IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, v. PAUL LEWIS BROWNING, Respondent.	Supreme Court No. 78476 District Court No. 85C72536 **Capital Case**

RESPONDENT'S ANSWERING BRIEF

Appeal from Grant of Motion to Dismiss
Eighth Judicial District Court, Clark County
Hon. Douglas Herndon

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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NRAP 26.1 DISCLOSURE STATEMENT (continued)

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Dated this 11th day of June, 2019.

Respectfully submitted

__*/s/ Dan Albregts*_____
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IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, v. PAUL LEWIS BROWNING, Respondent.	Case No. 78476

RESPONDENT'S ANSWERING BRIEF

STATEMENT OF THE ISSUES

The State's Brief says the only issue presented here is "[w]hether the district court erred in dismissing a retrial on a death penalty case." Appellants Opening Brief ("AOB") 1. The issues are better stated as follows:

> Did the District Court abuse its discretion by dismissing the murder charges against Respondent Paul Browning after finding that "a fair trial of this case consistent with due process is no longer possible" (11AA 2613[1]) because of the extensive loss of exculpatory evidence and the pervasive constitutional violations in his 1986 trial?
>
> When a trial court in a criminal case determines, after several pretrial hearings and an extensive review of evidence and arguments and admissions of the parties, that it is no longer possible to have a fair trial consistent with due process because of the passage of time and loss of exculpatory evidence, must the court still require the defense to proceed to trial, empanel a jury and let the prosecution put on its case before entering an order of dismissal?

[1] In this brief documents in the Appellant's Appendix are referenced "AA"; documents in Respondent's Appendix are referenced "RA".

STATEMENT OF THE CASE

Appellant's Statement of the Case leaves out many aspects of the procedural history of this case that are most relevant to the issues presented here, the aspects that explain why the case has dragged on for more than thirty three years and why a fair trial is no longer possible.

1. The trial and appeal

Paul Browning has always claimed he is innocent of the murder of Hugo Elsen and long ago asked for a speedy trial in which to prove it. He first formally invoked his speedy trial right on December 31, 1985. 1RA 003. He did so again on February 28, 1986—when, over objection, the State was granted a month-long continuance, based on the later-disproven claim that the prosecution could not contact its star witnesses, police informants Randy and Vanessa Wolfe.[2] *See Browning v. State (I)*, 104 Nev. 269, 757 P.2d 351, 352 (1988); 1RA 012, 014-24. During that continuance, which was extended into December 1986, Browning's court appointed lawyer, Randall Pike, lost track of a witness named Marsha

[2] It was later learned that the Wolfes had testified for the State in another case in the same courtroom that same week. See 3AA 656-61. In that other case the Wolfes swore the defendant, Gerald Morrell, robbed them; Morrell said, much like Browning, that the Wolfes were lying to cover up their own criminal actions—a knifepoint robbery they attempted less than a week after the Elsen murder. See 7AA 1711-13. The jury apparently believed Morrell and acquitted in minutes. *Id.* The next day the prosecution asked to continue Browning's trial. 1RA 010.

Gaylord, who he had sworn was critical to the defense, without making any apparent effort to detain or subpoena her. See 7AA 1717-18, 9AA 2037.

Mr. Pike conducted no significant pretrial investigation of Browning's innocence claim, and both this Court and the Ninth Circuit later found his trial representation was deficient (although the courts disagreed about the scope and prejudicial impact of his ineffectiveness). *See Browning v. State (II)*, 120 Nev. 347, 91 P.3d 39, 46, 48, 49 (2004); *Browning v. Baker*, 875 F.3d 444, 474-76 (9th Cir. 2017), *cert. denied* 138 S. Ct. 2608 (2018). This Court and the Ninth Circuit also both found that Browning's trial was marred by several incidents of prosecutorial misconduct—including an "outrageous" prosecution argument to the jury that the presumption of innocence is "a farce," and the failure to disclose exculpatory evidence impeaching Randy Wolfe—though, again, the courts disagreed on whether those violations were sufficiently prejudicial to require a new trial. *See Browning v. State (I)*, 757 P.2d at 272 and n.1; *Browning v. State (II),* 91 P.3d at 47-49; *Browning v. Baker*, 875 F.3d at 461-70.

Browning's convictions and sentences were affirmed on appeal, *Browning v. State (I)*, 757 P.2d at 352—although Browning's court-appointed appellate counsel also provided ineffective representation, which this Court later found necessitated a death penalty retrial. *Browning v. State (II),* 91 P.3d at 52.

2. The Postconviction Proceedings.

In May 1989, immediately after the affirmance on appeal, Browning filed a motion for postconviction relief. However, for reasons this Court later said were "unclear from the record," the "petition lingered in the district court for nearly twelve years." *Id.* at 91 P.3d 44n.2.

When the postconviction motion finally received a hearing, in 1999, Browning's new lawyers presented dramatic new evidence casting doubt on the State's case, and supporting claims of ineffective assistance of trial counsel and violations of the prosecution's due process duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 86 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The new evidence included:

- DNA tests showing that a spot of blood on a jacket found in the Wolfes' hotel room after Browning's arrest—a spot the prosecutor told the jury was "Hugo Elsen's blood" and by itself called for Browning's conviction in "five minutes," see 8AA 1850-51—was not Mr. Elsen's blood at all. 8AA 1960-70.

- The testimony of a police officer, Gregory Branon, that bloody shoeprints that led out the door of the Elsen's shop were already there when the first responders entered the scene. 5AA 1143, 1158; see *Browning v. State (II)*, 91 P.3d at 46. That meant the prints, which the State admitted were not Browning's, likely were the killer's, again contravening what the State told the jury at trial. *See Browning v. Baker,* 875 F.3d at 461, 464-5, 475, 489.

- Additional testimony from Officer Branon that the dying victim was "lucid" and told police the killer had hair that was "shoulder length," "loosely curled," and "wet looking," none of which terms fit

Browning. 5AA 1145-49; see 8AA 1972-73. This clarified a garbled version of the same testimony at trial, which the prosecution discounted to the jury as nothing more than a confused statement by "some white person."[3] *See Browning v. Baker,* 875 F.3d at 454, 463, 466-67.

- Court records showing that, contrary to the trial testimony, the prosecutor had rewarded Randy and Vanessa Wolfe for their testimony in Browning's case. See *Browning v. State (II)*, 91 P.3d at 54-55; *Browning v. Baker*, 875 F.3d at 457; 7AA 1673-1707.

Despite this, the trial judge, Joseph Pavlikowski, denied the postconviction petition. *Browning v. State (II)*, 91 P.3d at 39, 51.

On appeal from that ruling, this Court affirmed in part and reversed in part. It affirmed the convictions despite finding that Browning's defense counsel was ineffective in several respects and that the prosecution had failed to disclose exculpatory evidence and made improper arguments to the jury. *Browning v. State (II)*, 91 P.3d at 46, 47-8, 54-5. It reversed Browning's death sentence, however, and ordered a penalty retrial, because his appellate lawyer had ineffectively failed to challenge the "depravity of mind" aggravating circumstances on which the sentence was partly based. *Id.* at 52.

[3] This Court's decision on Browning's postconviction appeal said "the prosecutor argued that it was understandable if a white person, *such as the victim*," made a mistake in the description. *Browning v. State (II)*, 91 P.3d at 46 (emphasis added). This was a significant misreading of the record. The prosecutor never said or suggested the description came from "the victim" but instead told the jury it was just "someone, some white person…." See 8AA 1845. The jury never knew it was Mr. Elsen who described the killer to the police.

3. The federal habeas petition.

Rather than waiting for the outcome of the penalty retrial, on February 10, 2005 Browning filed a petition *pro se* for a writ of habeas corpus challenging his convictions in federal court. *See Browning v. Baker*, 2013 WL 275895 at *3 (D. Nev. Jan. 24, 2013). In February, 2007, at Browning's request, United States District Judge Robert C. Jones issued an unusual order allowing that petition to go forward despite the pendency of an appeal of a new judgment resentencing Browning to death,[4] because of the extraordinary delay in the state proceedings. *See Browning v. Baker*, 2015 WL 153452 at *3 (D. Nev. Jan. 13, 2015).

Despite these efforts to move that petition forward, it was not resolved by the federal district court until 2015, when Judge Jones dismissed it but issued a Certificate of Appealability ("COA")[5] authorizing an appeal on several different constitutional grounds involving ineffective counsel and prosecutorial misconduct. *See Browning v. Baker*, 875 F.3d at 458. After briefing and argument, the Ninth

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[4]The death sentence was reimposed in a trial in which the defense was not allowed to put on any "evidence … [that] suggested that [Browning] was not the individual who stabbed Elsen … because he had already been found guilty and such evidence was not relevant to the sentencing decision." *Browning v. State (III),* 124 Nev. 517, 188 P.3d 60, 67 (2008).

[5] The appeal of the denial of a federal habeas petition requires a Certificate of Appealability, which may be issued by the District Court or the Court of Appeals. 28 U.S.C. §2253. A Certificate of Appealability can issue only upon a showing that the constitutional claims the District Court rejected are ones about which reasonable jurists could differ. *Id*.

Circuit expanded the COA to include additional claims that Browning was denied due process by the prosecution's failure to disclose the victim's dying description, and was denied effective counsel by trial lawyer Pike's "wholesale failure to investigate and prepare for trial." *Id*. at 460, 471.

On the merits of the habeas appeal, the Ninth Circuit panel majority reversed. In doing so it largely accepted this Court's factual findings, but held that certain aspects of its rulings on ineffective counsel and the *Brady* violations were both wrong and "unreasonable." *Id*. at 472, 474-75. Specifically, it held that it was unreasonable to accept Pike's explanation that he didn't have key witnesses interviewed because "he had a policy of never personally interviewing witnesses to prevent becoming a witness himself"—when Pike had a court-authorized investigator who could do the interviews for him and had actually asked for leave to do so. *Id*. at 473-474; see 5AA 1219-6AA 1252. The Court of Appeals majority agreed with this Court's holding that it was ineffective for Pike to call Officer Branon as a witness at trial without first talking to him to find out what he had to say. *Id*. at 472. But it held that it was unreasonable to, at the same time, accept Pike's justification for not asking Officer Branon about the bloody shoeprints, which it called "fear of learning the truth." *Id*. at 472-74. It also agreed with this Court's determination that the benefits given Randy Wolfe by the prosecution should have been disclosed as *Brady* material, but found unreasonable

the determination that the shoeprint evidence, the dying declaration, and the incentives Wolfe received for his testimony were not sufficiently important to warrant reversal under *Brady* and *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Browning v. Baker*, 875 F.3d at 464, 475. It summarized:

> Pike … had an obligation "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. Here, Pike did neither. His failure to investigate what happened on November 8, 1985, "so undermined the proper functioning of the adversarial process that [Browning's] trial cannot be relied on as having produced a just result." *Id*. at 686, 104 S.Ct. 2052.
>
> We conclude that Pike unreasonably failed to investigate Browning's case, and that the Supreme Court of Nevada unreasonably concluded that Browning failed to prove just that.

Id. at 474.

In a footnote, the Ninth Circuit's original opinion said that several aspects of the ineffectiveness claim were being rejected for inadequate briefing—but in an amended opinion, consistent with its ruling expanding the COA, it corrected this and reserved judgment on whether those aspects of the ineffectiveness claim would separately require relief. *Id*. at 474 and n.19; *see* 7AA 1583, 10AA 2471-75.

The State did not seek rehearing but instead filed a petition for *certiorari* in the Supreme Court of the United States asking it to summarily reverse on the ground that the Court of Appeals had not given sufficient deference to this Court.

See 10AA 2389. Its petition was denied without dissent. *Filson v. Browning*, 138 S. Ct. 2608, 201 L. Ed. 2d 1014 (2018).

