Exhibit 8

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Seventy-second Session
May 22, 2003

The Senate Committee on Judiciary was called to order by Chairman Mark E. Amodei, at 8:14 a.m., on Thursday, May 22, 2003, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4406, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Mark Amodei, Chairman
Senator Maurice E. Washington, Vice Chairman
Senator Mike McGinness
Senator Dennis Nolan
Senator Dina Titus
Senator Valerie Wiener
Senator Terry Care

GUEST LEGISLATORS PRESENT:

Assemblywoman Sheila Leslie, Assembly District No. 27

STAFF MEMBERS PRESENT:

Nicolas Anthony, Committee Policy Analyst
Bradley Wilkinson, Committee Counsel
Lora Nay, Committee Secretary

OTHERS PRESENT:

Michael Pescetta, Attorney
JoNell Thomas, Attorney
Richard L. Siegel Ph.D., Lobbyist, American Civil Liberties Union of Nevada, Human Services Network
Nancy Hart, Lobbyist, Nevada Coalition Against the Death Penalty
Jan Gilbert, Lobbyist, Nevadans for Quality Health Care, and Progressive Leadership Alliance of Nevada
R. Ben Graham, Lobbyist, Clark County District Attorney, and Nevada District Attorneys' Association/Las Vegas
Clark Peterson, Chief Deputy District Attorney, Office of the District Attorney, Clark County
Kristin L. Erickson, Chief Deputy District Attorney, Criminal Division, Washoe County District Attorney
James F. Nadeau, Lobbyist, Nevada Sheriffs and Chief's Association/North, and Washoe County Sheriff's Office

CHAIRMAN AMODEI:
We will start today's hearing with Assembly Bill (A.B.) 13 and A.B. 16.

ASSEMBLY BILL 13 (1st Reprint): Eliminates panel of judges in certain penalty hearings in which death penalty is sought and requires district attorneys to report certain information concerning

MR. PETERSON:
I agree with you completely regarding aggravators and mitigators and similar things. My internal suggestion to our office is we track not only this information, but what aggravators were charged, what aggravators were found, whether or not there were multiple victims, whether or not mitigators were presented, what mitigators were found et cetera. All of that stuff is very important to record keeping. As far as going back, that is going to be very difficult. I have tried to do it and it is difficult. It could be done, but it is difficult.

KRISTIN L. ERICKSON, CHIEF DEPUTY DISTRICT ATTORNEY, CRIMINAL DIVISION, WASHOE COUNTY DISTRICT ATTORNEY:
On behalf of the Nevada District Attorneys Association and the Washoe County district attorney's office, Mr. Peterson has more than adequately stated our position and I would like to put our support on the record.

CHAIRMAN AMODEI:
Seeing no more testimony we will close the hearing on A.B. 13, and open the hearing on A.B. 16.

MR. PESCETTA:
Assembly Bill 16 is the DNA testing bill. I am in the odd position of supporting a bill that has been both editorialized in favor of by the *Las Vegas Review-Journal* and supported by Mr. Peterson. This provision is limited to capital cases and it is designed to provide a simple procedure for getting DNA testing when there is no other proceeding pending. At trial, or in the course of state or federal habeas proceedings, if there is DNA evidence that has not been subjected to testing, it is tested in the course of those proceedings. This plugs a hole where there is not anything pending. It is a simple petition that can be filed in the district court. The district court reviews whether there is any DNA evidence to be tested. The test is conducted, the results fall whichever way they do.

This is a bill that will be applied very seldom. It is important to have it in place for those cases where for whatever reason, there is not some other legal proceeding pending in which this can be obtained.

Mr. Peterson has submitted an opposition on amendment (Exhibit D), which is also sort of a support and amendment. I have reviewed the amendment, which provides for an appeal provision. The current state of the bill is the court directs the prosecutor to preserve the evidence. As Mr. Peterson points out, frequently evidence with any relevance may have been admitted at trial so it may be in possession of the clerk of the court. It may be in the possession of the police agencies. It may be in the possession of the prosecutor. The provision he suggests is acceptable in terms of identifying who has got what that may be subject to testing. He also proposes, in section 10, an appeal provision and I would support that.

With the amendments suggested by Mr. Peterson, I ask for the bill to be processed.

SENATOR TITUS MOVED TO AMEND AND DO PASS A.B. 16.

SENATOR WASHINGTON SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIRMAN AMODEI:
With the discussion on A.B. 13, I will allow the committee members to consider, converse, discuss, whatever with the appropriate parties A.B. 13 as it exists or with the proposed amendments. We will now

Exhibit 9

Clark County
District Attorney's
Office

Death Penalty Legislation:
Post-Conviction DNA Testing

SUPPORT WITH

~~*Opposition &*~~ *Amendment*

A.B. 16

David Roger
District Attorney
Clark County, Nevada

May, 2003

EXHIBIT D Committee on Judiciary
Date: 05/22/03 Page 1 of 3

A.B. 16: Post-Conviction DNA Testing

OVERVIEW

Summary: Creates new post-conviction remedy for DNA testing which could instead track existing procedures; improperly targets district attorney who is not the custodian of any such DNA evidence.

POSITION

The Clark County District Attorney's Office supports mechanisms, particularly in capital cases, that promote justice by freeing the innocent as well as convicting the guilty. The Clark County District Attorney's Office, however, opposes portions of this legislation as it does not provide a correct remedy and it improperly addresses the district attorney's office directly when the district attorney's office is not the custodian of DNA evidence. Additionally, the finding should be subject to judicial review.

ANALYSIS

I. Much Of The Proposed Legislation Is Appropriate

Because the Clark County District Attorney's Office is as concerned with freeing the innocent as convicting the guilty, we do not oppose a mechanism to test DNA to the extent it is helpful in carrying out our task of doing justice.

II. The Proposed Legislation Incorrectly Focuses On The Prosecutor, Who Is Not The Custodian Of The DNA Evidence

The proposed legislation requires the prosecutor to preserve and inventory any DNA evidence. Unfortunately, the prosecutor is not the custodian of that evidence. The court itself or law enforcement agencies are normally the custodians. Thus, the proposed legislation incorrectly targets prosecutors.

Instead, the legislation should require the court to determine who is the custodian of the evidence and require those persons to prepare any inventory. If the evidence is held by the court, the defendant is free to inspect and prepare his own inventory.

Thus, Section 2, Page 2, Lines 10-22 should be amended to read:

> 3. If a petition is filed pursuant to this section, ***the court shall make inquiry of the parties as to who currently has custody of any evidence that may be subjected to genetic marker analysis. The***

court then shall order those persons or agencies in actual custody of such evidence to preserve all evidence within its possession or custody and prepare an inventory of all evidence within its possession or custody within 30 days of the court's order.

4. The district attorney may file a written response to the petition within 30 days after the inventories are prepared pursuant to this section.

III. The Proposed Legislation Does Not Provide An Appropriate Remedy

The proposed legislation creates a new post-conviction procedure regarding DNA testing. However, the result of this new procedure is arrest of judgment pursuant to NRS 176.525, which is inappropriate. The result of arresting judgment is extreme—it treats the defendant as if charges had never been filed against him! This is inappropriate because DNA evidence is not a "magic bullet." It is possible that favorable evidence would not have led to a different result at trial. In essence, the proposed legislation wants to skip over that portion of the analysis.

Instead, if the genetic marker information is favorable to the defendant, the defendant should be excused from the two-year time bar on a motion for new trial and be allowed to bring a motion for new trial based on newly discovered evidence.

Thus, Section 2, Page 3, Lines 18-20 should be amended to read:

8. If the results of a genetic marker analysis performed pursuant to this section are favorable to the petitioner, the ***petitioner shall be allowed to bring a motion for new trial pursuant to NRS 176.515 for newly discovered evidence and any time restrictions contained in that statute are excused.***

As a result, there is no need to amend current NRS 176.525 and thus Section 4 of the proposed legislation can be stricken.

IV. There Should Be Judicial Review

The current proposed legislation leaves the decision to the district court and provides no review. However, for an issue of this magnitude, judicial review for both sides should be allowed as it is for a motion for new trial.

Thus, subsection 10 found on Page 3, Lines 27-28, should be stricken and the remaining subsections renumbered.

Exhibit 10

CHAPTER 335

AN ACT relating to crimes; providing for genetic marker analysis of certain evidence relating to the conviction of certain offenders who have been sentenced to death; providing for a stay of execution pending the results of the analysis; providing that a petitioner may file a motion for a new trial if the analysis is favorable to the petitioner; and providing other matters properly relating thereto.

[Approved: June 9, 2003]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

.....

Section 1. Chapter 176 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. ***1. A person convicted of a crime and under sentence of death who meets the requirements of this section may file a postconviction petition requesting a genetic marker analysis of evidence within the possession or custody of the State which may contain genetic marker information relating to the investigation or prosecution that resulted in the judgment of conviction and sentence of death. The petition must include, without limitation, the date scheduled for the execution, if it has been scheduled.***

2. Such a petition must be filed with the clerk of the district court for the county in which the petitioner was convicted on a form prescribed by the Department of Corrections. A copy of the petition must be served by registered mail upon:

(a) The Attorney General; and

(b) The district attorney in the county in which the petitioner was convicted.

3. If a petition is filed pursuant to this section, the court shall determine which person or agency has possession or custody of the evidence and shall immediately issue an order requiring, during the pendency of the proceeding, each person or agency in possession or custody of the evidence to:

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

(b) Within 30 days, prepare an inventory of all evidence within the possession or custody of the person or agency that may be subjected to genetic marker analysis pursuant to this section; and

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

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

5. The court shall hold a hearing on a petition filed pursuant to this section.

6. The court shall order a genetic marker analysis if the court finds that:

(a) A reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition;

(b) The evidence to be analyzed exists; and

(c) The evidence was not previously subjected to:

(1) A genetic marker analysis involving the petitioner; or

(2) The method of analysis requested in the petition, and the method of additional analysis may resolve an issue not resolved by a previous analysis.

7. If the court orders a genetic marker analysis pursuant to subsection 6, the court shall:

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

(b) Select a forensic laboratory to conduct or oversee the analysis. The forensic laboratory selected by the court must:

(1) Be operated by this state or one of its political subdivisions, when possible; and

(2) Satisfy the standards for quality assurance that are established for forensic laboratories by the Federal Bureau of Investigation.

(c) Order the forensic laboratory selected pursuant to paragraph (b) to perform a genetic marker analysis of evidence. The analysis to be performed and evidence to be analyzed must:

(1) Be specified in the order; and

(2) Include such analysis, testing and comparison of genetic marker information contained in the evidence and the genetic marker information of the petitioner as the court determines appropriate under the circumstances.

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

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

8. If the results of a genetic marker analysis performed pursuant to this section are favorable to the petitioner:

(a) The petitioner may bring a motion for a new trial based on the ground of newly discovered evidence pursuant to NRS 176.515; and

(b) The restriction on the time for filing the motion set forth in subsection 3 of NRS 176.515 is not applicable.

9. The court shall dismiss a petition filed pursuant to this section if:

(a) The requirements for ordering a genetic marker analysis pursuant to this section are not satisfied; or

(b) The results of a genetic marker analysis performed pursuant to this section are not favorable to the petitioner.

10. For the purposes of a genetic marker analysis pursuant to this section, a person under sentence of death who files a petition pursuant to this section shall be deemed to consent to the:

(a) Submission of a biological specimen by him to determine his genetic marker information; and

(b) Release and use of genetic marker information concerning the petitioner.

11. The expense of an analysis ordered pursuant to this section is a charge against the Department of Corrections and must be paid upon approval by the Board of State Prison Commissioners as other claims against the State are paid.

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

Sec. 3. *1. After a judge grants a petition requesting a genetic marker analysis pursuant to section 2 of this act, if a judge determines that the genetic marker analysis cannot be completed before the date of the execution of the petitioner, the judge shall stay the execution of the judgment of death pending the results of the analysis.*

2. If the results of an analysis ordered and conducted pursuant to section 2 of this act are not favorable to the petitioner:

(a) Except as otherwise provided in paragraph (b), the Director of the Department of Corrections shall, in due course, execute the judgment of death.

