could
9 be reasonably anticipated that the
10 evidence sought could be exculpatory and
11 material to the defense. It is not
12 sufficient to show merely hoped-for
13 conclusion or that the examination of
14 evidence will be helpful in preparing a
15 defense.

16 Quoting *Buchanan vs. State*, 119 Nevada 201, which
17 is a 2002 case.

18 Thank you.

19 THE COURT: Thank you.

20 Counsel, if you'll be here at 9:30 in the morning,
21 I told the jury 10 o'clock, this issue may continue in
22 some way after you've had time to reflect and consult.

23 I am not granting a mistrial. I am not
24 suppressing the RYOBI tool set. I remain open to some

1 curative step as I have identified, and I'll summarize
2 them again. There can be a stipulation. I'm not
3 ordering a stipulation under any circumstances, but a
4 stipulation that the drill was returned to Mr. McCulloch
5 consistent with department policy and therefore there is
6 no evidence that battery returned to Mr. McCulloch had a
7 handwritten date or other notes.

8 I certainly expect separately the defense to
9 inquire of these witnesses if they were aware of any such
10 handwritten dates or notes, because if they were aware
11 and the battery and drill set were returned, that would
12 allow additional analysis and argument.

13 If the defense wishes to develop a curative
14 instruction consistent with law, I would entertain that.
15 And I am renewing my conclusion that this whole
16 conversation is better framed within the State's burden
17 to prove guilt beyond a reasonable doubt, and the
18 province and ownership of the drill is now subject to
19 significant argument.

20 Anything else?

21 MR. DELONG: Your Honor, just maybe I'm slow.
22 Just for clarification, how are we beginning tomorrow
23 morning at 9:30?

24 THE COURT: Cross-examination.

1 MR. DELONG: Thank you.

2 THE COURT: Officer Fye.

3 MR. DELONG: Thank you, your Honor.

4 THE COURT: Ms. Reporter, we'll go off the record.

5 Please submit an off-hours per diem as we have kept you
6 after 5:00.

7 (At 5:12 p.m., court adjourned.)

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1 STATE OF NEVADA)
2 COUNTY OF WASHOE) ss.
3

4 I, ERIN T. FERRETTO, an Official Reporter
5 of the Second Judicial District Court of the State of
6 Nevada, in and for the County of Washoe, DO HEREBY
7 CERTIFY:

8 That I was present in Department No. 15 of
9 the above-entitled Court on WEDNESDAY, JUNE 30TH, 2021,
10 and took verbatim stenotype notes of the proceedings had
11 upon the matter captioned within, and thereafter
12 transcribed them into typewriting as herein appears;

13 That the foregoing transcript is a full,
14 true and correct transcription of my stenotype notes of
15 said proceedings.

16 That I am not related to or employed by any
17 parties or attorneys herein, nor financially interested
18 in the outcome of these proceedings.

19
20 DATED: This 5th day of November, 2021.

21
22 /s/ Erin T. Ferretto

23 _____
 ERIN T. FERRETTO, CCR #281

24

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Washoe County Alternate Public Defender's Office and that on this date I served a copy of the Appellant's Joint Appendix – Volume X to the following:

IAN CHRISTOPHER HELD, 96555
c/o NNCC
PO BOX 7000
CARSON CITY, NV 89702
Via U.S. Mail

CHRIS HICKS
WASHOE COUNTY DISTRICT ATTORNEY
Attn: Appellate Department
Via Electronic Mail

DATED this 28th day of February, 2022.

/s/Randi Jensen
Randi Jensen