Accordingly, on July 25, 2018 Judge Jones issued a writ of habeas corpus that required Browning to be released unless, within 180 days, "the State of Nevada conducts a new trial on th[o]se charges untainted by the constitutional violations found therein." 7AA 1600.

4. The proceedings below.

The proceedings in the Eighth Judicial District Court below recommenced on August 16, 2018. 6AA 1465. On that date defense counsel was appointed and a trial date was set of January 22, 2019, the last day of the 180 day period set by the federal court order. 6AA 1473. The defense promptly requested discovery from the State, including the present addresses or locations of known witnesses. 7AA 1508, 8AA 1885-88. A discovery packet was provided that included no current addresses but contained, among many other things, a police report that had never been brought up at trial by either side. 7AA 1527, 1624, 8AA 1992. That report, by LVMPD Det. Burt Levos, included a statement from the only eyewitness to the crime, Josy Elsen, the wife of the victim, which contradicted her trial testimony regarding whether she could identify the person she saw stabbing her husband and what she saw that person do. 7AA 1626, 8AA1992.

Further investigation by the defense showed that Det. Levos is dead, and so are almost all the important witnesses in the case. In addition to Det. Levos, the deceased and unavailable witnesses include:

- Josy Elsen, the only eyewitness to the crime. Her statement to Det. Levos about what she saw was highly exculpatory and apparently at odds with what she said at trial. See pages 40-48, below. At trial Browning's defense counsel never asked her a single question about what she saw that night or why she had picked two other men and not Browning from a police photo lineup. See 7AA 1526-1530.

- Randy Wolfe, the prosecution's star witness and the man Browning says framed him. Wolfe was a police informant and lied about the benefits he received from the prosecution for his testimony. Browning's defense counsel didn't ask him a single question about what happened the day of the murder, how he and his wife Vanessa ended up with most of the proceeds of the robbery, why before Browning's trial he asked for protection from "Cubans," or any other subject except his admitted drug use. 1AA 0201-249; see 7AA 1676; pages 51-52, below.

- Vanessa Wolfe, Randy's wife, who said Browning confessed the crime to her. There is substantial evidence Ms. Wolfe also received undisclosed benefits from the prosecution for her testimony (7AA 1685-1709), although she denied it at trial. Defense counsel asked her no questions about what she said happened the day of the murder, where she got the knife she showed police, or who her husband's Cuban associates might be. See 2AA 0253-292; pages 58-54, below.

- Minoru Aoki, an LVMPD lab technician who was asked to determine if there was blood on Browning's pants and shoes or on a knife the State claimed was the murder weapon. He found no blood on the knife and apparently found none on Browning's clothing, but he was never interviewed or asked to testify about his results. 7AA 1532-1533, 1643, 1648-1649, 9AA 2063-2067; see pages 49-51, below.

- Martha Hager, the manager of the hotel where both Browning and the Wolfes were staying. Ms. Hager testified that shortly after the crime she

saw the Wolfes with unusual amounts of jewelry and in the company of a dark skinned man who "could have been Cuban". She was not asked if that person had "wet looking," "loosely curled" "shoulder length" hair. 8AA 1787-92; see page 56, below.

- Gerald Morrell, a man who the Wolfes accused of robbing them with a knife. Morrell testified, much like Browning, that the accusation was false and made to cover up the fact the Wolfes and some accomplices had attempted to rob him, just days after the Elsen murder. Morrell was acquitted by a jury—and the next day the prosecution moved to continue Browning's trial. 7AA 1711-13; see note 2, above; pages 56-57, below.

- Fredrick Ross, a man Browning met in prison who testified at postconviction that he saw Randy Wolfe and a Cuban man fleeing from the scene of the robbery. 7AA 1726; 8AA 1779; see page 55-56, below.

- Marsha Gaylord, who was Browning's friend and told defense counsel Pike that she was in Elsen's store with Browning the day before the robbery, explaining his fingerprints there. She also told Pike that she knew Randy Wolfe had a Cuban associate. 7AA 1718-19; *Browning v. Baker,* 875 F.3d at 455-56. Pike never subpoenaed Gaylord or took other steps necessary to secure her testimony, and she was never called at trial. See page 54-55, below.

See generally 7AA 1526-1539.

Based on this and other lost evidence (including the scene of the crime and the scene of Browning's arrest, both of which had been razed, see 7AA 1641, 8AA 1853), the defense filed a Motion to Dismiss, supported by 42 documentary exhibits. 7AA 1520-1939. The State simultaneously filed a motion, unsupported by any documents or evidence, asking the trial court to allow it to submit all the transcripts of testimony at Browning's trial and preliminary hearing by any witness who was now unavailable to testify. 7AA 1514-18.

Those motions first came on for hearing on January 3, 2019. After hearing argument, Judge Herndon said he was denying the defense Motion to Dismiss based on the record then before him.

> I don't think the state of where we are rises to a due process violation for Mr. Browning to be retried again on things, even though I recognize that it's not going to be an easy proposition. …. I don't think that there's sufficient basis to grant the motion to dismiss, so I'm going to deny the motion.

9AA 2040. Consideration of the State's Motion to Admit Transcripts was deferred to the following week, so the State could submit additional briefing. 9AA 2038.

At the next hearing, on January 7, 2019, prosecutor Mark DiGiacomo said again that he was "seeking the admission of every single transcript that is admissible from both preliminary hearing and from trial." 1RA 050. When the court required him to be more specific, he named several witnesses who the State had been unable to locate or learned were deceased. 1RA 050-052. The judge then said the parties needed to "review those and then we can set a separate hearing and … talk about the propriety of … all or parts of those testimonies, assuming that those people are ultimately deemed unavailable once we get to the point of trial." 1RA 054.

> I'm not prepared just to -- to grant it or deny it right now. Like I said, I mean, I agree that there's a number of these people that I'm confident are deceased and that Mr. Pike had the opportunity to cross-examine them at trial, but without reading them, knowing exactly what the challenges are and why those challenges are being made, I don't think it's appropriate to say one way or the other ….

1RA 054-55.

Two days later, on January 9, 2019, the trial was continued past the federal 180 day deadline, to February 25, 2019, because additional forensic testing which the State had been permitted to have its laboratory conduct (over defense objection) had not been completed. 1RA 073.

The defense then submitted additional memoranda, documentary evidence, and proposed findings regarding the key witnesses' trial testimony the State was offering. 8 AA 1990-9AA 2017, 2063-2277. These memoranda contained specific factual allegations regarding each witness, to which the State then responded, admitting or disputing each of them. See 10AA 2299-2305, 2310-13, 2317-2320. The defense in its replies then summarized the facts that the State had admitted, and those that remained in dispute. 10AA 2328-2444.

On February 14, 2019 court reconvened to hear argument on several pending motions. In the first motion heard, the State asked for leave to present a new witness, a man who said that Browning once had a knife resembling the one the State claimed was the murder weapon. 10AA 2288-97. The new witness, Michael Ishmael, said this happened during an incident in another hotel to which police were called a week before the Elsen murder. 10AA 2448-53. However, Ishmael signed a statement describing this incident only when police contacted him *after* the Elsen murder and *after* Browning's arrest. 10AA 2297. Ishmael's statement

said simply that the knife was "taken from [Browning] during a drug related incident." *Id.*; see 10AA 2323-27. It didn't say how he claimed to know this. *Id.* It didn't say what was done with the knife. *Id.* It said Ishmael wrote a "security report" about the incident (10AA 2297), but no report was attached. *Id*. The State admitted it had no police reports or other records regarding this alleged incident, and the person who allegedly took the knife from Browning, Millard John Lambert, Jr., is dead. 10AA 2288, 2451. But overruling a defense objection, the court ruled that the incident was potentially relevant and not excludable as a prior bad act. 10AA 2453. He then turned again to the issue of admissibility of the trial transcripts.

In arguing against admission of the transcripts, one of Browning's defense counsel pointed out that, in addition to finding that Browning's original trial counsel guilty of a "wholesale failure to investigate and prepare for trial," *Browning v. Baker*, 875 F.3d at 471, the Ninth Circuit had reserved judgment on whether a number of specific deficiencies in his representation separately constituted prejudicial ineffectiveness. 10AA 2468-69. Judge Herndon responded that he had not previously understood that because he had been working with a copy of the Ninth Circuit's original, rather than amended, opinion. 10AA 2474-75. After taking a break to review more authorities and providing the State an extended

opportunity for further argument, the judge ruled that this new information required him to revisit the defense Motion to Dismiss:

> To me, the motion to dismiss comes back into play again because I viewed the motion to dismiss with the parameters of what I thought the Ninth Circuit had ruled and what they, just as particularly, what they didn't rule was available to me. So to the extent I'm making decisions about Mr. Pike's overall effectiveness with all these litany of other things in there, then that's a little different than all those other things are really off the table.

10AA 2478.

> So to the extent the Ninth Circuit ... has said that there is a failure to investigate generally, not just you just failed to investigate the shoe prints or you just failed to investigate the description, but there was a general failure and deficiency in investigating Mr. Browning's case and here's four things we're pointing to that were woefully ineffective and so we're going to reverse the case and we don't even need to get to the other ones, I think they're making a generalized statement that there is an overall failure to investigate.

10AA 2489.

> I think I have an obligation to decide whether those things are a result of ineffectiveness or not, particularly when you're dealing with witnesses that the post-conviction record is that Randy Pike said specifically he didn't interview any of those people and his investigator asked to and he still said, nope, don't go interview any of those people and he cross-examines Vanessa Wolfe for ten pages. Right? I mean, it's -- it's really, really concerning.

10AA 2481. The judge then continued the hearing on the Motion to Dismiss to allow the State to submit further briefing or evidence on the issue. 10AA 2494.

Both parties submitted additional briefs and evidence. See 10AA 2498-2533, 2536-43. By the time they did the list of unavailable witnesses had grown. In addition to the new missing witness, Millard Lambert, the prosecution had learned

that Charles Woods, who identified Browning as a man who jogged by him on the sidewalk south of Elsen's jewelry store on the day of the murder was dead. 7AA 1517; see 8AA 1947-48, 10AA 2422; page 58, below. The defense learned that William Hoffman, a man who told police and testified at trial that he saw a suspicious looking "Cuban" lurking outside the store shortly before the robbery, had died as well. 11AA2542; see page 58-59, below.

In addition, fairness issues had multiplied, as the prosecution said it would dispute all the factual claims which the defense said the unavailable witnesses would have supported. Prosecutor DiGiacomo disdained the idea that the benefits the prosecution gave Randy Wolfe were relevant to his credibility (8AA 1977 n.5), even though both this Court and the Ninth Circuit had held they were. *Browning v. State (II)*, 91 P.3d at 55; *Browning v. Baker*, 875 F.3d at 462-63. He said that the State would "hotly contest" Officer Branon's testimony that the bloody shoeprints were made before police entered and would "establish beyond a reasonable doubt" "the perpetrator didn't go out the front door" (11AA 2575)—even though Det. Levos' report says Mrs. Elsen said that's what the killer did. He discounted the 1985 Report of LVMPD Lab Technician Minoru Aoki, which found no blood on the knife the State says is the murder weapon, and put forth new, questionable forensic evidence showing there was. 11AA 2548-49; see 1RA 081. He disputed that Mr. Aoki "ever looked at [Browning's] jeans" (11AA 2580) even after

discovery uncovered a request for laboratory testing of those jeans directed to Mr. Aoki (from the deceased Det. Levos) (7AA 1643). He also said a new forensic witness had determined that, contrary to the original conclusions of police examiners, one of Browning's fingerprints was on a piece of jewelry that was taken in the robbery (9AA 2041, 11AA 2581)[6]—a piece that had been returned to Mrs. Elsen before Browning was even charged and that the defense, therefore, never had a chance to examine. See 8AA 1783

After reviewing the submissions and hearing further from both sides—including an extended colloquy with the prosecutor—Judge Herndon announced his decision. He began:

> [A]t least in my experience, in my close to 30 years now , this case is really, really unique in a lot of regards, not simply the age but just kind of the state of where we're at in terms of what's available, where we're at in terms of what occurred before …

11AA 2593. He then addressed the issue that had led him to reconsider, the scope and impact of the ineffectiveness claim, and said

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[6] The only place (other than the counter of Elsen's shop) which the prosecution had previously claimed to have found Browning's fingerprints was a broken electric Casio watch found in the Wolfe's hotel room. This watch was not admitted at trial because it was never shown to be something taken in the robbery and was completely unlike anything else in the store. See 2AA 0355, 10AA 2440. At trial the prosecution never asked Mrs. Elsen if the Casio watch was among the items taken, but nonetheless argued to the jury that it was further proof of Browning's guilt (2AA 0467). See pages 47-48, below.