(b) If the judgment of death has been stayed pursuant to subsection 1, the judge shall cause a certified copy of his order staying the execution of the judgment and a certified copy of the report of genetic marker analysis that indicates results which are not favorable to the petitioner to be immediately forwarded by the clerk of the court to the district attorney. Upon receipt, the district attorney shall pursue the issuance of a new warrant of execution of the judgment of death in the manner provided in NRS 176.495.

Exhibit 7

MINUTES OF THE MEETING OF THE ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Second Session
March 20, 2003

The Committee on Judiciarywas called to order at 8:14 a.m., on Thursday, March 20, 2003. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada, and, via simultaneous videoconference, in Room 4401 of the Grant Sawyer State Office Building, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

Note: *These minutes are compiled in the modified verbatim style. Bracketed material indicates language used to clarify and further describe testimony. Actions of the Committee are presented in the traditional legislative style.*

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Mr. John Oceguera, Vice Chairman
Mrs. Sharron Angle
Mr. David Brown
Ms. Barbara Buckley
Mr. John C. Carpenter
Mr. Jerry D. Claborn
Mr. Marcus Conklin
Mr. Jason Geddes
Mr. Don Gustavson
Mr. William Horne
Mr. Garn Mabey
Mr. Harry Mortenson
Ms. Genie Ohrenschall
Mr. Rod Sherer

STAFF MEMBERS PRESENT:

Allison Combs, Committee Policy Analyst
Danielle Christenson, Subcommittee Policy Analyst
Risa B. Lang, Committee Counsel
Sabina Bye, Committee Secretary

OTHERS PRESENT:

Kristin Erickson, Chief Deputy District Attorney, Criminal Division, Washoe County District Attorney's Office, Reno; and representing the Nevada District Attorneys Association
Jim Nadeau, representing the Washoe County Sheriff's Office, Reno
Michael Pescetta, Attorney at Law, Las Vegas
Ben Graham, representing the Nevada District Attorneys Association

Chairman Anderson:

[Called meeting to order and roll was called.] Please mark Ms. Ohrenschall present when she arrives; she is giving testimony in another committee. Fourteen members are present; a quorum is present.

We are in work session today. For those of you who are listening on the Internet, we are not taking testimony. We may call people forward who might be able to aid in our discussion. If you've signed in that's helpful so that I know that you're here and potentially would like to speak on some of the issues. We are going to be looking at several different bills.

We'll start with A.B. 16.

Assembly Bill 16: Provides for genetic marker analysis of certain evidence related to conviction of certain offenders sentenced to death. (BDR 14-200)

Allison Combs, Committee Policy Analyst:
The first bill in the Work Session Document (Exhibit C), page 1, is Assembly Bill 16. It is the last bill from the 2001-2002 Interim Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing. It provides for a genetic marker analysis of certain evidence related to the convictions of offenders who are under the death penalty.

The measure mirrors a bill from last session. Several amendments were proposed that involved a couple of word changes. There's a mock-up in the Work Session Document that includes all of these proposed amendments. It's right before the blue attachment to the Work Session Document; it's on white paper and has blue and red and green ink on it, entitled "Proposed Amendment to Assembly Bill 16." The amendments are from Mr. Pescetta and the Washoe County Sheriff's Office.

On the first page of the mock-up of the bill there's some language in Section 2 proposed by Mr. Pescetta, which would specify that the remedy provided by this section—in other words, for someone who is under sentence of death—to seek genetic marker analysis. That remedy is in addition to any remedy the inmate may have under other provisions of the law to obtain testing of evidence for genetic marker analysis. As noted in the box to the side, methods in non-capital cases to obtain testing through other legal proceedings exist and are currently possible under *Nevada Revised Statutes* (NRS) 34.780(2).

Chairman Anderson:
This amendment might be necessary to clarify how the DNA (deoxyribonucleic acid) testing would take place if we are going to proceed with the bill.

Allison Combs:
I think that is the intent of the sponsor of the amendment.

The second amendment on page 2 refers to Section 2, subsection 4(a). It is proposed by the Washoe County Sheriff's Office and the Las Vegas Metropolitan Police Department, and would specify, essentially, that other agencies may hold the evidence necessary for the testing. They suggested clarifying that the inventory would reference all available evidence that may be in possession of the state, which the bill currently references, as well as, perhaps, an investigating agency and the court.

Chairman Anderson:
On its face it appears okay to me. My concern—if we can get the Nevada District Attorneys Association to clarify for me—I just want to make sure that if we were to add this section—maybe my legal staff will help on this too—we're not going to create a situation where we are looking for the original notes of the investigatory officer. I'm not looking to expand this to be all the way back to "day one" of the investigation, only those things that were available or should have been available at time of trial. Is that

what this amendment is intended to accomplish?

Kristin Erickson, Chief Deputy District Attorney, Criminal Division, Washoe County District Attorney's Office, Reno; and representing the Nevada District Attorneys Association:
[Introduced herself.] Yes, that is my understanding. By the time a murder case does go to trial, they already have a copy of everything within the state's possession. It should not be anything new. It should be information that has already been provided to the defense.

Chairman Anderson:
So you don't see any particular problem with this language, even though it is suggested by the Washoe County Sheriff's Office and the Las Vegas Metropolitan Police Department?

Kristin Erickson:
No, Mr. Chairman, I don't.

Chairman Anderson:
Do they need it? Is it essential language?

Jim Nadeau, representing the Washoe County Sheriff's Office:
I think it is necessary because it directs a couple of things: the available evidence and evidence that may not have been used in court.

It specifically addresses DNA evidence, if I am reading this section correctly.

Chairman Anderson:
Does anybody have a problem with that amendment?

Assemblyman Brown:
I'm not sure if Mr. Nadeau is suggesting—I just heard his quick comment—you're suggesting that this relates only to DNA evidence, and really, that's what we're looking at here. Does it limit that inventory to the DNA evidence? I'm not sure that we need to go out and get every piece of evidence that was to be admitted. If not, would it make sense to include such . . .

Chairman Anderson:
Let me draw your attention to line 12 of the language of the bill "that may be subject to analysis."

Assemblyman Brown:
Thank you, Mr. Chairman.

Assemblyman Horne:
I have a question regarding, "all available evidence in the possession of the state." When wouldn't evidence be available?

Kristin Erickson:
Evidence, virtually, is always available prior to trial. We have a listing; the defense receives everything in the state's file. We usually always do an evidence viewing with the defense attorney, so they can physically look at every single piece of evidence that we have. Realistically, it would always be available for them to look at. Once the trial is over, the evidence is secured into a vault and that is within the district court's authority.

Assemblyman Horne:
So then why the need for the language of "all available evidence"?

Chairman Anderson:
Ms. Erickson, let me call on our legal counsel to clarify.

Risa Lang, Committee Counsel:
Currently, the way this is drafted requires the prosecuting attorney to prepare an inventory of the evidence that is within possession or custody of the state. Adding this language, I'm not sure that "all available" evidence—I think that the intent was to indicate by some of the evidence, for whatever reason,

might not be available anymore.

The other part, adding an investigating agency in the court would require the prosecuting attorney to include in the inventory any evidence that's within the possession or custody of an investigating agency and the court. So the prosecutor would have to determine what the investigating agency and the court may have in their possession that is outside the possession of the state. Otherwise, if that's not the intent, I'm not entirely sure why we are listing those. That's the way it is written.

Chairman Anderson:
As I recall from the original testimony, Assistant Sheriff Means indicated to us that it was possible that between this time and the time of the trial that some of the evidence may have been destroyed as a result of contamination from other materials it may have come in contact with initially. Although it was available at the time of trial, it may no longer be available.

Assemblyman Horne:
Yes, I remember that testimony. When I read it again it seemed to me as if, perhaps, it was with another jurisdiction—the FBI crime lab. If ten years from now someone requests to retest some evidence and they say, "It's not in our possession; it's still with the FBI," under this, if not in their possession, would they not have to test it?

Chairman Anderson:
Do you think it does the bill harm?

Assemblyman Horne:
I don't see a great need for it.

Chairman Anderson:
Do you think it does the bill harm?

Assemblyman Horne:
I would like to see it removed—the "all available" evidence, and just leave "the evidence."

Chairman Anderson:
So then we have some problems with this one. We will have to come back to it. Let's move on to the next one.

Allison Combs:
The next amendment is proposed by Mr. Pescetta to Section 2, subsection 5, and goes to the hearing the court would hold. Currently, the bill provides that the court may hold a hearing on the petition; Mr. Pescetta's proposal would change the "may" to "shall" to require a hearing.

Assemblyman Mortenson:
I'm puzzled by the words before that, "at its sole discretion." It sounds like we have a contradiction. It has discretion and yet it's "shall."

Chairman Anderson:
I think it's a drafting question and we'll have to take it up with Ms. Lang. Is there a problem here?

Risa Lang:
I think in preparing this document, Allison was trying to incorporate the suggestions and the actual language. Of course, when we put it through drafting, it will all be consistent.

Chairman Anderson:
In other words, Mr. Mortenson, if we decide to go from "may" to "shall" we'll make sure the agreement takes place.

Does anybody have a problem with the change from "may" to "shall?"

Michael Pescetta, Attorney at Law:
I just wanted to point out that in the proposal that I submitted, I had removed the "in its sole discretion" along with "may."

Chairman Anderson:
The bill drafter will take care of that. We're trying to do it on this mock-up copy that we have so we can try to move this. We have a member who is going to be leaving shortly and we're trying to move this one along.

Allison Combs:
The next change, also proposed by Mr. Pescetta, involves Section 2, subsection 6(a), which currently reads, "The court shall order the genetic marker analysis if the court finds that a reasonable probability exists that the petitioner would not have been prosecuted . . ." and the section continues. The word change would be changing "probability" to "possibility."

Chairman Anderson:
This is a little bit broader; moving from "probability" to "possibility," we've expanded the definition rather dramatically. Is everybody okay with the word change? Okay.

Allison Combs:
The next change is proposed by the Washoe County Sheriff's Office and the Las Vegas Metropolitan Police Department to Section 2, subsection 6(b). Currently the language reads, "The evidence to be analyzed exists and is in a condition that allows genetic marker analysis to be conducted as requested in the petition." The proposal would strike the condition language: "and is in a condition that allows genetic marker analysis to be conducted as requested in the petition."

Chairman Anderson:
Does anyone have a problem with that?

Allison Combs:
The next change is under Section 2, subsection 7(a), from the Washoe County Sheriff's Office and the Las Vegas Metropolitan Police Department who proposed to strike the word "promptly" under the order that the analysis be conducted promptly under reasonable conditions. There was a note that "promptly" may imply a request is a "rush analysis" in the eyes of the court.

Chairman Anderson:
If we drop "promptly" and leave it open do we need to give a specific time line or is that the same thing? I'm not sure I'm willing to leave it just to eventually do it.

Jim Nadeau:
The court order is going to give us the direction and, certainly, it is not our intention or desire to upset the court by not being responsive to their orders. So I think the court order will provide sufficient expediency.

Assemblyman Carpenter:
I like it the way it is. It says, "Order the analysis to be conducted promptly under reasonable conditions." I believe, at least that's what I would be looking for, that it would be handled. I just think we need to leave the word "promptly" in there.

Chairman Anderson:
Let's move to the next section on lines 42 and 43.

Allison Combs:
This change is also proposed by the Washoe County Sheriff's Office and the Las Vegas Metropolitan Police Department and it would delete the reference to CODIS (the FBI's Combined DNA Index System) that is currently in the bill. You can see that reference at the top of the next page, page 3, and replace that with: "meeting quality assurance guidelines established by the FBI." The notation was that the reference to CODIS needs to be removed because if either of the Nevada labs decides that the sample warrants another type of DNA analysis, which can't be performed in-house, the labs want the ability to send it to an external lab, but the lab would have to be one that meets the quality assurance guidelines established by the FBI.

Chairman Anderson:
Does anybody see a problem with that suggestion?