> I agree with that term that the defense has used in terms of wholesale ineffectiveness
> … [H]ow can anything … be effective if you're saying that somebody didn't prepare for the trial. I mean, that's just the most basic thing of what we do as attorneys every day. You may feel like you go to trial not having had as much of an opportunity as you would like sometimes … but nonetheless you do what you can, you investigate however you can, you prepare to go to trial, and if those things aren't done that is, that is patently unfair.

11AA 2594. He then explained why he agreed with the Ninth Circuit that the representation Browning received at trial was wholly ineffective:

> [I] don' t think anybody sitting in this room would go to trial, either side, and look at it later on and say as Randy Pike testified on post-conviction relief, that he made no attempt to interview the Wolfes before trial knowing that they were both informants, that they allegedly kept some of the stolen property, that there was some benefit for their – their testimony, and spend the entirety of cross-examining Randy Wolfe asking him about drugs, drug rehab, where did he live, did he pawn some jewelry, never once in that transcript asking any questions whatsoever about the defendant, about statements, about evidence, anything.
>
> And, all told, that was 18 pages of testimony and Vanessa Wolfe was 10 pages of testimony, three of which were on drug rehabilitation. And that he never, you know, attempted to interview them, never asked his investigator to try and interview them, or didn't allow the investigator… didn't allow the investigator to attempt to interview Mr. Stamps who allegedly had information about Mr. Wolfe. I mean, I don't think anybody sitting here would say, gee, that was effective. I think everybody, including Mr. Pike, and I like Mr. Pike, he's in trial with me right now, but I don't think anybody would say that was effective assistance.
>
> I am surprised, quite honestly, that 16 years ago the rulings were made that were ruled here. So I understand why the Ninth Circuit ruled in the manner that they ruled.

11AA 2596.

He then made clear that even a finding of wholesale ineffectiveness was not enough, absent a showing of prejudice:

> [N]ow we have to evaluate what the state of the case is. It doesn't matter if it's 33 years old or 3 years old, if a case gets reversed based on a finding, say, of prosecutorial misconduct, we try the case. That's not an effective issue. If a case gets reversed because of jury instructions, 25 years old, retry the case. That's not an issue of effectiveness of counsel and that may involve deceased witnesses and using trial transcripts.
> If a case gets … reversed because, you know, post-conviction DNA testing, maybe the State says, hey, we still have other evidence, even though maybe the DNA ruled out the blood on a jacket or something like that, retry the case.
>
> You can even have ineffective assistance of counsel, maybe counsel fails to obtain a mental health expert during the course of a trial, retry the case. But if you get a case that gets reversed because of wholesale ineffective assistance of counsel, you could retry the case, sure, but it doesn't always mean that you're going to be able to retry a case if it can't be done in a fair way.

11AA 2598. Accordingly, he turned to the issue of prejudice, listing some of the witnesses who were unavailable for effective cross examination at trial:

> Ms. Elsen who … was pretty much one of the only witnesses to anything that was occurring in and around the events and she said, at least on one occasion, that she came in and saw the gentleman kneeling near her husband, is deceased.
>
> Ms. Gaylord is apparently deceased and unavailable since prior to that first trial date. Mr. Aoki is deceased and there is arguably some question about what he did or didn't do. The other gentleman that I believe was alleged potentially to -- to be knowledgeable about some things, I think his last name was Ross, that came out during post-conviction proceedings,

> deceased. The hotel manager that apparently was alleged at some point during post –conviction to have seen the Wolfes with jewelry thereafter is deceased.
>
> So we have all these people that are deceased. We have the business at issue that's been destroyed, razed, whatever occurred to that jewelry business such that there's really an inability to go back and investigate that at all. And we have a finding that the attorney that represented the defendant at the original trial was ineffective.
>
> … It's not just, well, we can come in and tell the jury that Mr. Wolfe received some type of benefit. That's different than cross-examining on the nature of what they thought they were going to receive, understanding what it was that took place with Mr. Seaton,

11AA 2595.

> And if you can't investigate any of the witnesses who are now deceased, and you can' t follow up on any of the things that could have been learned from those folks, and you can' t posit to the jury in confrontation what it is that needs to be learned from those folks, and you can't get people there that potentially can explain away particular forensic evidence, I think you rise to the level of saying, yes, it would not be fundamentally fair to put somebody in jeopardy of being retried again.

11AA 2600.[7]

In his oral decision, Judge Herndon also said that, for the same reasons, if he hadn't dismissed the case "I would have excluded those transcripts such that I don't

[7] The judge also said why his decision wasn't inconsistent with the retrial alternative provided by the federal writ: "I agree that the federal court, when they issued their rulings had no idea about what evidence is or isn't available, what witnesses are or are not available living or deceased." 11AA 2597.

know that the State would be in any position to retry the case." 11AA 2599.

Prosecutor DiGiacomo responded:

> Well, just for the record, Judge, even if you excluded every single transcript, I'd retry Mr. Browning. I believe I can prove beyond a reasonable doubt he committed this murder absent every single dead witness in this case.

11AA 2599. Mr. DiGiacomo didn't elaborate on how he could do that, or otherwise or explain this statement; and it did not lead the judge to change his ruling.

On March 24, 2019 the judge signed written Findings and Conclusions and Order listing the pleadings and records he had reviewed and summarizing the factual and legal basis for his decision. 11AA 2608-2614. His final Conclusion said:

> Because defense counsel can't investigate any of the witnesses who are now deceased, and can't follow up on any of the things that could have been learned from those witnesses, and can't confront these witnesses and allow the jury to assess their responses, and can't call witnesses who potentially can explain or counter the State's forensic evidence or otherwise give exculpatory testimony, a retrial of this matter cannot be fundamentally fair.

11AA 2614. The State then filed a Notice of Appeal (11AA 2615) and over defense objection was granted a stay pending this appeal (11AA 2617-2621).

STATEMENT OF FACTS

As Judge Herndon said, this case is "really, really unique." 11AA 2598. It involves a crime and a trial that occurred more than three decades ago, and it is being retried because of multiple, pervasive constitutional defects in that first trial. It involves a claim of actual innocence, and it has every hallmark of wrongful conviction other than a false confession.[8]

There is no false confession because Paul Browning has always said he is innocent of this crime and was framed. When he was arrested he consented to a search of his hotel room and the police found nothing there. See 7AA 1542, 1RA 025. He asked his appointed lawyer for a full investigation and a fair trial, but got neither. See 3AA 0566-67, 5AA 1219-1251. Because of his lawyer's ineffectiveness and the prosecution's failure to expose exculpatory evidence, a real investigation wasn't done until long after he had been convicted and sentenced to

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[8] "[R]esearch has identified seven central categories of sources [of convictions of the innocent] … (1) mistaken eyewitness identification; (2) false confessions; (3) tunnel vision; (4) informant testimony; (5) imperfect forensic science; (6) prosecutorial misconduct; and (7) inadequate defense representation. … [T]he literature also discusses the potential role of race effects, media effects, and the failure of postconviction remedies." Gould and Leo, *100 Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. LAW & CRIM. 825, 841 (2010); *see also* B. Scheck et al., ACTUAL INNOCENCE 246 (2000); S.R. Gross, et al., *Exonerations in the United States, 1989-2003*, 95 J.CRIM.L. & CRIM. 523, 551 (2005).

death. But when the investigation finally was done it turned up fact after fact that supported Browning's claims and undermined the State's case against him.

Browning asked his postconviction lawyers to test a spot of blood on a jacket that the prosecutor had said was the victim's and by itself warranted his conviction in "five minutes" (7AA 1850-51) —and it turned out not to be the victim's at all (7AA 1960-70). When his postconviction lawyers spoke to a police officer who his trial lawyer had ineffectively called to the stand without interviewing him first, they learned two dramatically new facts, further supporting Browning's innocence claim: that the dying victim had described the killer in terms that couldn't fit Browning (5AA 1145-49); and that the prosecution's explanation for the bloody shoeprints made by someone else at the scene could not be true because the prints were made before police arrived (5AA 1143, 1157-58). When the prosecution then speculated to this Court that the prints were made by one of the two women on the scene, the habeas investigators asked both women and learned they could not have been the source of the prints. 7AA 1636, 8AA 1938-39.

The postconviction investigation turned up evidence that supported Browning's claim that he was framed by the State's star witnesses, the Wolfes. It showed that it was the Wolfes who had the loot from the robbery—leading police to most of it only after questioning; keeping and attempting to sell some of the rest,

and even brazenly wearing some it to Browning's preliminary hearing, and lying about it there. 9AA 2244-45; *Browning v. Baker*, 875 F.3d at 452. It also turned up evidence that the Wolfes were police informers with a reputation for "setting people up" (10AA 2286), that they had done just that to another man, Gerald Morrell, a week after they had Browning arrested (7AA 1711-13) and that they did get benefits from the prosecution for testifying at Browning's trial (*Browning v. State (II)*, 91 P.3d at 55). It also turned up evidence corroborating Browning's longstanding claim that the killer was an associate of the Wolfes who could have been the Cuban man who one of the scene witnesses (William Hoffman) had described in his trial testimony. 7AA 1676; 8AA 1776.

The State postconviction proceedings dragged out for a dozen years, and despite all this the State successfully opposed all Browning's arguments for a new trial. *Browning v. State (II), supra*. Although he was granted a new penalty trial, Browning filed for habeas relief *pro se* in federal court to prove his innocence. That effort only came to fruition after another dozen years, when the Ninth Circuit Court of Appeals ordered Browning released or retried because of multiple constitutional violations as to which it found the State's position not only wrong but "unreasonable". *Browning v. Baker*, 875 F.3d at 464, 474. The federal district court then ordered Browning released if not given a new trial "untainted by the constitutional violations …." 7AA 1600.

That was the situation Judge Herndon faced when the case was called in his court in August, 2018. A trial date was set, but as the case progressed it became more and more apparent that it was not going to be possible to comply with the federal mandate. Almost all the key witnesses turned out to be dead or unavailable. New evidence was found indicating that witnesses who had never been questioned by the defense, and were now dead, could have given exculpatory testimony. E.g., 7AA 1626-27; 7AA 1626-27. In argument on motions, the prosecution made clear that it would not concede or stipulate to any of the facts that the defense showed the missing witnesses could have supplied, and said it would offer new evidence contradicting what some of those witnesses would have said. See pages 16, above.

Judge Herndon made it clear he understood that retrial was the norm, even in cases involving serious constitutional violations. 11AA 2598. But after reviewing the record and some 21 briefs and memoranda, and more than 65 documentary exhibits, and hearing argument on the issues four times, he finally reached a conclusion that because of the irrevocably lost witnesses and evidence and the wholesale ineffectiveness of Browning's trial counsel, it is no longer possible to conduct a retrial in this case that comports with due process and satisfies the mandate of the federal court, and he dismissed the case. 11AA 2613-14. That was not error but a proper exercise of a trial judge's discretion and responsibility.