Assemblyman Geddes:
There are two things that I would suggest. Section 2, subsection 7(b)(1), says the lab must be operated by the state of the political subdivision. That requirement couldn't be met if they had to send it to an outside laboratory. I would suggest we take that out to meet the intention. There's a technical part, "or exceed" probably should come out. If you satisfy the quality assurance standards, that's all anybody can be certified for is to satisfy the standards. There is no qualification to exceed the standards. I would just recommend pulling out "or exceed" and also pulling out number 1 [under subsection 7(b)] so that if they do have to go out-of-house they do have that option.

Chairman Anderson:
Let me ask the bill drafter. Is Mr. Geddes' question relative to the point in number 1, "be operated by this state or one of its political subdivisions," preclude the use of outside testing laboratories?

Risa Lang:
Actually, when I looked at this last night I had the same question about how it would get sent to an external lab. If that is the intent it may be a good idea to take out subparagraph 1 and allow them to send it wherever they want. I think in the original drafting of this bill part of the reason for that was just for, potentially, cost-containment in having it sent to one of the state-operated labs, but I don't know that for certain.

Chairman Anderson:
Maybe we could amend it so it shows, "be operated by the state or a contracted agency of one of its political subdivisions" which would give them the opportunity to do both, but show a preference for one of the state-operated laboratories. Is that possible? Can we work on the language there to give them the option of doing both?

Risa Lang:
I think it's possible to do that or maybe even in subparagraph 1, just have it sent to a lab operated by the state or one of its political subdivisions, when possible, indicating that if they are capable of doing it, you send it to those labs.

Chairman Anderson:
Is that in subsection 7(a) you mean?

Risa Lang:
Subsection 7(b)(1).

Chairman Anderson:
I thought that the standard for the forensic DNA testing is something that the FBI sets as a floor rather than a ceiling and so it would be possible to have a higher assurance standard above that.

Assemblyman Geddes:
You could, but they only certify the floor.

Chairman Anderson:
Are you suggesting that we don't have that language at all?

Assemblyman Geddes:
I'm suggesting that we pull out the "or exceed" because when they satisfy the standards, that's all they could be certified for.

Chairman Anderson:
Ms. Lang, does that create a drafting problem?

Risa Lang:
No. That's fine, Mr. Anderson.

Chairman Anderson:
The intent there would be okay. Are we okay with the other suggested changes and removing the language suggested by the Washoe County Sheriff's Office and the Las Vegas Metropolitan Police Department? Let's move to Section 2, subsection 7(c).

Allison Combs:
In Section 2, subsection 7(c), at the top of page 3, is a proposal from the Washoe County Sheriff's Office and the Las Vegas Metropolitan Police Department to add language on line 5 with regard to ordering "the forensic lab selected pursuant to paragraph (b) to perform . . ." and adding some additional language, "an evidence review and then," and continue on with, "a genetic marker analysis of evidence."

Chairman Anderson:
Does anyone see a problem with that? It seems okay.

Assemblyman Carpenter:
I would like to know why we need the "evidence review" in there. I didn't know that the laboratories would be doing something like that. I just need an explanation of why that would be added.

Jim Nadeau:
I believe that the evidence review is to ensure that it can, in fact, be tested, and that there is sufficient DNA to perform the test. I think that's part of the justification there.

Assemblyman Mortenson:
It seems superfluous because when they go to perform the test then they will determine whether there is sufficient material.

Assemblyman Brown:
I certainly see some justification for it because they are provided with an inventory of evidence; so I think there should be an initial review of that inventory. From there, they may select acceptable pieces or types of evidence and then perform the genetic marker analysis on those acceptable pieces; so I think there is some justification for that.

Chairman Anderson:
I think that, while I don't disagree with Mr. Mortenson, it aids their comfort and where they are going to be going with the evidence that's in front of them. I don't think it harms the bill in any way. If it aids their comfort level in the forensic laboratory, I think we should probably do that.

Allison Combs:
The next one is Section 2, subsection 7(d), also from Washoe County Sheriff's Office and the Las Vegas Metropolitan Police Department. It raises a question with regard to the ordering of the production of the reports. There was a question of who would be the recipient of the reports, and whether that may need to be specified. It appears that the recipient would be the court, but I would certainly defer to our legal counsel or any of the counsel in the audience.

Risa Lang:
I think that this is all under subsection 7, which covers orders of the court. If the court is ordering them to produce reports, I'm assuming it would be for the court that is going to be making the determination in these cases.

Chairman Anderson:
It should be fairly clear that the language in subparagraph (d) should be left in if it doesn't cause any harm to the bill, and since the court ordered it, I'm sure that they'll be able to get it back. We appreciate the Washoe County Sheriff's Office bringing it to our attention.

Allison Combs:
The next change, proposed by Mr. Pescetta, is to Section 2, subsection 10, and relates to the proposal to require the court to hold a hearing. It was discussed earlier on page 2. This change would provide that the order of the court granting or dismissing the petition be subject to judicial review. Currently, the bill provides that it is final and not subject to judicial review, and there's a reference to a statutory section suggested by the sponsor of the amendment.

Chairman Anderson:
Shall this order be open to judicial review? Sounds okay, since they are dealing with somebody's life.

Ms. Lang, would the court's order tell them what to test in subsection 7? Do you think this is probably not necessary? Do you have an opinion that the court has already told them what needs to be done?

Risa Lang:
Are we going back to . . .

Chairman Anderson:
Mr. Pescetta changed Section 2, subsections 5 and 10.

Risa Lang:
Is that going back to (c), the one we discussed earlier?

Chairman Anderson:
Does this cause us a problem? Is there a problem with opening this up for judicial review? It seems to

me that it's okay if we're dealing with somebody's life.

[Several Committee members responded positively to the proposed amendment off microphone.]

Allison Combs:
Section 2, subsection 11(a), revises the reference to the specimen to be taken and it provides new language: "Submission of a biological specimen from the individual to determine the genetic marker information." It would delete the references to, just simply, "specimen," as well as to a "sample of blood."

Chairman Anderson:
Ms. Lang, in *Nevada Revised Statutes* (NRS) we use the term "specimen" and I think in the *Nevada Administrative Code* (NAC) they use the term "biological specimen." Is that what's happening, is there a difference between the two bodies of work?

Risa Lang:
I think that is a different "biological." On this one we do use "biological specimen" in NRS for other places where we talk about genetic marker information. I think previously it was always done by blood and, as they've moved to different types of DNA testing, we've changed it to "biological specimen."

Chairman Anderson:
So this does no irreparable harm to the bill? So that one is an "okay."

Allison Combs:
The next one, also proposed by the Washoe County Sheriff's Office and the Las Vegas Metropolitan Police Department, proposed to add a reference to where the information would be released, which would be into CODIS. They suggest specifically referencing the CODIS, the FBI's Combined DNA Index System.

Chairman Anderson:
There's no problem with that.

Allison Combs:
The next one raises a question more than an amendment. The expense of the analysis is a charge against the Department of Corrections and so there was a question as to how the labs would get the money from the Department of Corrections, but it appears that may be addressed in other areas, but I will defer to our legal counsel on that.

Risa Lang:
I think that there shouldn't be any difficulties with this. It says in here that it is charged against the Department of Corrections upon approval. So they would be billed and they would process the bill the way they ordinarily pay for things.

I have a question on subsection 11 and was wondering about paragraph (b) where they've requested to add [information] into CODIS. Subsection 11 is talking about a person who files a petition "shall be deemed to consent to the release and use of genetic marker information." I'm not sure if it is only for releasing it to be placed into CODIS. I think part of it was just saying that they're authorizing to have the DNA testing done at all. I'm just not sure if limiting it to saying that releasing it to be placed into CODIS would be accurate.

Chairman Anderson:
So you think that we need it broader than that; therefore, the amendment wouldn't be acceptable?

Risa Lang:
It looks like Mr. Nadeau wants to comment on that but I would think that it is probably not necessary.

Jim Nadeau:
I think one concern we had is that it is not limiting us from putting it into CODIS. If for some reason it has not already been placed into CODIS, we would just like to be able to put it into CODIS. So I guess we're looking at making sure that CODIS is one of the places it could be released to.

Chairman Anderson:
So adopting the suggested change is to expand it to make sure that CODIS is included but not limited. Can we draft it in such a way to do that, Ms. Lang?

Risa Lang:
Sure, Mr. Anderson. We can say that it's including the release to have it put into CODIS, rather than saying it's only for that purpose.

Jim Nadeau:
We might add, just for the legislative record that it is okay, if this language is broad enough under . . .

Chairman Anderson:
So, clearly, if we state the fact that this does not limit the ability of the Department to put this into CODIS in any way it is . . .

Jim Nadeau:
Mr. Chairman, we assume that because of the conviction that it is already in CODIS, but I think we just want to make sure it can be put in if it is not there.

Assemblyman Conklin:
We're still under the instructions of the court, so I would assume the court would decide if this belongs in CODIS and in the other place it needs to go; I'm sure they are going to say yes.

Chairman Anderson:
I think the concern of the Department is that this does not limit the ability to have the information in CODIS. It is clearly not our intention to take away the ability of the Department to ensure that it is entered into CODIS as a result of the fact that the court order has taken place. It also gives the ability of the Department to put the material into CODIS if it were not already there. So even though it is a court order, and the Department is now conducting the test, they can put it into CODIS. So we don't need the amendment because we have it on the record.

Subsection 12 we find has no problem because they are going to send them a bill.

Let's jump to Section 5, which is the last.

Allison Combs:
The last question raised by the Washoe County Sheriff's Office and the Las Vegas Metropolitan Police Department is on page 4 of the mock-up bill. There was a concern raised regarding the amount appropriated and whether that would sufficiently cover the costs involved. So, there was a proposal to remove this amount and authorize payment based upon the cost per sample.

Chairman Anderson:
This is an ongoing problem with the Department.

Jim Nadeau:
Our concern is making sure the bill is paid and that there's adequate funding. It's very difficult at this particular juncture for us to figure out what the costs are going to be because we haven't encountered this type of cost and have no historical record to base what the costs are going to be. I'm in a dilemma, too, because we really don't know what to put in as a fiscal note.

Chairman Anderson:
When you do those for the District Attorney's Office and for the prosecution the state pays for them. Are they fully reimbursed?

Kristin Erickson:
I have no idea who pays for the genetic testing; I'm sorry I can't help you there.

Chairman Anderson:
It seems to me that I recently read a story relative to the fact that while the forensic laboratory is more than pleased to be the repository of the evidence, it is becoming something of an economic burden upon the county to carry on this activity.

Jim Nadeau:
I think if it is a normal investigation, we do have investigative funds that pay for the cost of that. Our lab contracts with 13 other counties in the state and is paid for services based upon their investigations and that type of thing. Again, those various entities' budgets are based on historical perspective as far as what has happened and that changes again year after year, depending on the budget and past experience. We do have investigative funds that do pay for this in Washoe County and the 13 other counties that we service.

Assemblyman Oceguera:
It would seem to me that this would be an appropriation and if you took it out of the bill they wouldn't get anything.

Jim Nadeau:
It would be my suggestion that we leave the amount as it is, then, based on historical reference, we just—if we exceed that or need additional funding—then we go for some type of a funding augmentation. How's that?

Assemblywoman Buckley:
I don't know who normally pays for this, but when I saw the fiscal note I e-mailed Assemblywoman Leslie. Since there was an appropriation in the original bill, it has to go to Ways and Means anyway. She indicated that she was going to strip out the appropriation and make the Department of Corrections pay it out of their own budget because of all the new positions they've requested.

Chairman Anderson:
It would appear that we should take the suggestion of the Washoe County Sheriff's Office.

Jim Nadeau:
Mr. Chairman, if I may, I know that this is just a minor correction and I know it's strictly a typo but on page 1 of the mock-up bill on line 12 it says "genetic market" and we might want to change that to "genetic marker."

Chairman Anderson:

We appreciate bringing that to our attention and let me indicate to you that the mock-up is just that, for us to "mock it up." Our Legal Division will make sure that all typing is correct. I'm sure Ms. Lang appreciates that being brought to her attention.