STANDARD OF REVIEW

Respondent is correct that dismissal of a criminal charge is reviewable for abuse of discretion. AOB 11. "We review a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion." *Hill v. State*, 124 Nev. 546, 188 P.3d 51, 54 (2008); *accord, e.g, State v. Keenan*, 143 Ohio St.3d 397, 38 N.E.3d 870, 872 (2015). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 121 P.3d 582, 585 (2005).

SUMMARY OF ARGUMENT

Judge Herndon did not abuse his discretion by ruling that "a fair trial consistent with due process is no longer possible" in this case. 11AA 2613. The dismissal was mandated under any constitutional analysis.

Every factor that governs Sixth Amendment speedy trial claims supports the dismissal decision: the length of the delay is unprecedented; the cause of the delay was the ineffectiveness of court-appointed trial counsel and prosecutorial misconduct, and the State's "unreasonable" defense of them; the defendant has long and repeatedly asserted his speedy trial rights; and the prejudice to his defense from the evidence lost during the delay and misconduct is overwhelming and irremediable. *See Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L.Ed.2d 101 (1972)); *Middleton v. State*, 114 Nev. 1089, 968 P.2d 296, 310–11 (1998).

Although we submit *Barker* sets the correct standard here, the result would be the same under other constitutional tests.

Even if considered as a case of preindictment delay, as the State suggests—although more than 99% of the delay occurred after Browning's arrest and indictment—the dismissal order should be sustained, either under the test applied by this Court or the one established in the Ninth Circuit. It would satisfy this Court's test because the record before the trial court proved "actual, nonspeculative prejudice from the delay" and showed "bad faith" in the unreasonable effort by the prosecution to gain an advantage over Browning by preventing or delaying a fair trial. *See Wyman v. State*, 125 Nev. 592, 217 P.3d 572, 578 (2009). It would also clearly meet the Ninth Circuit's standard: "the delay, when balanced against the government's reasons for it, 'offends those fundamental conceptions of justice which lie at the base of our civil and political institutions.'" *United States v. DeGeorge*, 380 F.3d 1203, 1210–11 (9th Cir. 2004) (internal quotes omitted).

For the same reasons, considered simply as a case of lost evidence, dismissal would be appropriate under this Court's cases which require a showing that either "the defendant is prejudiced by the loss *or,* (2) the evidence was 'lost in bad faith by the government." *Sparks v. State*, 104 Nev. 316, 759 P.2d 180, 182 (1988) (emphasis added). The evidence presented below showed that "in the context of

the entire record," the now-unavailable evidence likely would have created "a reasonable doubt … which was not otherwise present." *Id.*

Having concluded, after an extensive review of arguments, hearings and evidence, that due process can no longer be afforded in this case, the judge did not abuse his discretion by ordering dismissal rather than going through the motions of a capital trial that could not be made constitutional. The most prejudicial problems were not going to change. The numerous dead witnesses were not going to appear. There was no available substitute for their live testimony consistent with the defendant's due process right to compel witnesses and present a defense. The prosecution made clear it would take full advantage of the witnesses' unavailability, "hotly contesting" the facts to which they would have testified, and disputing the accuracy of documents recording their statements. The prosecution never suggested below that the prejudice to the defense could be remedied with jury instructions—and it does not seriously do so in its brief to this Court. Even if the State were to agree to such instructions—and everything it has said indicates it would not—there are so many facts at issue it would make a jury trial into a charade.

Judge Herndon properly recognized that on these "unique" facts the only possible remedy was dismissal and ruled accordingly.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING THE MURDER CHARGES IN THIS CASE AFTER IT DETERMINED THAT, IN THE UNIQUE CIRCUMSTANCES HERE, A FAIR AND CONSTITUTIONAL TRIAL IS NO LONGER POSSIBLE.

As the above procedural summary makes clear, before deciding this case had to be dismissed Judge Herndon carefully reviewed and considered its extensive record and the complex due process issues it presents. He examined and reexamined the prior opinions in this case, reviewed more than a dozen briefs and memoranda that related to the dismissal motion (7AA 1514-1640; 9AA 2063-10AA 2444, 10AA 2498-11AA 2543, 2611-12), heard argument of counsel on four separate occasions, (9AA 2018ff, 11AA 2544ff, 1RA 026-77) and twice granted the State continuances to submit additional briefing (9AA 2025, 10AA 2494). His decision recognized that the remedy he was ordering was exceptional and was justified only because of the unique circumstances this case presents. 11AA 2593, 2598. His handling of this matter and his decision were the antithesis of an abuse of discretion.

A. Dismissal was warranted here under any Due Process standard.

Although Paul Browning was arrested and indicted for the robbery and murder of Hugo Elsen in November 1985 and has been continuously incarcerated on those charges ever since, the State's Brief argues (for the first time) that the

ensuing 33 ½ year delay in giving him a fair and constitutional trial should be considered "pre-indictment delay" and its constitutionality should be measured by the due process standards applicable to such delays. AOB 12.

This argument makes little sense. Pre-indictment delay is, by definition, delay that occurs during a "time during which defendants are neither under indictment nor subject to any restraint on their liberty." *United States v. Loud Hawk*, 474 U.S. 302, 310, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986). Pre-indictment delay is subject to less demanding constitutional scrutiny because of the difficulty in determining precisely when a charge could or should have been brought, and the countervailing interests of both potential defendants and society in avoiding premature accusations. *See United States v. Lovasco*, 431 U.S. 783, 795–96, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977); *United States v. Marion*, 404 U.S. 307, 322, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971). No such concerns or limitations apply to circumstances like those here, where the defendant has been "arrested and held to answer" (*id.* at 321) for decades.

In addition, the State's Brief misstates the standards that apply to true preindictment delay. It says:

> To demonstrate a due process claim, the defendant must show: 1) the preindictment delay substantially prejudiced the defendant's right to a fair trial; and 2) the State intentionally caused the delay to gain some advantage. *United States v. Valenzuela-Bernal,* 458 U.S. 858, 868-69, 102 S. Ct. 3440, 3447 (1982); *United States v. Marion*, 404 U.S. 307, 324-25, 92 S. Ct. 455, 465-66 (1971).

AOB 12. Neither of the cited cases so holds. *Valenzuela-Bernal* the Court said nothing about a requirement that delay be intentionally caused to gain an advantage; it held simply that "sanctions will be warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." 458 U.S. at 873–74 (emphasis added). The *Marion* decision did mention a *concession by the Government* that dismissal would be warranted "if it were shown at trial that the preindictment delay … caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." 404 U.S. at 324. But the Court in *Marion* specifically *declined* to adopt that as a constitutional standard or requirement. "Since appellees rely only on potential prejudice and the passage of time between the alleged crime and the indictment," it said, "*we need not … determine* when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution." 404 U.S. at 323–24 (emphasis added).

This Court's cases say that the standard in preindictment cases is whether "the prosecution intentionally delayed bringing the charges in order to gain a tactical advantage over the accused, *or* that the prosecution delayed in bad faith." *Wyman v. State*, 217 P.3d at 578 (citing *United States v. DeGeorge*, 380 F.3d 1203, 1210–11 (9th Cir.2004)) (emphasis added). The Ninth Circuit standard set out in

DeGeorge is even more general: it balances the delay "against the government's reasons for it" to determine whether it "'offends those fundamental conceptions of justice which lie at the base of our civil and political institutions.'" *DeGeorge*, 380 F.3d at 1210–11.

This Court has adopted a similarly flexible test in assessing whether dismissal of charges is appropriate when evidence has been lost due to government misconduct or error:

> A conviction may be reversed when the State loses evidence if (1) the defendant is prejudiced by the loss *or,* (2) the evidence was "lost" in bad faith by the government. *Howard v. State*, 95 Nev. 580, 582, 600 P.2d 214, 215–216 (1979). … [I]t is [the defendant's] burden to show "that it could be reasonably anticipated that the evidence sought would be exculpatory and material to appellant's defense." *Boggs v. State*, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979). In describing this test of materiality, the Supreme Court in *United States v. Agurs*, 427 U.S. 97, 112–113, 96 S.Ct. 2392, 2402, 49 L.Ed.2d 342 (1976), stated that the lost evidence "must be evaluated in the context of the entire record." The question is whether when so evaluated a reasonable doubt exists which was not otherwise present.

Sparks v. State, 759 P.2d at 182 (emphasis added).

The loss of evidence from post-indictment delay, including delay attributable to appellate proceedings after indictment but before trial, is subject to a different and better established analysis, an analysis that applies to delay in "criminal prosecutions" governed by the Sixth Amendment. *See Loud Hawk*, 474 U.S. at 312-13. The State's Brief appears to recognize this when it reverses course and says "[c]ourts analyz[e] post-indictment delay complaints … under a speedy

trial right inquiry" in which there are "four factors to consider … 1) length of delay; 2) the reason causing the delay; 3) the defendant's assertion of his speedy trial right; and 4) prejudice to the defendant." AOB 31 (citing *Barker v. Wingo,* 407 U.S. at 530; *see Middleton v. State*, 968 P.2d at 310. We agree that is the appropriate analysis.

But selection of the applicable standard is not dispositive here. With respect to each of the factors in each of these tests, the circumstances here are, as the judge said in his oral opinion, "really, really unique." 11AA 2593. The delay here was longer, less justified, more unfair to the defendant, and more prejudicial to the search for truth than any of the cases the State cites, or any other we have found. Because of this, whatever standard is applied, the dismissal decision was not an abuse of discretion.

1. The length of the delay.

It is beyond dispute that the length of the delay in bringing this case to a fair trial raises a presumption of prejudice. In *Barker v. Wingo*, the Court called a delay of "well over five years … extraordinary." 407 U.S. at 533. *Byford v. State*, 116 Nev. 215, 994 P.2d 700, 711 (2000), said a delay that "totaled about one year" was "not extreme, but long enough to conceivably cause prejudice." The delay here is more than six times as long as the delay in *Barker*, over 30 times the delay in *Byford*. It is more than twice as long as the 15-year delay in *Girts v. Yanai*, 600

F.3d 576, 588 (6th Cir. 2010), which the court there called "appalling," and it is seven years longer than the 26 year delay at issue in *State v. Keenan*, 38 N.E.3d at 871, the case on which the State's Brief most heavily relies.

The first of the *Barker* factors could not weigh more heavily in the defendant's favor, or lend more support to the trial court's decision in this case.

2. The reason for the delay.

As explained above, the State's argument that prejudicial delay is unconstitutional only when "the State intentionally caused the delay to gain some advantage" (AOB 12) is not consistent with the caselaw. See page 31, above. As noted above, this Court's cases have rejected any such requirement where a criminal defendant is prejudiced by the loss of important evidence, and have long held that due process is violated where a defendant shows "*either* (1) bad faith or connivance on the part of the government *or*, (2) that he was prejudiced by the loss of the evidence." *Howard v. State*, 95 Nev. 580, 600 P.2d 214, 215–16 (1979); *accord*, *Higgs v. State*, 125 Nev. 1043, 21, 222 P.3d 648, 660 (2010).

Where delay alone is involved, government culpability is relevant; but the constitutional test is more flexible than the State claims: "different reasons [for delay] are assigned different weights" *State v. Robles-Nieves*, 129 Nev. 537, 306 P.3d 399, 404 (2013) (citing *Barker*, 407 U.S. at 531).

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.

Id. Accordingly, the weight given to delay caused by appellate proceedings depends on the reasonableness of the State's position in such appeals. *See Loud Hawk,* 474 U.S. at 316 ("The Government's position in each of the appeals was strong."); *Robles-Nieves,* 306 P.3d at 404-405 (delay from a State's appeal which "does not appear to be frivolous" "does not weigh heavily against the State").

In this case, this factor does weigh heavily against the State. The delay in bringing this case to a fair trial is the result of the State's unfair and unconstitutional actions. It started with the State's successful effort to delay trial in the wake of the Morrell acquittal. See note 2, above. It continued when Browning was provided ineffective trial and appellate counsel, and it was compounded when the prosecution engaged in misconduct at trial[9] and repeatedly

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[9]Mr. Seaton's misconduct at Browning's trial was part of a longstanding pattern. In *Santillanes v. State*, 104 Nev. 699, 765 P.2d 1147, 1149 (1988) this Court took the unprecedented step of admonishing the District Attorney of Clark County to take action to assure that "Mr. Seaton's prosecutorial misconduct, so frequently repeated heretofore, does not again recur." In *Howard v. State*, 106 Nev. 713, 800 P.2d 175, 180n.1 (1990) the Court included in its opinion "[a] non-exhaustive sampling of cases in which Mr. Seaton has participated [which] reveals a history of persistent disregard for established rules of professional conduct regarding improper argument before a jury."

violated its duty to disclose exculpatory evidence under *Brady v. Maryland* (at least).[10] See pages 4-6, above. Then the prosecutor engaged in "outrageous … misconduct" at trial. *Browning v. State (I),* 757 P.2d at 272 and n.1. Then the State made arguments excusing those violations which were not only wrong but "unreasonable." *Browning v. Baker*, 875 F.3d at 464, 474.

This finding of unreasonableness is never mentioned in the State's Brief, but under the doctrine of issue preclusion the State is bound by it because it was party to the proceeding in which it was made—and it unsuccessfully attempted to have it

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[10]There is substantial reason to believe that Seaton's misconduct went beyond nondisclosure of exculpatory evidence and constituted deliberate misleading of the jury.

At trial Seaton allowed and encouraged Randy Wolfe to deny he expected any benefit for his testimony (1AA 0246-48), when it is now clear that "Randy knew that Seaton might help reduce his sentence if he testified against Browning." *Browning v. Baker*, 875 F.3d at 462.

There is also evidence that Seaton was aware of what Officer Branon saw and heard at the crime scene and intentionally misled the jury about it with Spec. Horn's testimony. See 7AA 1525 n.7. Although the Ninth Circuit rejected a separate claim to this effect, saying "[t]he record before the Supreme Court of Nevada [did] not suggest that the prosecution knew that Horn's testimony was false or misleading," 875 F.3d at 461, the defense has since obtained evidence that was not available in the postconviction appeal: handwritten notes made by Seaton before Browning's trial. 8AA 1892-96. Those notes show Seaton knew that Off. Branon was one of the "first on the scene," and Seaton put a star (*) and a check mark next to Branon's name. 8AA 1894. Combined with the manner in which Seaton raised the issue with Spec. Horn at trial (see 8AA 1901-04), his postconviction testimony that he personally interviews "all potentially important witnesses prior to trial" (8AA 1898), and his conspicuous failure to ask Off. Branon, alone among the percipient witnesses, a single question (8AA 1909), there is good reason to believe that Seaton knew before trial what Branon saw and presented Horn's testimony in order to mislead the jury (and the defense) about it.

reversed by the Supreme Court of the United States. See 10AA 2389. [11] And the finding is plainly correct: the rationales for denying Browning relief which the State convinced this Court to adopt in Browning's postconviction appeal simply made no sense. A defense lawyer's "policy of not personally interviewing witnesses" cannot reasonably explain a refusal to allow an investigator to interview them. *Browning v. Baker,* 875 F.3d at 474. All three of the Ninth Circuit judges agreed on that. *Id.* at 493. So did Judge Herndon. 11AA 2594, 2596. Neither is it reasonable to hold that a defense lawyer can decline to do basic investigation and go to trial unprepared because of "fear of learning the truth." *Browning v. Baker*, 875 F.3d at 473. Nor can dramatically exculpatory evidence like bloody shoeprints apparently left by the killer reasonably be held immaterial by "pure speculation"

[11] "[I]ssue preclusion ... prevent[s] relitigation of … a specific issue that was decided in a previous suit between the parties ...." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709, 713-14 (2008). *See LVRC Holdings, LLC v. Brekka*, 128 Nev. 915, 381 P.3d 636 (2012) (giving preclusive effect to federal court rulings). This is true for rulings and decisions in federal habeas proceedings like those in any other prior litigation between parties. *See Madrigal v. California Victim Comp. & Gov't Claims Bd.*, 6 Cal. App. 5th 1108, 1119, 212 Cal. Rptr. 3d 60 (2016), *as modified* (Jan. 5, 2017); *People v. Tenner,* 206 Ill.2d 381, 396–97, 794 N.E.2d 238 (2002) ("collateral estoppel bars relitigation of an issue decided in a prior case, including the defendant's federal habeas corpus proceedings"); *People v. Griffith,* 404 Ill. App. 3d 1072, 936 N.E.2d 1174, 1183 (2010) (same); *State v. Gillispie*, 65 N.E.3d 791, 802 (Ohio App. 2017) ("the doctrine of collateral estoppel can be invoked to preclude relitigation, in state court, of issues addressed by a federal district court in a habeas proceeding"). The State of Nevada was a party to the federal habeas litigation through its Attorney General, who was a named defendant, and who was represented there (as the State is here) by the Attorney General's Office. *See Browning v. Baker*, 875 F.3d at 444, 449.

that the prints could possibly have been left by some other person; again, all three Ninth Circuit judges agreed on that. *Id.* at 465, 485-86.

The State obviously made these specious arguments, to this Court and the federal courts, "to gain some advantage" over Browning—to prevent him from getting a new and fair trial. A reasonable prosecutor, committed to the "duty to see that justice is done," *Jimenez v. State*, 112 Nev. 610, 918 P.2d 687, 692 (1996), would have known that justice required a retrial long before: when it turned out that the blood on a jacket that the prosecutor told the jury "had Mr. Hugo Elsen's blood on it" and compelled a guilty verdict in "five minutes" (8AA 1850-51) was not the victim's blood at all; when it was learned that the bloody shoeprints at the scene of the crime were not made by medics or police, as the jury was led to believe, but likely were the true killer's; when it was made clear that the description of the killer given police on the night of the murder was from the dying victim himself, in clear and vivid terms; when it was revealed that the trial prosecutor had breached his constitutional obligation to disclose benefits given Randy Wolfe for his testimony.

All this was revealed and proved in court in 1999. Since then, Josy Elsen, Charles Woods, William Hoffman, Burt Levos, Minoru Aoki, Martha Hagar, Gerald Morrell, Randy Wolfe, Vanessa Wolfe, Frederick Ross, and Marsha Gaylord have all died or disappeared; the scene of the crime and the arrest have

been demolished; and the trail of the Wolfes' Cuban associate has grown cold. The State clearly bears primary responsibility for that.

This is the opposite of cases like *Middleton,* where "the reason for the delay … was much more [the defendant's] responsibility than the state's." *Middleton*, 968 P.2d at 310. Paul Browning has done everything he can to avoid this delay, promptly challenging his convictions every way possible—and his challenges ultimately proved right and the State's position was found wrong and unreasonable, on multiple counts.

As Judge Herndon pointed out in a colloquy below,

> we're not talking about the same kind of concept as a cold case.… State arrested, State charged, State prosecuted, State provided discovery or not, State appointed the attorney that represented Mr. Browning and was found to be ineffective, you know, and kind of decided what avenues of investigation and funding would available, so all of that's kind of on us as the State, all of us.

11AA 2579. The second *Barker* factor also weighs heavily against the State.

3. The Defendant's assertion of his rights.

As noted above, Browning first invoked his speedy trial right on December 31, 1985, has done so repeatedly and continuously ever since—before trial, on appeal, in postconviction, and in federal habeas. See pages 2-6, above. He has never waived that right or waivered in its assertion. There is literally nothing more he could have done to assert his speedy trial rights.

This *Barker* factor weighs fully in the defendant's favor as well.

4. The extensive and irreparable prejudice to the defense.

The most important factor to consider under *Barker,* or any due process test, is the prejudice the defendant has suffered as a result of trial delay. "Prejudice is the most important of the four *Barker* factors." *West v. Symdon*, 689 F.3d 749, 752 (7th Cir. 2012) (citing *Barker*, 407 U.S. at 532); *see also Valenzuela-Bernal*, 458 U.S. at 873–74; *Marion*, 404 U.S. at 324; *Howard v. State*, 600 P.2d at 215.

> "'Prejudice' … can be a lesser chance of an acquittal, the indignity and discomfort of being jailed for a long period of time awaiting trial, or the psychological or financial consequences of finding oneself stuck between indictment and trial in a limbo of anxiety and uncertainty. The first of these three prejudice subfactors is the most important … because it protects against the conviction of the innocent."

Loera v. United States, 714 F.3d 1025, 1031 (7th Cir. 2013).

Although the State has refused to acknowledge it, here and in the court below, there is overwhelming evidence of prejudice to the defense—the loss of evidence and witnesses who could have supplied a basis for "reasonable doubt … which was not otherwise present," *Sparks v. State*, 759 P.2d at 182—as a result of the extraordinary delay in this case.

a. The dead and missing witnesses.

Almost a dozen people who are known to have had information which is exculpatory to Paul Browning or impeaching of the State's case, have died or are unavailable to testify in the years since the constitutional errors in this case first came to light.

(1) Josy Elsen.

As noted above, Josy Elsen was the only eyewitness to the murder of her husband, Hugo. 11AA 2609 FF6. Mrs. Elsen testified at defendant's trial (7AA 1602-22), but prior to defendant's trial she never gave a formal interview or made a written statement to police (see 10AA 2299), and Browning's defense counsel made no attempt to have her interviewed (7AA 1552). Because of this, the constitutional errors that occurred at trial, and the fact that both Mrs. Elsen and the officer who took her statement on the night of the murder are dead, it would be fundamentally unfair to admit Mrs. Elsen's trial testimony. At the same time, it would be fundamentally unfair to proceed to trial without her, because much of what she would say if effectively questioned would be exculpatory to Browning.

Mrs. Elsen's initial statement to police. On the night of the murder, Mrs. Elsen spoke to Det. Burt Levos. According to Det. Levos's police report, Mrs. Elsen was very upset and told Det. Levos the following:

> She heard a noise in the front and as she came out of the living quarters, she heard her husband say, "Please don't stab me; please don't stab me". And when she came out into the jewelry store she observed a black male adult over her husband's body in the northeast corner of the store behind the glass showcase. She stated all she could remember was that he had on a blue cap. *She could not describe the black male, who got up and ran out the front door.*
>
> She at this time went to the next door neighbor for help and they returned to the store and gave assistance to her husband until Uniform Officers and Mercy Ambulance arrived.

(Emphasis added.) 7AA 1626-27. Mrs. Elsen was never asked about any of these statements at defendant's trial. See 7AA 1602-22. Defense counsel never referred to Det. Levos or his report in any question, argument or statement during trial. *See id.*; 8AA 1827-41.[12] Det. Levos didn't testify at defendant's trial or in any other proceeding in this case. See 8AA 1992, 10AA 2300. He was never interviewed by defense counsel or a defense investigator. *Id.*

In cross examination at trial, Browning's defense counsel asked Mrs. Elsen no questions about what she saw on the day of the murder. 7AA 1619-21. No one ever asked her about her statement to Det. Levos that she saw the killer run out the front door before she went for help. See 7AA 1602-22. Unaware of Det. Levos' report, in its decision on direct appeal and postconviction, this Court accepted the implication of Mrs. Elsen's trial testimony: that when she "saw a black man wearing a blue cap squatting over Hugo and holding a knife" "Josy immediately ran out the front door". *Browning v. State (I),* 757 P.2d at 270-71; *Browning v. State (II)*, 91 P.3d at 43.