Are there any questions from members of the Committee?

It looks as if we are going to move with the amendment as follows:

- Section 2, subsection 1, page 1 of the mock-up as proposed by Mr. Pescetta
- Section 2, subsection 5
- Section 2, subsection 6(a)
- Section 2, subsection 6(b)
- Section 2, subsection 7(b), the language change with additional clarification as suggested by Mr. Geddes
- Section 2, subsection 7(c)
- Section 2, subsection 10 as proposed by Mr. Pescetta
- Section 2, subsection 11(a) as proposed by the Washoe County Sheriff's Office

In Section 2, subsection 12, we didn't find a problem; we clarified their problem so we are not doing Section 2, subsections 11 or 12, and we are removing Section 5 from the bill.

Ms. Lang, are we okay?

Risa Lang:
We are okay. Are we not going to do the suggestion in subsection 4?

Chairman Anderson:
I'm sorry; did I miss one?

Risa Lang:
Subsection 4(a) takes out "all available" and then adds "an investigating agency and the court."

Chairman Anderson:
I wasn't sure; did we agree that we were going to do that? I see a bobbing head or two, so yes, we are doing that one also.

I thought Mr. Horne was of the opinion that "all available" was not necessary. Mr. Horne, is that correct?

Assemblyman Horne:
It should be, "Shall prepare an inventory of all the evidence within the possession or custody of the state," et cetera.

Chairman Anderson:
All right. So we're going to take out the word "available." We're just making it "all the evidence within the possession or custody of the state." We'll wait for the bill drafter's intent there, to make sure that's all in agreement.

Assemblyman Carpenter:
I was looking at subsection 7(a), "Order the analysis to be conducted . . ." They were going to take out "promptly"; I would like to see "promptly" remain in there.

Chairman Anderson:
We're not removing "promptly"; we're keeping it.

ASSEMBLYWOMAN BUCKLEY MOVED AMEND AND DO PASS A.B. 16.

ASSEMBLYMAN CARPENTER SECONDED THE MOTION.

On the Buckley/Carpenter motion of Amend and Do Pass for Assembly Bill 16, are there any questions?

[Called for a voice vote.]

THE MOTION CARRIED. (Ms. Ohrenschall was not present for the vote.)

We'll assign this bill to Mr. Geddes.

Let's turn to Assembly Bill 106.

Allison Combs:
If I could clarify with regard to the mock-up before we move off A.B. 16. When the Committee sees these in the future, I would like to clarify that they are prepared by Research and the language in them will reflect what the sponsors are proposing and not what will ultimately come out of Legal—just to avoid any confusion.

Assembly Bill 106: Revises penalty for driving under influence of intoxicating liquor or controlled or prohibited substance and revises qualifications of person who may apply to court to undergo program of treatment for alcoholism or drug abuse. (BDR 43-606)

Assembly Bill 106, located at the bottom of page 1 [Exhibit C of the Work Session Document], revises the penalty for driving under the influence of liquor or a controlled or prohibited substance. It was a measure that came out of the Nevada Supreme Court's mandatory minimum sentencing review commission. The testimony indicated the changes and number of community service hours were intended to provide a greater incentive for offenders to complete the treatment programs.

There were no amendments proposed to the bill. There was a potential conflict with federal law raised with regard to the changes in the penalties. I contacted the Office of Traffic Safety, who contacted the federal government, which reviewed the bill and indicated that there would not be a problem with compliance.

Chairman Anderson:
Are there any problems with the bill? The Chair will entertain.

ASSEMBLYMAN CARPENTER MOVED TO DO PASS A.B. 106.

ASSEMBLYMAN GUSTAVSON SECONDED THE MOTION.

THE MOTION CARRIED. (Ms. Ohrenschall was absent for the vote.)

We will assign that to Mrs. Angle. I don't think I've assigned you a bill yet. [She indicated he had.] This is your second then.

Assembly Bill 107: Provides additional penalty for committing certain crimes in violation of temporary or extended order for protection. (BDR 15-285)

Allison Combs:
Assembly Bill 107, located at the bottom of page 2 of the Work Session Document (Exhibit C), is a bill

Exhibit 6

MEMORANDUM

Date:	March 12, 2003
To:	Honorable Bernie Anderson Chair, Assembly Committee on Judiciary Honorable Sheila Leslie Chair, Legislative Commission's Subcommittee to Study the Death Penalty
From:	Michael Pescetta
Re:	AB 16 (DNA Testing)

AB 16 has been scheduled for a hearing in the Assembly Judiciary Committee on March 17, 2003. There are some concerns about the current draft of the bill which should be addressed.

1. Section 2(1) of the proposed bill limits the availability of the procedure to inmates under death sentences. Many of the DNA exonerations in cases across the country that are documented in the Department of Justice Report, Conners et al., Convicted by Juries, Exonerated by Science: Case Studies on the Use of DNA Evidence to Establish Innocence After Trial (1996), involved non-capital cases, particularly sexual assault cases. Limiting the availability of the proposed procedure to capital cases would exclude many of the cases in which DNA exoneration would be possible.

If the Committee concludes that the specific proposed procedure should be limited to capital cases, it should be made clear that the procedure is not exclusive, that is, that it does not prevent use of existing methods in non-capital cases to obtain testing through other legal proceedings, which is currently possible under NRS 34.780(2) (discovery available in habeas corpus proceedings); see Jones v. Wood, 114 F.3d 1002, 1009-1010 (9th Cir. 1997) (ordering testing of physical evidence in discovery in habeas proceeding), or NRS 176.515(3) (motion for new trial based on newly discovered evidence). Attached to this memorandum is a proposed draft of the existing bill, with language inserted in Section (2)1 to make this clear.

2. Section 2(5) of the proposed bill provides that a court can hold a hearing on the request for testing "in its sole discretion." Since the decision whether testing is going to be authorized or not is practically the most important one in the whole proceeding, a hearing should be mandatory, in which the parties can present their arguments in the traditional adversary manner. Similarly, Section 2(10) of the proposed bill currently provides that the decision whether or not to conduct testing is immune from any appellate review. Again, since this decision will determine whether or not testing will even be allowed, it should be subject to appellate scrutiny, as are virtually all decisions of the district courts. Language is provided in the attached version of the bill on both of these points.

March 13, 2003

3. Section 2(6)(a) of the bill provides that testing will be ordered if the court finds that "a reasonable probability 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." The attached version changes that language to a "reasonable possibility." All of the cases involving post-conviction DNA analysis necessarily include a jury finding of guilt beyond a reasonable doubt. The Department of Justice DNA Report (at Ex. 3) includes numerous instances of "positive" eyewitness identifications, strong circumstantial evidence, and even false confessions. The point of DNA testing is that it cuts through the other evidence and establishes innocence even if the other evidence appears compelling. Because of this, testing ought to be permitted if there is any possibility of an exculpatory finding, rather than allowing the court to deny testing because the other evidence does not make it "probable" that an exculpatory result would be obtained.

D-295

Exhibit 5

MINUTES OF THE MEETING OF THE ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Second Session
March 17, 2003

The Committee on Judiciarywas called to order at 9:08 a.m., on Monday, March 17, 2003. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada, and, via simultaneous videoconference, in Room 4401 of the Grant Sawyer State Office Building, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

Note: *These minutes are compiled in the modified verbatim style. Bracketed material indicates language used to clarify and further describe testimony. Actions of the Committee are presented in the traditional legislative style.*

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Mr. John Oceguera, Vice Chairman
Mrs. Sharron Angle
Mr. David Brown
Ms. Barbara Buckley
Mr. John C. Carpenter
Mr. Jerry D. Claborn
Mr. Marcus Conklin
Mr. Jason Geddes
Mr. Don Gustavson
Mr. William Horne
Mr. Garn Mabey
Mr. Harry Mortenson
Ms. Genie Ohrenschall
Mr. Rod Sherer

STAFF MEMBERS PRESENT:

Allison Combs, Committee Policy Analyst
Risa B. Lang, Committee Counsel
Sabina Bye, Committee Secretary

OTHERS PRESENT:

Lieutenant Stan Olsen, Las Vegas Metropolitan Police Department, Nevada Sheriff's and Chief's Association, Las Vegas, Nevada
Don L. Means, Assistant Sheriff, Washoe County Sheriff's Office, Reno, Nevada
Ben Blinn, Citizen, Carson City, Nevada
Michael Pescetta, Attorney at Law, Las Vegas, Nevada
Glen Whorton, Assistant Director of Operations, Nevada Department of Corrections, Carson City, Nevada
Kim Blandino, Citizen, Las Vegas, Nevada

Chairman Anderson:
[Said "Good Morning" in Gaelic in commemoration of St. Patrick's Day.]
[The Chair reminded the Committee members and those present in the audience of the Standing Rules and appropriate meeting etiquette. Roll called.]

There is a quorum present; 13 members are present, two are absent.

Assembly Bill 16: Provides for genetic marker analysis of certain evidence related to conviction of certain offenders sentenced to death. (BDR 14-200)

As a member of the Death Penalty and Related DNA Testing (A.C.R. 3 of the 17th Special Session) Interim Study and being that the she, the Chair [of that study], has prior obligations in the Assembly Committee on Ways and Means, Chairwoman Leslie has asked me to provide an introduction to the topic of DNA evidence.

This Committee has already heard four bills from the A.C.R. 3 Death Penalty Study, with A.B. 16 being the fifth and final bill before us to study.

As you are aware, the topic of genetic marking analysis, or DNA evidence, has recently received national attention due to the advancements in technology and the growing number of innocent persons who have been released, according to the "Innocence Project" at the Cardozo School of Law in New York, which was founded by Barry Scheck. There have been 124 exonerations to date from the use of DNA evidence. These exonerations include persons who are on death row and those who are serving lesser sentences.

The bill before us relates to post-conviction relief, which is a request for a hearing on new evidence after a person has been convicted. Nevada currently does not have a procedure for post-conviction relief based upon DNA evidence.

Last session, this issue was before this Committee as Assembly Bill 354 of the 71st Legislative Session. The bill was heard in the Assembly Committee on Judiciary, but the topic was ultimately combined into the A.C.R. 3 Death Penalty Interim Study so the issue could be more thoroughly examined. During the work session the subcommittee unanimously voted to redraft A.B. 354 of the 71st Legislative Session, but included a slight modification to Section 4 of the bill providing for an arrest of judgment if the results of a genetic marker analysis are favorable to the petitioner.

Moving to the bill generally as whole, A.B. 16 allows for persons who have been convicted and sentenced to death to file a post-conviction petition requesting genetic marking analysis of evidence within the possession of the state. The court, at its discretion, may then order a hearing on the petition. The court must order a genetic marker analysis if the court finds that:

- A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained.
- The evidence is in a condition that allows it to be tested.
- The evidence was not previously subjected to genetic marker analysis involving the petitioner or the method of additional analysis may resolve an issue not previously resolved.

If the results of the petition are favorable to the petitioner, the court shall restore the petitioner to his pretrial status.

According to the "2001 National Conference of State Legislatures Survey of Other States' Laws," at least 26 other states now have laws that provide a window for offenders with claims of innocence to petition for post-conviction relief. Fifteen of the 26 states passed this type of legislation in 2001, when we were looking at it, and have already taken advantage of this new science.

I would like to turn it over to the experts to more fully discuss DNA evidence and why this legislation is needed for our state. I would particularly like Mr. Means, the Assistant Sheriff in Washoe County, and Stan Olsen to come forward.

Lieutenant Stan Olsen, Las Vegas Metropolitan Police Department (Metro), and Nevada Sheriff's and Chief's Association:
[Introduced himself.] With me today is the Assistant Sheriff, Don Means, with the Washoe County Sheriff's Department. He has some information and some suggested amendments (Exhibit C) and is speaking for the Metro lab and the Washoe County lab, the only two labs in the state.

Chairman Anderson:
Assistant Sheriff Means, have you shown the amendments to A.B. 16 to Ms. Leslie?

Don L. Means, Assistant Sheriff, Washoe County Sheriff's Office:
Yes. We met with her before we came in here.

We have a couple of points of clarification that I'd like to bring to the Committee.

In Section 2, subsection 4, when we're talking about the inventory of the evidence, I would like the Committee to be aware that there may be more than one inventory. There is the district court inventory and there is the individual department, the original jurisdiction's inventory of evidence. There may be, depending on the severity of the crime—if it was a task-force type situation—there may be four or five different inventories. So there might be some wording put in there to say "all inventories" or "all evidence" regarding the case, which may be in three or four different locations. I know there would be at least two locations, because you all know the vast majority of evidence never makes it into district court. Depending on when this happened, it may have happened to a point where some of the evidence was not actually analyzed at the time, to the degree of the technology that we have.

Are there any questions on that point? Or do you want to wait until the end?

Chairman Anderson:
Do you think a phrase like "all known evidence" would be sufficient to cover?

Don Means:
I would say "all available evidence" in any of the investigating agencies and the district court.

In Section 2, subsection 6(b), whether or not the evidence is in a condition that allows genetic analysis to be conducted will be unknown until it reaches the laboratory. There are cases where some evidence was stored improperly; it could have not been dried, it could have been contaminated with fluids from the body or things like feces, which would destroy DNA. We would not be able to tell if it was actually anything that could be tested until we got it into the laboratory.

There have also been unfortunate incidents where freezers have actually broken down in some jurisdictions and the samples were contaminated with black mold. We would not be able to tell what the

condition of that evidence was until it actually made it into the laboratory.

We are thinking about all 17 counties. A lot of things can happen and a lot of things have happened over the course of time.

Chairman Anderson:
You don't think it's covered by [Section 2, subsection 4(a)] "the inventory of all evidence within the possession or custody . . ." because if the evidence was destroyed by some methodology or some . . .

Don Means:
I think the concern was that we wouldn't know if there was DNA or not until we looked at the item of evidence. I think that was a concern.

In Section 2, subsection 7(a), the word "promptly," given the caseload of Las Vegas and Washoe County . . .

Chairman Anderson:
I'm sorry; I was under the impression you were speaking in support of the legislation.

Don Means:
We are. We just wanted to get some clarification for some of the issues. We are in support, but we wanted to make the Chair aware that there are some concerns.

Chairman Anderson:
Are these the issues that you brought up before? Let me go back and start again. I was under the impression that you were—are these issues that you brought, again, to Ms. Leslie's attention this morning?

Don Means:
That's correct.

Chairman Anderson:
This legislation has been out since January. This is a pre-filed piece of legislation and you brought it to her attention this morning?

Lt. Stan Olsen:
Jim Nadeau couldn't be here this morning. Apparently the amendments were submitted to Mr. Nadeau and Mr. Nadeau didn't recall getting them. It was apparently done electronically, and that's what caused the delay. As soon as I realized this, Mr. Means and I immediately got hold of Ms. Leslie.

Chairman Anderson:
This is the same piece of legislation that came out two years ago.

Don Means:
Mr. Chairman, I would like to apologize. I was contacted yesterday to come and speak today. I have actually been out of the laboratory business for the last six weeks. I was just here to voice some clarification.

Chairman Anderson:
I will allow you to proceed, but I was under the impression that you had already reviewed the material. In fact, this particular material is identical to another piece of legislation, which I just got through sending back per your request because it was word-for-word identical in format.

Don Means:
Mr. Chairman, again, I want to apologize; I've been out of the loop. I've been dealing with jail issues for the last six weeks. I would like to just basically show that there are different types of testing. I don't think that anybody's arguing that the bill shouldn't be passed. I think it is a very good bill. I just think that the real challenge is the condition of the evidence and the type of analysis that is going to be done.

Chairman Anderson:
Continue on, then, with "promptly."

Don Means:
[Referring to A.B. 16, Section 2, subsection 7(a)] "Promptly" would be because of the caseloads. I think that was a concern to both laboratories, as far as what "promptly" means; we didn't want to be in violation.

The other part would be if it had to go out for mitochondrial testing, which is extremely expensive. Neither laboratory has the capability to do mitochondrial testing, which could be valuable in these types of cases. It was something that was not foreseen 20 years ago. The testing of hair and bone fragments would be of value to the spirit of this bill.

Chairman Anderson:
Don't you think that the state would have taken that precaution if it was about to take somebody's life?

Don Means:
I just wanted to make sure. I think what they were concerned about was a cap and if they would actually be able to bill the state or have a laboratory, other than the in-house laboratory, be able to bill the state. I think that is what they were looking at. I have been involved in two cases where they sent out for mitochondrial testing.

In Section 2, subsection 11(a), we wanted to get rid of the words "blood sample" because basically, it is a biological sample. I know it has changed back and forth; it's been frustrating for me because I've got to

come in here and change it back and forth. I think we went to the term "biological specimen" so if it does need blood or saliva . . .

Chairman Anderson:
You want the words "biological specimen."

Don Means:
Yes, "biological specimen," and that's basically it. [Mr. Means said he would be glad to answer any questions.]

Chairman Anderson:
We will ask you to stay in the area since you are our one resident expert on DNA that we have with us.

Assemblywoman Ohrenschall:
I am confused about two things. What was it in subsection 11 that you want to eliminate?

Chairman Anderson:
I believe it is at line 37 on page 3 of the bill. Assistant Sheriff Means was indicating in (a) that "Extraction of biological specimen" rather than just "a specimen" would be helpful to the bill, which is an issue that the Assistant Sheriff has raised in the past. The preferred language is "biological specimen" and he would like to try to make that consistent throughout the statutes.

Assemblywoman Ohrenschall:
I must be looking at a different section; I don't see the word "biological."

Chairman Anderson:
He wants to add that in after the "Extraction of a specimen"; he wanted it to be specifically "biological" specimen. Is that correct?

Don Means:
Yes. "Sample of blood" was what we asked for in the past; however, the new current STR (Standard Tandem Repeat) testing is just a swab on the inside of the cheek.

Assemblywoman Ohrenschall:
What about the mitochondrial?

Don Means:
Mitochondrial DNA would be the same as far as the standards go. The testing is vastly different. You only get the maternal link; so you only get half of the information.

Assemblywoman Ohrenschall:
So do you want that included in or taken out?

Don Means:
No, we wouldn't need that. What we're bringing up is that the mitochondrial DNA would be testing that would exceed the capabilities of the Las Vegas and Washoe County laboratories.

Ben Blinn, Citizen:
I am definitely for this bill. Anything that would exonerate an innocent man or give him mercy, I think we need to address. In some cases where the appeals have been used up—this DNA is a recent thing—these people wouldn't have any recourse that I can see; this provides it. In that way I think it's a good bill.

There are a couple ideas I'd like to put before you. One of those, I think all the evidence, known or new—because sometimes you learn something that's new that you didn't know how to do before—I saw them doing DNA [testing] on plants that were in an area; they proved that people were there by the plants that were in the back of a truck. So new evidence could sometimes be considered with the DNA.

I think that all the evidence in all jurisdictions pertaining to a case should be at the disposal of the lab and if anything has been destroyed or is missing, to give that information to the court. Primarily, to spell it out, as we know from the O.J. Simpson case, they found blood with markers in it in places that they couldn't explain. So I think that counting for the evidence, if there's an amount of evidence that's missing when it's inventoried, that fact should be noted to the court.

The other thing, if our lab here in Nevada is not quite up to the task of finding out what's happened and we have a better lab that can free any innocent person, a provision should be made for that. I definitely approve of your action.

Michael Pescetta, Attorney at Law, Las Vegas, Nevada:
I am testifying as an attorney who practices in the area of capital defense work and as a member of Nevada Attorneys for Criminal Justice (NACJ), not as a representative of the Federal Public Defender's Office.

Assembly Bill 16 is going to be a useful bill. It is very narrow at this point; it applies only to capital

cases, a very narrow class of cases. I've submitted a brief memo (Exhibit D) and some proposed alterations to the Chair because I'm a lawyer, and, therefore, paranoid about leaving anything unclear. I do suggest that in Section 2, subsection 1, that it might be useful to insert language indicating that the remedy provided by this petition procedure is in addition to any other remedy that may be available by law.

Currently, when there is DNA testing it's normally done in the context of a state habeas proceeding; *Nevada Revised Statutes* (NRS) 34.780, sub 2, allows discovery in such proceedings. I think the advantage of having this bill will be to ensure that, for an individual who may no longer have access to the state habeas remedy, that this petition procedure would be available for that inmate.

Also in Section 2, subsection 5 of the bill, the current language provides the court, in its sole discretion, to determine whether there will be a hearing on the petition; once the court makes a decision under Section 2, subsection 10, that decision is immune from appellate review. I've suggested that whenever a petition of this sort is filed that the court should be required to have a hearing, at least, to bring the parties into court and find out whether there is evidence that would support an analysis for DNA and genetic markers. I think a decision whether a test should not be conducted should be subject to appellate review since that's basically outcome-determinative. If the testing were done and it proved to be exculpatory, but there were no mechanisms for taking an appeal from the denial of a test, then you would have somebody who might well be exonerated but has no remedy beyond the district court.

The only other thing that I wanted to mention was that in Section 2, subsection 6(a), the testing is required if the court finds a "reasonable probability" that the results would be exculpatory. I suggest the wording be changed to a "reasonable possibility." I think we have to look at the context in which these kinds of petitions will arise. Everyone who asks for one of these tests will have been convicted beyond a reasonable doubt; so there is always going to be a good deal of evidence that he or she is, in fact, guilty of the crime. One of the documents that was presented to the A.C.R. 3 Committee was the Department of Justice's report on DNA exonerations, which had numerous cases in which there where many positive eye-witness identifications, strong circumstantial evidence, and sometimes even confessions. The point of DNA analysis is to cut through that and show scientifically that this individual is, in fact, innocent. What I would suggest by changing "reasonable probability" to "reasonable possibility" is to make this testing available to the broadest class of people because, ultimately, the question with DNA testing is whether there is an enormous amount of evidence against the defendant. DNA evidence may show that all that evidence is mistaken whether there was one eyewitness or ten. That's why I think that the lower standard of "reasonable possibility" would be appropriate for this testing procedure. But with those minor suggestions, I do think we support having a DNA bill for a specific petition procedure to obtain this sort of testing in capital cases.

Chairman Anderson:
Did you hear the suggestions made by Assistant Sheriff Means to the bill? I'm sure you don't have an objection to the "biological specimen" discussion or the qualifying statement relative to the inventory. Isn't that already done?

Michael Pescetta:
I would be happy to agree with everything that Mr. Means brought up. Certainly, the changes in the language are unexceptionable; I agree that there are going to be instances where you just don't know whether there is testable material in some of the evidence that comes up on this inventory until it is actually tested. I would guess that is something that would be worked out in practice. The short answer is yes; I would support what Mr. Means said.

Chairman Anderson:
Did you have an opportunity to share your suggestions with the interim committee chair,

Assemblywoman Leslie?

Michael Pescetta:
I submitted an alternate version to the interim subcommittee that was tabbed "AA" of the appendix to the session document; the subcommittee decided to go ahead with the previous version of A.B. 354 of the 71st Legislative Session. I have communicated my suggestions to Ms. Leslie; I haven't talk to her about it, but she received them last week.

Chairman Anderson:
Do these suggestions conform to what you had suggested to the interim study or are they new, original thoughts?

Michael Pescetta:
They are actually a little milder. The version that we proposed to the interim subcommittee also included proposed a provision for a disputable presumption if genetic evidence was collected and lost by the state. If, in fact, such evidence was lost or destroyed while it was in the state's possession, a rebuttable presumption would arise and would be favorable to the defendant if it had existed and had been able to be tested. There was not much enthusiasm for that. I think these other changes are fairly modest changes to the bill that was already drafted before we got into discussion.

Chairman Anderson:
We have the memorandum now from the Washoe County Sheriff's Office and the Las Vegas Metropolitan Police Department (Exhibit C); we have Mr. Pescetta's memorandum (Exhibit D).