There is a consequential difference between Mrs. Elsen's two stories about whether she or the killer ran from the store first. That is because, when Mrs. Elsen went for help, she went out the back door of the store and over to the business next

[12]It is undetermined whether Det. Levos' report was withheld from the defense or was overlooked in defense counsel's inadequate preparation. Defendant asked for an evidentiary hearing to resolve that, if the trial court deemed it crucial to its decision. 10AA 2333.

door, knocked, and told the person who answered, Debra Coe, what she had seen—and Ms. Coe then went to the front of her business, looked out the window and saw a man she identified as Paul Browning pass by. 7AA 1612; *see Browning v. Baker,* 875 F.3d at 451. If the killer ran out the door before Mrs. Elsen went for help, he surely would not have been outside the store next door minutes later, when Ms. Coe looked out. But if the crime was still in progress when Mrs. Elsen ran away, as the State led the jury and this Court to believe, the timing fits perfectly, as prosecutor Seaton told the jury in closing:

> And it was after that when [Mrs. Elsen] left, went over to the publishing house next door that the glass was broken and the door taken off and the jewelry taken out and put in pockets and the individual ran out. It would have taken that long for Debra Coe to have made contact with Mrs. Elsen, to hear what had gone on, to walk up to the front of the store and then see the person leaving. The timing was almost perfect in this particular situation.

8AA 1801-02. Mrs. Elsen's statement to Det. Levos not only destroys that argument but turns it on its head: it makes Ms. Coe's testimony exculpatory for the very reasons Mr. Seaton told the jury it was incriminating.

Mrs. Elsen's statement to Det. Levos also corroborates another important defense claim, one that was not pursued at trial because of the *Brady* violations and counsel's ineffective assistance: that the bloody shoeprints leading toward the store's front door which were not Browning's were made by the killer, not by first responders or someone else. *See Browning v. Baker*, 875 F.3d at 464, 474.

Recognizing this, the State argued below that Det. Levos' report of what Mrs. Elsen told him can't be relied on because it can't be known whether what is in it "is complete, or a paraphrase" or "a conclusion drawn from evidence not specific words uttered by Mrs. Elsen …" 11AA 2299. Knowing that neither Mrs. Elsen nor Det. Levos are alive to contradict him, prosecutor DiGiacomo told the court below, "one thing I will establish beyond a reasonable doubt is the perpetrator didn't go out the front door." 11AA 2575.

The trial court correctly recognized that to allow the State to do that in these circumstances would be fundamentally unfair.

Mrs. Elsen's identification testimony. Another thing Mrs. Elsen said to Det. Levos that would have been helpful to the defense, but was never brought up at trial, was that "she could not describe" the killer and "all she could remember was that [the killer] had on a blue cap." 7AA 1626. She said much the same thing to LVMPD Det. Robert Leonard a month later:

> [S]he did not think that she would be able to identify the subject that she only saw him for a very slight moment from the side and … she could readily recognize the blue cap he was wearing, however never saw him full face and did not think she would be able to pick him out.

7AA 1631. On that same occasion, Det. Leonard showed Mrs. Elsen an array of twelve photographs that included a photograph of defendant Browning. Mrs. Elsen chose three other photos, not Mr. Browning's, as most closely resembling the killer. 7AA 1631-32.

At trial, defense counsel Pike never questioned Mrs. Elsen about these statements or her failure to pick Browning in the photo showup and their inconsistency with her identification testimony there. 7AA 1619-21. He simply asked her if Det. Leonard had shown her “pictures of black men” and she said “No. Never showed me.” “No, I never saw them.” 7AA 1621. Then Pike asked her no more questions. *Id*.

Mrs. Elsen saw Browning numerous times, in the news and in court, before her trial testimony. *See State v. Browning (II)*, 91 P.3d at 47n.12. But defense counsel never asked Mrs. Elsen any questions about that, either. 7AA 1619-21. Nor was Mrs. Elsen asked about the vantage point from which she made her alleged identification, partly because defense counsel didn’t bother to get a copy of the police sketch of the scene until after Mrs. Elsen’s testimony (and nearly at the end of trial). 2AA 0354-55. Defense counsel admitted in postconviction proceedings that a sketch or drawing would have been helpful. 9AA 2012-13.

In the state postconviction proceedings, when the defense challenged Mrs. Elsen’s in-court identification of Browning as improperly suggestive, the prosecution did an about-face and told the court that "Ms. Elsen ... never made an in court identification ... Ms. Elsen never positively identified Defendant." 8AA 1912. Despite that, and despite all the defects in her cross examination, the State sought below to have her trial testimony—in which Judge Pavlikowski says “The

record will indicate she has identified the defendant," 7AA 1610—read to the jury at the retrial. 7AA 1516. Judge Herndon rightly said he would not allow that. 11AA 2599.

Mrs. Elsen's likely corroboration of Officer Branon's testimony. Mrs. Elsen testified, and the investigating officers confirmed, that after going next door she returned to the jewelry store before the first responders arrived. 7AA 1613. Because of that she would have been in a position to see the man sized, bloody shoeprints that Officer Branon revealed in postconviction were there before the police and medics entered. She also would have been present when her husband told Officer Branon that the killer's hair was "loosely curled," "shoulder length," and "wet looking." But because of the State's *Brady* violations and defense counsel's ineffectiveness, defense counsel didn't know to ask her about either of those things.

No witness at trial or in the postconviction proceedings has disputed Officer Branon's postconviction testimony on either of these points, and in Browning's postconviction appeal this Court accepted it as factual. *See Browning v. State (II)*, 91 P.3d at 46. Since Mrs. Elsen was in a position to see and hear what Officer Branon described, it is likely that she did so. But she was never asked, and now never can be asked.

As noted above, the State made clear below that it intended to challenge the credibility of Officer Branon's postconviction testimony, though it has offered no evidence contradicting it. To allow that when Mrs. Elsen is no longer available to be asked if she can confirm it—and never was asked due to constitutional error—would immeasurably compound the unfairness of any retrial.

In Browning's postconviction appeal, the State compounded its *Brady* violation by arguing without evidence that the bloody shoeprints may have been made by Mrs. Elsen or Ms. Coe. 9AA 2009. This Court accepted that as a possibility (*Browning v. State (II)*, 91 P.3d at 46), but the Ninth Circuit held that was a speculative and unreasonable determination of fact, *see Browning v. Baker*, 875 F.3d at 465, 486. In 2006, when Mrs. Elsen was interviewed by an investigator for Browning's penalty retrial, she said she wore a shoe size 8W, which is much smaller than the shoeprints at the scene, dispelling this speculation. See 7AA 1636, 1638. But Mrs. Elsen is no longer available to be asked if it is so, so the State is free to make the same specious argument again.

Mrs. Elsen's testimony about the Casio watch. At Browning's trial there was no evidence that his fingerprints were found on the stolen jewelry or watches recovered by police.[13] However, there was testimony that his thumbprint was

[13] The State said below that it has new testimony that, contrary to what its experts originally determined, there was one of Browning's fingerprints on one of the items of stolen jewelry. 7AA 1578. See page 63, below.

found on a broken Casio electronic watch that was found on the floor of the Wolfe's hotel room. 2AA 0372. The Casio watch was not included in the pictures of the stolen jewelry and watches Mrs. Elsen was asked to identify at trial. See 7AA 1615-19. All of the items she identified were the kind of merchandise to be expected in the store of a Swiss watchmaker like Mr. Elsen. She was not asked about the Casio watch, by defense or prosecution.

Because there was no evidence that the Casio watch was among the stolen goods, it was not admitted at trial (2AA 0355); but that didn't stop prosecutor Seaton from arguing to the jury that print was incriminating because the Casio watch was likely taken in the robbery (7AA 1821). Were Mrs. Elsen alive now, it is highly probable that she would testify that there is no reason her craftsman husband would have such a cheap, electronic item on offer in his store. But she is not, so the State is free to renew its spurious arguments about this, as well.

(2) Det. Burt Levos.

As noted just above, Det. Burt Levos was the first officer to interview Mrs. Elsen, and he recorded statements by her that were exculpatory to Browning and undermined the prosecution's case against him. 7AA 1626-27. He also was one of the principal investigating officers and was at the crime scene early in the investigation. 7AA 1624-28. He was the only detective who was present throughout the critical process of gathering evidence and fingerprints from broken

glass at the scene (1AA 0060), which an expert retained during federal habeas has said was deficient and unreliable in numerous respects (see 7AA 1868-69). Det. Levos also attended the autopsy and saw wounds on the victim's body, which the expert says also were inadequately documented. *Id.*

Det. Levos was also responsible for critical pieces of evidence, and requested lab tests for blood on Browning's shoes and pants and tests of Browning's blood for the presence of drugs.[14] 7AA 1643, 1645. No record or report of the tests done on the pants and shoes has ever been disclosed—which they surely would have if any blood had been found. The State argued below that the tests may never have been done. 11AA 2580-81. Det. Levos was never interviewed by the defense and never testified in any forum about his part of the investigation of Browning's case. Now he never can be because he is dead.

(3) LVMPD Lab Technician Minoru Aoki.

Minoru Aoki was an LVMPD examining officer who tested various items of evidence gathered by police in this case for the presence of blood, at Det. Levos's and the prosecution's request. See 7AA 1643, 1645, 1648-49. He died in 2016. 8AA 1879.

The items tested by Mr. Aoki included the knife claimed by the prosecution to be the murder weapon and the cap which it claimed Browning wore during the

[14] The drug test returned negative (7AA 1646), undermining the State's theory that this crime was driven by Browning's desire for drugs.

crime. 7AA 1649. Mr. Aoki reported the results of his tests as "N.R." *Id.* In argument below, the parties agreed that this meant "No Result," but disagreed about "exactly what that means." 11AA 2550. Mr. Aoki was never interviewed and never testified about this, so there is no way to know for sure. In argument below, the defense contended that "no result" meant that tests for blood were administered and returned no result, meaning no blood was found on these two items. 11AA 2549. The State refused to concede that point, and indicated that in any event it intended to offer new testing done on the knife by the LVMPD crime lab (over defense objection) that returned what it claims to be a partial match to Hugo Elsen's DNA (11AA 2548; 1RA078-87), thus discounting any contrary inferences from Mr. Aoki's reports. The trial court found that if NR means "no result" that "would be exculpatory to the defendant" but because Mr. Aoki is dead "there are unresolved questions about what he did or didn't do with respect to that testing." 11AA 2610.

As noted above, Mr. Aoki was also asked by Det. Levos to test Browning's Levis and shoes for the presence of blood. 7AA 1643. No record of what he found was ever disclosed to the defense, and no record of his testing on these items exists. But the fact the prosecution never offered testimony about that testing at trial (though it called Mr. Aoki to give misleading testimony about the blood type of a spot on a jacket) strongly suggests those results were negative and exculpatory

to Browning. But again, because Mr. Aoki was never asked about this and is now dead, there is no way to know.

(4) Informant Randy Wolfe.

Randy Wolfe was the prosecution's star witness in this case. Browning was arrested in Wolfe's hotel room, which is where the police found the jewelry stolen in the Elsen robbery. *Browning v. Baker*, 875 F.3d at 452. After being questioned, Wolfe and his wife Vanessa showed police where most of the jewelry was hidden, though he still kept some for himself. *Id.* Wolfe is the person that Browning has always said framed him for this murder.

Wolfe had a long criminal record, had several aliases and had worked as a police informant. *Id.* at 457; see 7AA 1674, 1678-82. His false testimony at trial about the reward he clearly expected to receive for his testimony was one of the bases for the reversal of Browning's conviction. *Browning v. Baker*, 875 F.3d at 462-63. The ineffectiveness of Browning's appointed defense counsel in investigating the Wolfes and confronting Randy Wolfe at trial was an additional reason for the reversal. *Id.* at 474.

Randy Wolfe is dead, so the defendant has no way to adequately confront his testimony or bring out the exculpatory and impeaching information from him that it has acquired since the first trial.