[The Chair asked if there was anyone else who wised to testify on A.B. 16.]

Let me close the hearing on A.B. 16. I suggest we bring it back to Committee to take a look at the two amendments and hold it over for the work session where we can have some discussion relative to how these amendments play out. I want to make sure that I have sufficient time to review them before I make recommendations on them.

Let's open the hearing on A.B. 103, a piece of legislation we have heard in the past.

Assembly Bill 103: Requires Director of Department to submit list to each county clerk providing certain information concerning offenders who were released from prison or discharged from parole during previous month. (BDR 14-532)

Glen Whorton, Assistant Director of Operations, Nevada Department of Corrections:
[Introduced himself.] We appreciate your courtesy in hearing this bill. Assembly Bill 103 is a proposal from the Department of Corrections to change NRS 176.335 to delete a requirement for the Department of Corrections to return a Judgment of Conviction to the County Clerk.

We believe this is an archaic component of the *Nevada Revised Statutes*; it dates back to 1967. Our corporate memory on this issue runs back about 28 years. We do not recollect any instance in which the Department of Corrections has engaged in this particular process per the statute. This law was put forward prior to technological advances that provided the facts by e-mail, Internet, and easy telephone access to officials who might have this type of information for individuals who are interested.

We believe that it is counter-intuitive for an individual to seek information from a county clerk regarding the status of an inmate's or former inmate's sentence and, in that regard, we believe it should be taken out of statute.

Exhibit 4

ASSEMBLY BILL NO. 16–COMMITTEE ON JUDICIARY

(ON BEHALF OF LEGISLATIVE COMMITTEE TO STUDY DEATH PENALTY AND RELATED DNA TESTING (ACR 3 OF THE 17TH SPECIAL SESSION))

PREFILED JANUARY 27, 2003

Referred to Committee on Judiciary

SUMMARY—Provides for genetic marker analysis of certain evidence related to conviction of certain offenders sentenced to death. (BDR 14-200)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: Contains Appropriation not included in Executive Budget.

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EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

AN ACT relating to crimes; providing for genetic marker analysis of certain evidence relating to the conviction of certain offenders who have been sentenced to death; providing for a stay of execution pending the results of the analysis; requiring a court to arrest judgment if such an analysis is favorable to the petitioner; making an appropriation; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 176 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. ***1. A person convicted of a crime and under sentence of death who meets the requirements of this section may file a postconviction petition requesting a genetic marker analysis of evidence within the possession or custody of the State which may contain genetic marker information relating to the investigation or prosecution that resulted in the judgment of conviction and sentence of death. The petition must include,***

without limitation, the date scheduled for the execution, if it has been scheduled.

2. Such a petition must be filed with the clerk of the district court for the county in which the petitioner was convicted on a form prescribed by the Department of Corrections. A copy of the petition must be served by registered mail upon:

(a) The Attorney General; and

(b) The district attorney in the county in which the petitioner was convicted.

3. If a petition is filed pursuant to this section, the court shall immediately issue an order requiring, during the pendency of the proceeding, the prosecuting attorney to preserve all evidence within the possession or custody of the State that may be subjected to genetic marker analysis pursuant to this section.

4. Within 30 days after receiving notice of a petition pursuant to this section, the prosecuting attorney:

(a) Shall prepare an inventory of the evidence within the possession or custody of the State that may be subjected to analysis pursuant to this section;

(b) Shall submit a copy of the inventory to the petitioner and the court; and

(c) May file a written response to the petition with the court.

5. The court, in its sole discretion, may order a hearing on the petition.

6. The court shall order a genetic marker analysis if the court finds that:

(a) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition;

(b) The evidence to be analyzed exists and is in a condition that allows genetic marker analysis to be conducted as requested in the petition; and

(c) The evidence was not previously subjected to:

(1) A genetic marker analysis involving the petitioner; or

(2) The method of analysis requested in the petition, and the method of additional analysis may resolve an issue not resolved by a previous analysis.

7. If the court orders a genetic marker analysis pursuant to subsection 6, the court shall:

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

(b) Select a forensic laboratory to conduct or oversee the analysis. The forensic laboratory selected by the court must:

(1) Be operated by this state or one of its political subdivisions; and

(2) Satisfy or exceed the standards for quality assurance that are established by the Federal Bureau of Investigation for participation in CODIS. As used in this subparagraph, "CODIS" has the meaning ascribed to it in NRS 176.0911.

(c) Order the forensic laboratory selected pursuant to paragraph (b) to perform a genetic marker analysis of evidence. The analysis to be performed and evidence to be analyzed must:

(1) Be specified in the order; and

(2) Include such analysis, testing and comparison of genetic marker information contained in the evidence and the genetic marker information of the petitioner as the court determines appropriate under the circumstances.

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

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

8. If the results of a genetic marker analysis performed pursuant to this section are favorable to the petitioner, the court shall arrest judgment as provided in NRS 176.525.

9. The court shall dismiss a petition filed pursuant to this section if:

(a) The requirements for ordering a genetic marker analysis pursuant to this section are not satisfied; or

(b) The results of a genetic marker analysis performed pursuant to this section are not favorable to the petitioner.

10. An order of a court granting or dismissing a petition pursuant to this section is final and not subject to judicial review.

11. For the purposes of a genetic marker analysis pursuant to this section, a person under sentence of death who files a petition pursuant to this section shall be deemed to consent to the:

(a) Extraction of a specimen, including, without limitation, a sample of blood, from him to determine his genetic marker information; and

(b) Release and use of genetic marker information concerning the petitioner.

12. The expense of an analysis ordered pursuant to this section is a charge against the Department of Corrections and must be paid upon approval by the Board of State Prison Commissioners as other claims against the State are paid.

Sec. 3. ***1. After a judge grants a petition requesting a genetic marker analysis pursuant to section 2 of this act, if a judge determines that the genetic marker analysis cannot be completed before the date of the execution of the petitioner, the judge shall stay the execution of the judgment of death pending the results of the analysis.***

2. If the results of an analysis ordered and conducted pursuant to section 2 of this act are not favorable to the petitioner:

(a) Except as otherwise provided in paragraph (b), the Director of the Department of Corrections shall, in due course, execute the judgment of death.

(b) If the judgment of death has been stayed pursuant to subsection 1, the judge shall cause a certified copy of his order staying the execution of the judgment and a certified copy of the report of genetic marker analysis that indicates results which are not favorable to the petitioner to be immediately forwarded by the clerk of the court to the district attorney. Upon receipt, the district attorney shall pursue the issuance of a new warrant of execution of the judgment of death in the manner provided in NRS 176.495.

Sec. 4. NRS 176.525 is hereby amended to read as follows:

176.525 The court shall arrest judgment if the indictment, information or complaint does not charge an offense ***,*** ~~[or]~~ if the court was without jurisdiction of the offense charged ~~[. The]~~ ***or if the results of a genetic marker analysis performed pursuant to section 2 of this act are favorable to the petitioner. Except when the motion is based upon the results of a genetic marker analysis performed pursuant to section 2 of this act, the*** motion in arrest of judgment ~~[shall]~~ ***must*** be made within 7 days after determination of guilt or within such further time as the court may fix during the 7-day period.

Sec. 5. 1. There is hereby appropriated from the State General Fund to the Department of Corrections the sum of $6,250 for the expense of genetic marker analyses performed pursuant to section 2 of this act.

2. Any remaining balance of the appropriation made by subsection 1 must not be committed for expenditure after June 30, 2005, and reverts to the State General Fund as soon as all payments of money committed have been made.

Sec. 6. The Department of Corrections, in consultation with the Attorney General, shall, on or before August 1, 2003:

1. Prescribe the form for a petition requesting the genetic marker analysis of evidence pursuant to section 2 of this act; and

2. Provide a copy of the form and a copy of the provisions of section 2 of this act to each person in the custody of the Department who is under a sentence of death.

Sec. 7. This act becomes effective upon passage and approval.

Exhibit 3

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CLERK OF THE COURT

RPLY
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Telephone: (702) 892-3500
Facsimile: (702) 386-1946
tbarrick@gwwo.com
Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

* * *

KIRSTIN BLAISE LOBATO,

Petitioner,

Vs.

THE STATE OF NEVADA,

Respondent.

Case No.: C177394
Dept No.: II

REPLY IN SUPPORT OF MOTION TO RECONSIDER ORDER RE: PETITION REQUESTING POST-CONVICTION DNA TESTING PURSUANT TO NRS §176.0918

REPLY IN SUPPORT OF MOTION TO RECONSIDER ORDER RE: PETITION REQUESTING POST-CONVICTION DNA TESTING PURSUANT TO NRS §176.0918

Pursuant to Eighth Judicial District Court Local Rule 2.24, Petitioner, Kirstin Blaise Lobato, by and through her counsel of record, Travis Barrick, hereby submits her Reply in Support of the Motion to Reconsider Order Re: Petition Requesting Post-Conviction DNA Testing Pursuant to NRS §176.0918 ("Reply"). This Reply is based upon the papers and pleadings on file herein, the Points and Authorities below and upon such oral argument as the Court should entertain at the hearing thereon.

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DATED this 12th day of August 2011.

GALLIAN WILCOX WELKER, OLSON & BECKSTROM, LC

Travis Barrick, #9257
540 E. St. Louis Avenue
Las Vegas, Nevada 89104
Attorneys for Petitioner

POINTS AND AUTHORITIES

I. Procedural Posture.

On March 1, 2011, Ms. Lobato filed her Petition Requesting Post-Conviction DNA Testing Pursuant to NRS §176.0918 (the "DNA Petition").

On June 6, 2011, the Court heard oral argument on the DNA Petition and denied the DNA Petition.

On June 27, 2011, the Court's order denying Ms. Lobato's DNA Petition (the "DNA Order") was filed, but not noticed or served upon Ms. Lobato.

On August 1, 2011, pursuant to EDCR 2.24, Ms. Lobato filed the instant Motion to Reconsider the DNA Order. The hearing on the Motion to Reconsider is set for September 1, 2011.

On August 2, 2011, a Notice of Entry of Order of the DNA Order was filed and served upon Ms. Lobato and the time for appealing the DNA Order does not run until September 1, 2011; that is, 30 days after the filing and service of the Notice of Entry of Order.

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II. The Court has jurisdiction to hear the instant Motion to Reconsider.

A. The *Buffington* case is distinguishable on the facts and the holding.

The State cites the *Buffington* case[1] for the proposition that when Ms. Lobato appealed the denial of her *habeas corpus* petition, the District Court lost "jurisdiction over a case until the remittitur is issued." There, the issue was of a gap in timing of eleven days between the time a remittitur was issued by the Supreme Court and received by the District Court. The issues appealed, the issues remitted and the issues of the inappropriate sentencing were **singular and identical**. The District Court simply acted too soon after the remittitur.

Here, the facts could not be more distinguishable. Ms. Lobato has not appealed the DNA Order. Thus, Ms. Lobato's DNA Petition is not yet in the province of the Supreme Court or even subject to remittitur. And opposite to the facts and holding in *Buffington*, Ms. Lobato's *habeas corpus* petition has nothing factually or legally in common with her DNA Petition.

B. The State is confused regarding the nature of Ms. Lobato's DNA Petition.

The State's error lies in their misapprehension of the statute under which Ms. Lobato filed her DNA Petition. NRS §176.0918(14) specifically provides:

> The remedy provided by this section is in addition to, is not a substitute for and is not exclusive of any other remedy, right of action or proceeding available to a person convicted of a crime.

Habeas corpus petitions are a direct attack on the conviction and immediate release from confinement. The U.S. Supreme Court held in the *Dotson* case[2] that when a prisoner's claim would not 'necessarily spell speedier release,' that claim does not lie at 'the core of *habeas corpus*."

Here, Ms. Lobato's DNA Petition is not a direct attack on her conviction. Thus, Ms. Lobato's DNA Petition is in no way a sub-set to or ancillary to her *habeas corpus* petition and

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[1] Buffington v. State, 110 Nev. 124, 126 868 P.2d 643, 644 (1994).
[2] Wilkinson v. Dostson, 544 U.S. 74, 82, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005).

her appeal of her *habeas corpus* petition has no controlling nexus to her DNA Petition.

This is precisely the kind of confusion that Ms. Lobato sought to address by way of her Motion to Assign a Civil Case Number, which was filed on September 21, 2010 and denied on March 1, 2011. As a simplistic result, the State incorrectly views all of Ms. Lobato's actions as one action, simply because they share a case number.

C. The State has waived any objection to Ms. Lobato's substantive claims.

By way of its Opposition, the State failed to address any of Ms. Lobato's substantive arguments in favor of her Motion for Reconsideration; specifically (i) that certain pieces of evidence for which Ms. Lobato requested fall outside the Court's findings of fact and (ii) her request for rulings on the specific issues raised in her Motion to Reconsider. The State's failure to address these issues amounts to concession under both Rule 2.20 and Rule 3.20 of the Eighth Judicial District Local Rules, which provide that "[f]ailure of the opposing party to serve and file written opposition may be construed as an admission that the motion is meritorious and a consent to granting of the same."

III. CONCLUSION.

For the reasons set forth above, Ms. Lobato respectfully requests that the Court reconsider its Ruling and Order and (i) permit Ms. Lobato to conduct testing on a) the Victim's Rectal Swabs and Smears and b) the Pieces of Plastic and Silver from the Victim's Rectum and (ii) enter rulings on the specific conclusions of law requested by Ms. Lobato.

DATED this 16th day of August 2011.

GALLIAN WILCOX WELKER, OLSON & BECKSTROM, LC

Travis Barrick, #9257
540 E. St. Louis Avenue
Las Vegas, Nevada 89104
Attorneys for Petitioner

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 11th day of August, 2011, a copy of the foregoing upon each of the parties by hand delivery and depositing a copy of same in a sealed envelope in the U. S. mail, registered, first-class postage fully prepaid, and addressed to those counsel of record:

David Rogers, Esq. District Attorney's Office 200 Lewis Avenue Las Vegas, Nevada 89155	Catherine Cortez-Masto, Esq. Office of the Attorney General 555 E. Washington Avenue, Suite 3900 Las Vegas, NV 89101

Tonya Baltazar, an Employee of
GALLIAN, WILCOX, WELKER
OLSON & BECKSTROM LC

Exhibit 2

OPPS
DAVID ROGER
Clark County District Attorney
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TYLER D. SMITH
Deputized Law Clerk
Nevada Bar #011870
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(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- KIRSTIN BLAISE LOBATO, #1691351 Defendant.	CASE NO: 01C177394 DEPT NO: II

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER ORDER RE: PETITION REQUESTING POST-CONVICTION DNA TESTING PURSUANT TO NRS 176.0918

DATE OF HEARING: September 1, 2011
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through TYLER D. SMITH, Deputized Law Clerk, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to Reconsider Order Re: Petition Requesting Post-Conviction DNA Testing Pursuant To NRS 176.0918.

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Kirstin Blaise Lobato, hereinafter "Defendant," was found guilty of Voluntary Manslaughter with Use of a Deadly Weapon (Category B Felony NRS 200.050, 200.080, 193.165) and Sexual Penetration of a Dead Human Body (Category A Felony NRS 201.450) on October 6, 2006. A Judgment of Conviction was filed on February 14, 2007, and remittitur issued from Petitioner's Direct Appeal on October 14, 2009.

On May 5, 2010, Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction). The State filed its Response on August 20, 2010. Defendant filed her Reply on October 2, 2010. The district court heard argument and denied Defendant's petition on March 1, 2011. The court's Findings of Fact, Conclusions of Law, and Order denying the petition were filed on June 16, 2011. Defendant filed a Notice of Appeal appealing the denial of her petition on August 1, 2011. That appeal has not been resolved, and no remittitur has issued.

On March 1, 2011, Defendant filed a Petition Requesting Post-Conviction DNA Testing Pursuant to NRS 176.0918. The State filed its Opposition on April 14, 2011. The district court heard argument and denied the petition on June 7, 2011. The court's Findings of Fact, Conclusions of Law, and Order denying the petition were filed on July 27, 2011. Defendant filed the instant Motion to Reconsider on August 1, 2011. The State's opposition is as follows.

ARGUMENT

I

THE DISTRICT COURT LACKS JURISDICTION TO CONSIDER DEFENDANT'S MOTION

The district court currently lacks jurisdiction over Defendant's case.

Jurisdiction in an appeal is vested solely in the supreme court until the

> remittitur issues to the district court. Under the relevant statutes, the Supreme Court has control and supervision of an appealed matter from the filing of the notice of appeal until the issuance of the certificate of judgment. NRS 177.155; 177.305. The "certificate of judgment" and various other documents constitute the remittitur. See NRAP 41(a). From these provisions, we conclude that a district judge lacks jurisdiction over a case until the remittitur is issued...

Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994). August 1, 2011, Defendant filed a notice appeal with the Nevada Supreme Court. That appeal has not been resolved and no Remittitur has been issued. Thus, the district court lacks jurisdiction over Defendant's case, and her instant motion should be vacated.

CONCLUSION

Based on the foregoing arguments, Defendant's motion should be denied.

DATED this 10th day of August, 2011.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/TYLER D. SMITH
TYLER D. SMITH
Deputized Law Clerk
Nevada Bar #011870

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing, was made this 10th day of August, 2011, by facsimile transmission to:

TRAVIS D. BARRICK, ESQ.
FAX: 386-1946

/s/Deana Daniels
Secretary for the District Attorney's Office

Exhibit 1

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CLERK OF THE COURT

MRCN
Travis Barrick, #9257
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tbarrick@gwwo.com
Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

* * *

KIRSTIN BLAISE LOBATO,

Petitioner,

Vs.

THE STATE OF NEVADA,

Respondent.

Case No.: C177394
Dept No.: II

MOTION TO RECONSIDER ORDER RE: PETITION REQUESTING POST-CONVICTION DNA TESTING PURSUANT TO NRS §176.0918

MOTION TO RECONSIDER ORDER RE: PETITION REQUESTING POST-CONVICTION DNA TESTING PURSUANT TO NRS §176.0918

Pursuant to Eighth Judicial District Court Local Rule 2.24, Petitioner, Kirstin Blaise Lobato, by and through her counsel of record, Travis Barrick, hereby submits her Motion to Reconsider Order Re: Petition Requesting Post-Conviction DNA Testing Pursuant to NRS §176.0918 ("Motion"). This Motion is based upon the papers and pleadings on file herein, the Points and Authorities below and upon such oral argument as the Court should entertain at the hearing thereon.

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DATED this 1st day of August 2011.

GALLIAN WILCOX WELKER, OLSON
& BECKSTROM, LC

Travis Barrick, #9257
540 E. St. Louis Avenue
Las Vegas, Nevada 89104
Attorneys for Petitioner

NOTICE OF MOTION

PLEASE TAKE NOTICE that counsel for Petitioner will bring the aforementioned Motion to Reconsider Order Re: Petition Requesting Post-Conviction DNA Testing Pursuant to NRS §176.0918 on for hearing before the above entitled Court in Department II on the 1st th day of September, 2011, at 9:00 am/pm.

DATED this 1st day of August 2011.

GALLIAN WILCOX WELKER, OLSON
& BECKSTROM, LC

Travis Barrick, #9257
540 E. St. Louis Avenue
Las Vegas, Nevada 89104
Attorneys for Petitioner

POINTS AND AUTHORITIES

I. Procedural Posture.

On March 1, 2011, Ms. Lobato filed her Petition Requesting Post-Conviction DNA Testing pursuant to NRS §176.0918 (the "Petition").

On April 14, 2011, the State filed its Opposition to Ms. Lobato's Petition.

On April 28, 2011, Ms. Lobato filed her Reply in Support of her Petition.

On June 30, 2011, the Court held its hearing on Ms. Lobato's Petition. In denying Ms.

Lobato's Petition, the Court made certain findings of fact and conclusions of law (the "Ruling").

On July 27, 2011, an Order was filed with the Court that set forth the Court's Ruling (the "Order"). As of the date of this Motion, a Notice of Entry of Order has yet to be filed or served upon Ms. Lobato.

II. The Court has jurisdiction to hear the instant Motion to Reconsider.

Pursuant to EDCR 2.24, "a party seeking reconsideration of a ruling of the court, other than any order which may be addressed by motion pursuant to NRCP 50(b), 59, or 60, must file a motion for such relief within 10 days after service of written notice of the order."

Here, Ms. Lobato has filed her Motion within the time provided by EDCR 2.24 and none of the exceptions set forth in the rule apply.

III. Ms. Lobato requests that the Court revise its Ruling and Order.

A. Certain pieces of evidence for which Ms. Lobato requested testing fall outside the scope of the Court's findings of fact.

By way of its Ruling and Order, the Court made the following Findings of Fact:

> 6. The underlying facts of this case demonstrate that the victim was killed and discovered in a trash dumpster enclosure that was accessible by anyone in the public. This is not a pristine environment such as a private home in which a limited number of individuals had access.
>
> 8. Based upon the underlying facts of this case and the totality of the circumstances, particularly that the crime scene was impacted by large numbers of individuals ...

The Court's appears to accept the State's argument that any biological material suitable for testing that existed outside the victim's body was potentially exposed to multiple biological sources due to the "environment;" thus, any DNA markers derived from those sources would have no probative value.

However, certain pieces of evidence for which Ms. Lobato requested testing fall outside the scope of the Court's findings of fact:

> The Victim's Rectal Swabs and Smears from these Swabs; and
> Pieces of Plastic and Silver from the Victim's Rectum.

These pieces of evidence were found ***inside*** Mr. Bailey. The State has made no argument (i) that these particular pieces of evidence were ever exposed to the non-pristine environment of the trash enclosure or (ii) that anyone other than Mr. Bailey's killer had access to his rectum. Thus, the argument that the interior of his rectum were somehow inadvertently exposed to a contaminated environment stretches credulity. Certainly, anything that was deposited ***in*** that body part would be material to the underlying crime and outside the scope of the Court's findings of fact.

B. Ms. Lobato requests that the Court make specific rulings on the issues raised by Ms. Lobato in her Reply and in oral argument.

By way of her Reply and oral argument, Petitioner specifically requested the Court to make three specific rulings:

1) That People v. Brown, 46 Cal.3d 432,448 785 P.2d 1135, 250 Cal. Rptr. 604 (1988) is inapplicable as the standard for reasonable possibility under NRS 176.0918,

2) That Valdez v. State, 124 Nev. 97, 196 P.3d 465 (2008) is the applicable standard for reasonable possibility under NRS 176.0918 and

3) That Strickland v. Washington, 466 U.S 668, 104 S.Ct. 2052 (1984) is applicable to petitions for habeas corpus and is not applicable to NRS 176.0918.

At the hearing on Ms. Lobato's Petition, the Court did include these three specific requests in its Ruling or subsequent Order.

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IV. CONCLUSION.

For the reasons set forth above, Ms. Lobato respectfully requests that the Court reconsider its Ruling and Order and (i) permit Ms. Lobato to conduct testing on a) the Victim's Rectal Swabs and Smears and b) the Pieces of Plastic and Silver from the Victim's Rectum and (ii) enter rulings on the specific conclusions of law requested by Ms. Lobato.

DATED this 1th day of August 2011.

GALLIAN WILCOX WELKER, OLSON & BECKSTROM, LC

Travis Barrick, #9287
540 E. St. Louis Avenue
Las Vegas, Nevada 89104
Attorneys for Petitioner

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 12th day of August, 2011, a copy of the foregoing upon each of the parties by hand delivery and depositing a copy of same in a sealed envelope in the U. S. mail, registered, first-class postage fully prepaid, and addressed to those counsel of record:

David Rogers, Esq. District Attorney's Office 200 Lewis Avenue Las Vegas. Nevada 89155	Catherine Cortez-Masto, Esq. Office of the Attorney General 555 E. Washington Avenue, Suite 3900 Las Vegas, NV 89101

An Employee of
GALLIAN, WILCOX, WELKER
OLSON & BECKSTROM LC

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

KIRSTIN BLAISE LOBATO, Petitioner, vs. STATE OF NEVADA, Respondents.	Case No.: 59147

PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE

Attorney for Petitioner Travis N. Barrick, SBN 9257 Gallian Wilcox Welker Olson & Beckstrom, LC 540 E St. Louis Avenue Las Vegas, Nevada 89104	Attorneys for Respondents David Roger, SBN 2781 Sandra K. Digiacomo, SBN 2781 Tyler D. Smith, SBN 11870 Clark County District Attorney 200 Lewis Avenue Las Vegas, NV 89155
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I. STATEMENT OF THE ISSUES.