At trial, defense counsel at trial never asked Wolfe about the jewelry found in his hotel room, and the fact that much of it was withheld from the police until after he and his wife Vanessa were questioned and released. See 7AA 1651-72. He was never confronted with testimony of another witness, Thomas Stamps, who reported that Wolfe had kept some of the stolen jewelry and was attempting to fence it after Browning's preliminary hearing. *Id.*; see 10AA 2285-86. Nor was he asked about his history as an informant and the ties to police that led them to accept his accusations against Browning rather than consider him as an obvious suspect. *Id.*; see 10AA 2263. Nor can he be asked about his connections to the "Cubans" by whom he said he was being threatened in a jail kite written before defendant's trial. 7AA 1676. Nor can he be asked about his many other prior convictions and acts of deception. See 7AA 1674, 1678-89. No future jury will be able to see Mr. Wolfe, assess his demeanor and the credibility of his story and decide whether he or Paul Browning is telling the truth.

(5) Informant Vanessa Wolfe.

Vanessa Wolfe and Randy Wolfe were the only witnesses who have ever claimed that Browning confessed to this crime. *See Browning v. State (II)*, 91 P.3d at 352-53; *Browning v. Baker*, 875 F.3d at 452-53. She was a prostitute with an extraordinarily long criminal record. 7AA 1685-92. She was questioned at trial about only a small part of that record—and she lied about it, denying that she had

been charged with a felony which was reduced when she became a State witness, and understating the large number of charges she had dropped or reduced between the time she started cooperating with police and her testimony at trial. *See id*; *compare* 7AA 1694-1707; 9AA 2082-83. Defense counsel Pike didn't even try to ask Ms. Wolfe about her near-contemporaneous, strikingly similar attempt to frame a man named Gerald Morell for a knifepoint robbery he didn't commit. See pages 56-57, below.

Mrs. Wolfe was not questioned at trial, and is not available to be questioned now, about the fact that it was she and her husband who had the lion's share of the stolen jewelry recovered by police, not Browning, who had none. See 2AA 0346-47, 10AA 2276-77. Or the fact that she and her husband provided that jewelry to police only after being questioned and denying knowledge of it. *Id.* Or the fact that it was she, not Browning, who was the source of the knife that the prosecution argued at trial was the murder weapon, and a cap that the prosecution contended was worn by the killer. *Id.* Her unavailability not only destroys the chain of custody of those items, it prevents defense counsel from now confronting her about whether she actually got those items from Paul Browning or someone else—someone like her husband or one of his partners in crime.

Nor can Ms. Wolfe be questioned about the shirt that she says Browning took off in her hotel room. 2AA 0259. One of the police officers reportedly said

they took the shirt from Browning (1AA 0120), but it has never turned up in evidence—as it surely would have if it was stained with Hugo Elsen's blood as the killer's must have been.

Finally, and perhaps most importantly, Mrs. Wolfe is not available to be questioned about the dark skinned Cuban-looking man who Marsha Gaylord said was associated with the Wolfes and who another now-deceased witness, Martha Hager, said she saw with them. See below. Nor can she be asked why her husband, after turning over most of the stolen jewelry to police, would be facing threats from "Cubans" in jail. See 7AA 1676. The possibility the Wolfes were under threat from the actual perpetrator of the crime or his associates raises questions about their credibility that are different from, and perhaps stronger than, the many other reasons to doubt it. But neither of the Wolfes is available to be questioned about that or to have the jury assess their demeanor or their answers.

(6) Defense witness Marsha Gaylord.

Marsha Gaylord was "an essential witness for Browning's trial defense, according to [defense counsel] Pike." *Browning v. Baker*, 875 F.3d at 450. Ms. Gaylord told Pike that she had been with Browning at the Elsen's Jewelry store a day or so before the crime, which explained Browning's fingerprints on glass from the store counters. 7AA 1717-19. She also apparently confirmed to him that she had been released from jail on the afternoon of the crime, and was planning to

meet Browning nearby—which undermines part of the prosecution's theory of the case and explains his presence in the area near the time of the crime. 7AA 1718. She also told Pike that she knew the Wolfes associated with a "Cuban". 4AA 0952; 7AA 1718-19. But due to a continuance of the trial based on the prosecution's supposed "mistake" (*Browning v. State (II)*, 91 P.3d at 49) and Pike's failure to secure the testimony of his allegedly most important witness, Ms. Gaylord did not testify at trial, and there is no record of her potential testimony except Pike's hearsay statements about it.[15]

(7) Defense witness Frederick Ross.

Frederick Ross was a witness who Browning's lawyers found after trial, who said testified at Browning's 1999 postconviction hearing that he witnessed the aftermath of the murder and saw Randy Wolfe and the Cuban individual who apparently committed it drive away from the scene. See 7AA 1726-8AA 1778. Ross claimed to know the Cuban by the name "Willy." 8AA 1776. His testimony

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[15] The State's Brief says Pike's declaration and testimony about Ms. Gaylord should be disbelieved and disregarded as "self serving" and "speculation." AOB 19. The two cases it cites involve declarations containing information from defendants, not lawyers, which described what witnesses might say if called—not what a specific witness had actually said. *See United States v. Ogungbe,* 39 F.3d 1189, 1994 WL 587658 (9th Cir. 1994); *United States v. Mays*, 549 F.2d 670, 679 (9th Cir. 1977); *compare Dickey v. Florida*, 398 U.S. 30, 35, 90 S. Ct. 1564, 1567, 26 L. Ed. 2d 26 (1970) (accepting the defendant's declaration regarding the testimony of a missing witness). Judge Herndon, who knows Mr. Pike (11AA 2596), was not required to disregard his sworn testimony, especially when there was no evidence contradicting it.

was wholly exculpatory to Browning and strongly corroborated Browning's claim that he was framed by the Wolfes.

Ross is deceased (11AA 2595), so there is no way now a jury can assess his testimony.

(8) Hotel Manager Martha Hager

Martha Hager was the manager of the Normandie Hotel. 8AA 1787-92. She was called by the defense at trial and testified that after the crime she saw Randy and Vanessa Wolfe with unusual amounts of jewelry, "rings and a watch," and that she was aware that the Wolfes had a dark skinned companion who could have been Cuban. 8AA 1790-91. On both these points, her testimony was exculpatory and corroborative of Browning's claim that he is innocent and was framed.

Ms. Hager died in 1999. 8AA 1882. Although her trial testimony is available, there is no way for any new jury to assess her credibility or for defense counsel to ask her questions based on the competent investigation that trial counsel Pike never did—for example, whether the dark skinned man she saw with the Wolfes had "shoulder length," "loosely curled" "wet looking" hair.

(9) Falsely accused Gerald Morrell

Gerald Morrell was the defendant in the case in which Vanessa and Randy Wolfe testified as prosecution witnesses the week Browning's case was first scheduled to go to trial. 3AA 0656-61, 7AA 1711-13. The day after a jury quickly

acquitted Morrell, rejecting the Wolfes' testimony, the prosecution moved to continue Browning's trial, and over defense objection was given a continuance of the case on the claim that the Wolfes could not be located. *Id.*; 1RA 012-24.

The parallels between Morrell's case and Browning's are striking. Morrell, much like Browning, claimed the Wolfes went to the police and falsely accused him of a robbery to cover up a crime of their own, an armed robbery that they attempted with accomplices just six days after the Elsen robbery-murder. 7AA 1711. Just as she did in Browning's case, Vanessa Wolfe gave police a knife which she claimed Morrell had used in the robbery. 7AA 1712. Unlike Browning's, Morrell's defense lawyer apparently investigated and was able to show that the knife belonged to the Wolfes themselves. *Id.*

Although Browning learned of Morrell's case while they were both in jail, and told defense counsel Pike about it, Pike made no apparent attempt to investigate the incident, call Morrell as a witness, ask the Wolfes about the him, or utilize this information in any way (7AA 1713), and it was never brought up during Browning's trial. Morrell was ill and unable to testify live at Browning's postconviction hearing (6AA 1322-23), and he died in 2005 (7AA 1880), so there is no way to determine how much of his testimony could be admitted under NRS 48.045, 48.059 or 50.085, or what effect it would have on a jury if it was.

(10) Scene witness Charles Woods

Charles Woods was a friend of the owner of a business adjacent to the Elsen's store. 1AA 0163-4. He testified at trial that on the day of the murder Browning jogged by him on the sidewalk in front of the stores. See 1AA 0163-67. He said this happened "shortly" before police and medics arrived at the Elsen's store. 1AA 0169. Apparently unaware of Mrs. Elsen's statement to Det. Levos, defense counsel did not ask him to be more specific about when this occurred. 1AA 0172-74. Mr. Woods testified that Browning was wearing a white or light colored shirt, but he didn't notice any blood on him and he didn't see anything in his hands. 1AA 0167, 0171-72. He also said that the hat Browning was wearing was a "beret" type hat and was *not* the hat the prosecution claimed the killer wore, the cap Vanessa Wolfe gave police. See 1AA 0168.

Mr. Woods is dead (1RA 089) so a jury can't now assess his testimony or the significance of the points on which he contradicted the State's case.

(11) Scene witness William Hoffman.

William Hoffman was one of the few witnesses called by the defense at Browning's trial. See 2AA 0383. He owned a business two doors from Elsen's. 2AA 0384. He testified that around 4 o'clock, about 20 minutes before the crime, he saw a "Cuban male" who he thought was "not a desirable individual" outside Elsen's store. 2AA 0389-91. He said the man was wearing a blue cap (2AA 0394)

as Mrs. Elsen said the killer was (7AA 1607). Because Hugo Elsen's dying description of the killer had not been disclosed, Mr. Hoffman was not asked if the "Cuban male" had "shoulder length," "loosely curled" "wet looking," hair.

Mr. Hoffman also testified that the police later brought Paul Browning to the scene after his arrest, for him and others to identify. 2AA 0387-88. He told them Browning was not the man he saw earlier (*id.*)—but he specifically noticed and recalled that when police brought Browning he had an inch long afro hairstyle and it did not appear that he had been wearing a hat. *Id.* [16]

Defense investigation below disclosed that Mr. Hoffman is dead (11AA 2542), so a jury can't now hear his testimony, either.

(12) Wolfe associate Thomas Stamps

Before Browning's trial, a man named Thomas Stamps told defense counsel Pike that he knew the Wolfes and had sold drugs to them, and he had driven Randy Wolfe to a pawn shop to sell gold jewelry shortly after the murder. 10AA 2285-86. He said they were with another man named Mike Hinz. *Id.* He said Wolfe told him the jewelry came "from his girlfriend." *Id.*

Stamps also said he knew the Wolfes well and Randy Wolfe was a "hustler and schemer of the worst kind" who had a reputation for "setting people up," and

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[16] The police took no pictures of Browning that night, but grainy stills from a television news video taken that night appear consistent with what Mr. Hoffman testified to in this regard. See 8AA 1972-73.

he knew that Randy and Vanessa had been "working for the police …." 10AA 2286. Despite this, Pike never contacted Stamps again. *Id.* He had a subpoena issued to bring Stamps to trial, but he did not request it until after the trial had already started, when Stamps was out of state and it was too late to bring him to Court. 10AA 2419-20.

Neither the defense nor the prosecution was able to locate Mr. Stamps during the proceedings below. 11AA 2561, 2574.

(13) Other witnesses.

The dismissal order noted that, in addition to the known witnesses who were unavailable, "numerous other potential witnesses are deceased or unavailable … and memories have faded" (11AA 2610), but it didn't specify exactly who those potential witnesses were.

The State's initial Motion to Admit Transcripts listed a number of witnesses who it anticipated might be unavailable, including a number of police officers and investigators: "Crime Scene Analyst David Horn … Officer David Radcliffe … Detective Robert Leonard … Dr. Giles Sheldon Green … Henry Truskowski … Crime Scene Analyst Kathy Adkins … Sargent Michael Bunker ….Steven Scarborough." 7AA 1516. Early on, the defense made a discovery request for contact information for each of these witnesses (8AA 1887-88), but none was ever provided.