A. Whether the District Court's Order is appealable?
B. Whether Ms. Lobato's appeal was timely filed?

II. STATEMENT OF THE CASE.

On March 1, 2011, Ms. Lobato filed her Petition Requesting Post-Conviction DNA Testing Pursuant to NRS §176.0918 (the "DNA Petition").

On April 14, 2011, the State filed their Opposition to the DNA Petition.

On April 28, 2011, Ms. Lobato filed her Reply in Support of the DNA Petition.

On June 7, 2011, the District Court held its hearing on the DNA Petition and made its rulings from the bench.

On July 27, 2011, the District Court issued and filed its Order on the DNA Petition. The Notice of Entry of Order on the DNA Petition **was not filed until August 2, 2011**.

On August 1, 2011, Ms. Lobato filed (i) her Notice of Appeal of the Order on her Petition for *Habeas Corpus* ("Habeas Petition") and (ii) her Motion to Reconsider the District Court's Order on the DNA Petition pursuant to EDCR 2.24.[1] The District Court set the hearing on the Motion to Reconsider on September 1, 2011.

On August 10, 2011, the State filed its Opposition to the Motion to Reconsider wherein the State asserted that the District Court did not have jurisdiction to consider the Motion to Reconsider on the ground that the DNA Petition was joined with the previously filed Notice of Appeal on her Habeas Petition.[2]

On August 16, 2011, Ms. Lobato filed her Reply in Support of the Motion to Reconsider, wherein she (i) disputed the State's assertion that the District Court lacked jurisdiction, (ii) argued that her DNA Petition was not subject to the law of *habeas corpus* and (iii) that by its

[1] *See* Ms. Lobato's Motion for Reconsideration, attached as Exhibit 1.
[2] *See* the State's Opposition to Ms. Lobato's Motion for Reconsideration, attached as Exhibit 2.

silence, the State had waived any objection to Ms. Lobato's substantive claims.[3]

On September 1, 2011, the District Court held its hearing on the Motion to Reconsider. The District Court rejected the State's argument that it did not have jurisdiction to hear the Motion to Reconsider but then summarily denied it. That same day, Ms. Lobato filed her Notice of Appeal and Case Appeal Statement on the DNA Petition.

III. ARGUMENT.

A. Standard of Review.

The Court is correct that NRS §176.0918 does not explicitly contain the right to appeal a District Order denying a DNA petition, such as Ms. Lobato's. However, neither does NRS §176.0918 contain an explicit prohibition of appeal and is, in fact, silent on the issue.

In the most recent case on the subject, the Nevada Supreme Court observed that a statute is ambiguous if it "is capable of being understood in two or more senses by reasonably informed persons." Nevada State Dem. Party v. Nevada Rep. Party, 256 P.3d 1, 5, 2011 LEXIS 57, 10, citing McKay v. Board of Supervisors, 102 Nev. 644, 649, 730 P.2d 438, 442. If a statute is ambiguous or lacks plain meaning, "a court should consult other sources such as legislative history, legislative intent and analogous statutory provisions." Nevada State Dem. Party v. Nevada Rep. Party, 256 P.3d at 5, citing State, Div. of Insurance v. State Farm, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000). There, NRS §304.240(1) lacked specific language on the issue of filling vacancies in major political party nominations.

Here, as in NRS §304.240(1), the statute in question, NRS §176.0918 is ambiguous because it lacks plain meaning on whether a District Court's order on a DNA petition is appealable. Thus, this Court "should consult other sources such as legislative history, legislative intent and analogous statutory provisions." *Id.*

[3] *See* Ms. Lobato's Reply in Support of Motion to Reconsider, attached as Exhibit 3.

B. The unambiguous intent of the Nevada legislature was to provide appellate review of a District Court order denying a DNA Petition.

In 2003, AB 16[4] was introduced which ultimately created NRS §176.0918. The original language of AB 16, Section2(10) provided "An order of a court granting or dismissing a petition pursuant to this section is final and not subject to judicial review."

During the March 17, 2003 Meeting of the Assembly Committee on Judiciary which considered AB 16, Las Vegas attorney Michael Pescetta testified as a guest of the committee.[5] In his remarks, Mr. Pescetta testified as follows: "I think a decision whether a test should not be conducted should be subject to appellate review since that's basically outcome-determinative."

In support of his comments, Mr. Pescetta submitted a Memorandum (the "Pescetta Memorandum")[6] to the Chairman of the Assembly Committee on Judiciary wherein he set forth his rationale for appellate review:

> Section 2(10) of the proposed bill currently provides that the decision whether or not to conduct testing is immune from any appellate review. Again, since this decision will determine whether or not testing will even be allowed, it should be subject to appellate scrutiny, as are virtually all decisions of the district courts. Language is provided in the attached version of the bill on both of these points.

During the March 20, 2003 Meeting of the Assembly Committee on Judiciary, AB 16 was duly amended by deleting Section 2(10).[7] "This change would provide that the order of the court granting or denying the petition be subject to judicial review."[8]

During the May 22, 2003 Meeting of the Senate Committee on Judiciary, AB 16 was amended and unanimously passed to provide for appellate review by deleting Section 2(10).[9] Included in the minutes of the May 22, 2003 Senate hearings was a memorandum from the

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[4] *See* AB 16, as originally submitted, attached as Exhibit 4.
[5] *See* March 17, 2003 Minutes of Assembly Committee on Judiciary, pertinent portions attached as Exhibit 5.
[6] *See* the Pescetta Memorandum, attached as Exhibit 6.
[7] *See* March 20, 2003 Minutes of Assembly Committee on Judiciary, pertinent portions attached as Exhibit 7.
[8] *See* March 20, 2003 Minutes, page 11.
[9] *See* March 22, 2003 Minutes of Senate Committee on Judiciary, pertinent portions attached as Exhibit 8.

Clark County District Attorney in unequivocal support of judicial review.[10]

In its final adopted form as Chapter 335, NRS §176 does not contain the original prohibition against judicial review.[11] This fact clearly evinces the legislative intent that an order on a DNA petition from the District Court is subject to appellate review. At no time in subsequent legislation was this intent altered or amended.

C. Ms. Lobato's DNA Petition is based upon a civil right and remedy, and is therefore subject to NRAP §3A(b) and NRAP §4(a).

NRS §176.0918(14) provides that a petition for post-conviction DNA testing is "in addition to, is not a substitute for and is not exclusive of any other remedy, right of action or proceeding available to a person convicted of a crime."

According to the U.S. Supreme Court, the denial of a petition for post-conviction DNA testing is not subject to the law of §2254 habeas corpus relief and "is properly pursued in a §1983 action." Skinner v. Switzer, 131 S Ct. 1289, 1293, 179 L. Ed. 2d 233, 239, 2011 LEXIS 1905 (2011). The U.S. Supreme Court took up the *Skinner* case to resolve the diverse responses of the various Circuit Courts of Appeal on the characterization of such a claim. Citing the *Dotson* case where the Court undertook a comprehensive analysis of the differences between §1983 actions and §2254, the Court characterized DNA petitions as subject to §1983 and not §2254 because a DNA petition is not a direct attack on the petitioner's conviction and would not "necessarily spell speedier release." *See* Wilkinson v. Dotson, 544 U.S. 74, 82,125 S.Ct. 1242, 161 L.Ed.2d 253 (2005).

Ms. Lobato has consistently asserted that her DNA Petition was a civil right and remedy. When she filed her Motion to Reconsider the Order on the DNA Petition pursuant to EDCR 2.24, the District Court took jurisdiction, arguably confirming a civil status on the DNA Petition which is not available in criminal matters.

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[10] *See* Clark County District Attorney memorandum, dated May 22, 2003, attached as Exhibit 9.
[11] *See* Chapter 355, attached as Exhibit 10.

NRAP §3A (b)(1) provides that a civil appeal may be taken from a "final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered." Here, by its very terms, the District Court's Order was a flat denial which closed the matter for all purposes and is therefore an appealable final order.

NRAP §4(a)(1) provides that the time a Notice of Appeal must be filed "no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served." Here, the Notice of Entry of Order was filed and served on August 2, 2011. Thus, the time to file Ms. Lobato's Notice of Appeal ran on September 1, 2011, the same day that Ms. Lobato's Notice of Appeal was filed.

Because Ms. Lobato's appeal of the District Court's Order is not governed by the law of habeas corpus as set forth in *Skinner*, it is not subject to the filing deadlines set forth in NRS §34.575(1).

D. The case law proffered by the Court is distinguishable on the facts and the law and does not support a prohibition against appeal sufficient to overcome unambiguous legislative intent.

The Court cites the *Castillo* case for the broad proposition that "where no statutory authority to appeal is granted, no right to appeal exists." Castillo v. State, 106 Nev. 349, 352, 792 P.2d 1133 (1990). The *Castillo* case cites two cases in support of this general rule: Taylor Const. v. Hilton Hotels, 100 Nev. 207, 678 P.2d 1152 (1984) and Kokkos v. Tsalikis, 91 Nev. 24, 530 P.2d 756 (1975).

In *Castillo*, the appellant was facing criminal charges at the time he appealed the denial of his petition to be transferred back to juvenile court. There, this Court held that an "appeal in a criminal case lies from the final judgment of the district court, not from an order finally resolving an issue in a criminal case." *Castillo*, 106 Nev. at 351. The denial resolved only a procedural issue and not the underlying criminal matter. Thus, this Court held that the denial of Castillo's petition was not a final order and thus was not appealable. Here, in contrast, by its

very terms, the District Court's Order was a flat denial which closed the matter for all purposes and is therefore an appealable final order.

In *Taylor*, a civil action, a contractor sought to prematurely appeal the denial of a motion for summary judgment, which is ordinarily not appealable until after trial and final judgment is entered. The District Court sought to shorten the process by declaring the denial of summary judgment a "final judgment." In dismissing the appeal of the "final judgment," this Court held that the "District Court was without authority to direct the entry of a final judgment as to the order from which the appeal was taken; therefore, the order was not appealable and we are without jurisdiction to entertain this appeal." *Taylor*, 100 Nev. at 208. Here, the holding of this Court in *Taylor* is completely distinguishable on the facts. Ms. Lobato's appeal is not premature because the District Court's Order closed the matter for all purposes; there are no pending proceedings or an attempt by the District Court to abbreviate any pending matters. Thus, the District Court's Order on the DNA Petition is the final order and is thus appealable.

In *Kokkos*, this Court merely held that an order setting aside entry of default in a civil matter is not an appealable order because it was among the "judgments and orders from which appeal may be taken" under NRAP §3A(b). Kokkos, 91 Nev. at 24. Here, there is unambiguous legislative intent that orders under NRS §176.0918 are appealable. The fact that such orders are not listed in NRAP §3A(b) is irrelevant.

IV. CONCLUSION.

As set forth above, unambiguous legislative intent vests this Court with jurisdiction for appellate review of the District Court's order denying Ms. Lobato's DNA Petition, which was timely filed pursuant to NRAP 3A(b) and NRAP 4(a). Ms. Lobato respectfully requests that this Court reinstate deadlines for filing a transcript request form, docketing statement and briefs.

Respectfully submitted,

By: _____

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I HEREBY CERTIFY that on the 24th day of October, 2011, a copy of the foregoing upon each of the parties by hand delivery and depositing a copy of same in a sealed envelope in the U. S. mail, registered, first-class postage fully prepaid, and addressed to those counsel of record:

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