During the second hearing below, on January 7, 2019—two weeks before the then-scheduled trial—prosecutor DiGiacomo told the Court he "believe[d] we're going to find Dave Horn … [and] Mike Bunker," because "I've had people from Metro tell me that they know people who know them and nobody's heard that they are deceased yet." 1RA 041. He said the pathologist, Dr. Sheldon Green "is still alive and still at that ranch up north"—but added that "I think we might use a substitute medical examiner" (1RA 042)—without indicating who that might be (and in apparent disregard of the Confrontation rules of *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011)). He provided no information about the whereabouts of fingerprint experts Truskowski and Scarborough except to say "Scarborough's alive." 1RA 053.

Three weeks later, after the trial had been continued, Mr. DiGiacomo sent defense counsel an email, which he copied to the court, saying "We have information that Debra Coe may be alive" and we have located "Radcliffe, Leonard, Horn, Bunker and Adkins"—but still providing no specifics about their availability or their whereabouts. 1RA 088. The email also disclosed that another of the investigating officers, Officer R. Robertson—who was one of the first on the scene and in a position to see and hear the things Officers Levos and Branon reported—is deceased. *Id.*

At the time of the dismissal order, the prosecution still hadn't answered the defense request, which had been made more than seven months before, for information about the current whereabouts of these or the other half dozen potential witnesses—including several other officers involved in prior incidents in which the Wolfes lied or tried to exchange information for leniency. 7AA 1887-88.

b. The lost evidence.

(1) The Scene of the Crime.

The scene of the crime—the Elsens' Jewelry Store and the business next door where Debra Coe worked—no longer exists. The properties were razed sometime after 1997. 7AA 1641. Because of that, there is no way for the defense to effectively investigate, for example, what the various scene witnesses say they saw, or to estimate how much time must have passed between the time Mrs. Elsen told Det. Levos she saw the killer run out the door and the time Ms. Coe looked out the window and saw the person she identified as Mr. Browning.

(2) The jewelry recovered from the Wolfes.

As noted above, only a few items of stolen jewelry were found in the Wolfes' hotel room when Browning was arrested, and the bulk of the loot was later turned over to police by the Wolfes themselves. See 2AA 0347, 10AA 2276-77. The defense never inspected that jewelry or had it tested for fingerprints because, before the preliminary hearing, the prosecutor had almost all of it released from

evidence and returned to Mrs. Elsen. 8AA 1785. This was done although it was known that police examination of the jewelry found no evidence any of it bore Browning's fingerprints. See 7AA 1578.

In the hearings below, the prosecutor indicated that at trial the State would present new testimony contradicting this earlier finding, from an expert who says he has found one of Browning's prints on a lift from one of the stolen rings. See 11AA 2581. Since the rings are gone, the defense cannot test or counter that.

(3) Paul Browning's shirt.

Although Charles Woods said that when he saw Browning go past the door he was wearing a white or light colored shirt, when Browning was brought back by police for a one person identification showup he was shirtless. See 7AA 1927. Vanessa Wolfe testified that she saw Browning taking off a shirt in her hotel room. 2AA 0259. Yet Browning's shirt is not in evidence and has never been accounted for. Debra Coe testified at Browning's trial that she was told by police "that they took off his shirt or they didn't have anything on the top half of him." 1AA 0120.

Whether the shirt was taken by police or left behind at the Wolfe's hotel room, it is lost. The fact it was not taken into evidence corroborates Mr. Woods' testimony that there was no visible blood on Browning when he saw him on the sidewalk outside the store. 1AA 0171-2. Given the bloody nature of this crime, it is likely that the perpetrator would have a great deal of blood on his shirt. Had the

police seen blood on Browning's shirt, it surely would have been taken into evidence. The preponderance of evidence suggests the shirt was another piece of evidence exculpatory to Browning, but now the defense can never prove that.

(4) The scene of Browning's arrest.

The Normandie Hotel was razed sometime around the year 2000. 7AA 1890. Because of that, there is no way for the defense to inspect the premises, see the layout of the Wolfes room and its relation to Browning's (which police searched with Browning's consent, finding nothing incriminating, 7AA 1542; 1RA 025). Nor can the defense inspect the layout of the hotel and determine the accuracy and credibility of the testimony of Randy and Vanessa Wolfe, Martha Hager, and the several police witnesses who described what they saw and did there on the day of Browning's arrest.

* * *

In sum, despite the fact that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify," *Doggett v. United States*, 505 U.S. 647, 655, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992), the evidence of prejudice from lost evidence and witnesses in this case is overwhelming and far exceeds the showing required by the constitution. *Compare, e.g., Dickey v. Florida*, 398 U.S. at 38 (finding "abundant evidence of actual prejudice to petitioner in the death of two potential witnesses, unavailability

of another, and the loss of police records"). That, more than anything, supports the trial court's decision.

B. The out-of-state cases on which the State relies on are clearly distinguishable.

The State's Brief cites four cases from other jurisdictions which it claims support its request for reversal. All of them are easily distinguishable from the unique circumstances here.

***Girts v. Yanai*, 600 F.3d 576 (6th Cir. 2010)** involved a completely different issue: whether a federal habeas court should have prohibited the State from conducting a retrial because of the "failure to retry [the defendant] … within the time provided by [the federal court's] conditional grant of a writ of habeas corpus." *Id.* at 578. After rejecting the proposition that extending the retrial beyond 180 days constituted a due process violation, the *Girts* Court said that its own previous grant of the conditional writ "forecloses [the] … claim that *any* third trial in his situation poses a due process violation." *Id*. at 588 (emphasis added). But it did not say, as the State's Brief implies (AOB 13) that a conditional writ means that *no* subsequent trial could ever constitute a due process violation. The *Girts* decision was issued in and limited to "the habeas context." *Girts*, 600 F.3d at 588. As Judge Herndon noted in his decision below, federal habeas courts that order retrials have no way to know whether witnesses are dead or unavailable or if crucial evidence has been lost. See note 7, above.

***State ex rel. Watkins v. Creuzot*, 352 S.W.3d 493 (Tex. Crim. App. 2011)** is also far afield. The trial court order reversed there did not dismiss the charges, but precluded the State from seeking the death penalty upon conviction. *Id*. at 494. The reversal was based on the proposition that a Texas "trial judge does not have the legal authority to preclude the State from seeking the statutorily authorized punishment of death." *Id.* at 495. The appellate court explained that an order precluding a death sentence is necessarily "based upon a contingency"—"the assumption that [the defendant] would be found guilty of capital murder." *Id.* at 502-03. It also said "there had been no showing regarding whether "certain 'missing' primary evidence could be presented in another form or through other witnesses." *Id*. A concurring judge added that "the procedural posture of this case … negates any intentional and purposeful misconduct by the State ….." *Id.* at 508.

Here, none of those things are true: The State no longer questions that Nevada judges have the power to dismiss charges where due process cannot be provided due to lost evidence or delay. See AOB 11 (recognizing review is for "abuse of discretion"). Browning's scheduled trial did not depend on any "contingency," there was a more than ample showing of prejudice, and the delay was caused in large part by the misconduct and unreasonable positions taken by the State.

***Sons v. Superior Court*, 125 Cal.App.4th 110 22 Cal.Rptr.3d 647 (2004),** is closer, but it held only that dismissal of charges as a discovery sanction was improper "at this stage of the proceedings" when there had been no indication of actual prejudice to the defense. 22 Cal.Rptr.3d at 655. The decision said, that "misconduct, even flagrant misconduct, ordinarily is corrected by a fair retrial" (*id.* at 654)—just as Judge Herndon said in his decision below, 11AA 2598. But it also acknowledged that "[a]t some point, the trial court may find it necessary to determine, as this case unfolds on retrial, that evidentiary and instructional sanctions on the prosecution are insufficient to secure [the defendant] a fair trial" and the defense could "renew his motion to dismiss … on due process grounds, throughout the retrial." *Id.* at 654-55. So *Sons* says nothing about whether dismissal was warranted here; at most it supports the State's position that it was ordered prematurely—a contention which we address below.

***State v. Keenan*, 143 Ohio St.3d 397, 38 N.E.3d 870 (2015)** stands for little more than that same proposition. "We conclude that whether it is possible for Keenan to receive a fair trial remains to be seen and that the trial court's decision to dismiss the case with prejudice was premature and, therefore, not justified." 38 N.E.3d at 871. The *Keenan* opinion acknowledged that a decision to dismiss is within a trial court's discretion, and that it involves a "highly subjective determination, requiring the analysis of a voluminous record with appropriate

adjustments for the absence of certain key witnesses who are now unavailable because they have died." *Id*. at 872. But it said it was an abuse of that discretion in Keenan's case to dismiss "[w]ithout first giving the parties the opportunity to develop the record …." *Id*.

The weakness of the defense position in *Keenan*, and the extent to which the trial court there did not allow the State to respond to it, was spelled out in more detail by a dissenting judge of the lower court, whose position the Ohio Supreme Court affirmed. "Keenan acknowledged the lack of specific evidentiary material to substantiate the degradation of memory issue and instead relied on the notion of 'common sense' to determine that the witnesses would not have sufficient memory to testify at the retrial." *State v. Keenan*, 998 N.E.2d 837, 851 (Ohio App. 2013) (dissenting opinion). "There is no evidence in the record establishing the prejudice created by the passage of time. Quite the opposite. The state presented evidence that witnesses were ready and able to testify at the retrial." *Id*. In fact, the State's brief in *Keenan* included a list of some 26 witnesses, including 19 "core alibi/impeachment witnesses" favorable to the defendant, who were "alive, located and ready to testify;" and it provided charts and detailed explanations identifying the specific issues each of those witnesses could address. Appellant's Reply Brief at 5-8, *State v. Keenan*, Ohio Sup. Ct. No. 2013-1731 (http://www.supremecourt.ohio.gov/Clerk /ecms/#/caseinfo/2013/1731, last visited 6/6/19).

Here, "quite the opposite" of that, it is the defense that has presented overwhelming "prejudice created by the passage of time," and it is the State that has offered no evidence to the contrary. Unlike the trial judge in *Keenan*, Judge Herndon gave the State ample opportunity to develop the record. Despite that, the State has never attempted to explain how the prejudice from the lost evidence could be remedied. To the contrary, it has made clear it intended to take full advantage of the fact key witnesses are all dead or unavailable. *See* pages 16-17, above.

In sum, none of the cases cited in the State's Brief involved anything like the circumstances that prevent a fair trial from being conducted here. None involved a delay of anything close to thirty three (33) years. None involved claims of ineffective assistance of trial counsel, let alone "wholesale" ineffectiveness.[17] None involved a combination of ineffectiveness of counsel *and* multiple *Brady* violations. Most importantly, none involved the loss of all the most critical witnesses, including ones whose testimony could dramatically undermine the prosecution's case and support the defendant's claim of innocence, witnesses whose death or disappearance has created an evidentiary void that cannot be filled.

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[17] The State's Brief accuses Judge Herndon of misreading the Ninth Circuit opinion, which it says "does not amount to a finding that trial counsel was 'wholesale' ineffective." AOB 23. This simply ignores what the opinion said: Pike "fail[ed] to investigate what happened on November 8, 1985…. We conclude that Pike unreasonably *failed to investigate Browning's case*." *Browning v. Baker*, 875 F.3d at 474 (emphasis added).

Such cases are rare and extraordinary, as Judge Herndon emphasized. 11AA 2593. But they do exist. This Court has encountered them before, and ordered dismissal on far less egregious facts than these. *See Sparks v. State*, 759 P.2d at 320 (ordering dismissal); *Howard v. State*, 600 P.2d at 216 (same). So have other state courts. In *Gillespie v. State*, 65 N.E.2d 791 (Ohio App. 2016), for example, an Ohio appellate court, fully cognizant of the decision in *Keenan*, affirmed an order barring retrial because events subsequent to a retrial order showed that the constitutional violation that spawned it could not be remedied. *Id.* at 808. The violation there involved nondisclosure of some police reports of the investigation of other possible subjects. *Id.* As shown above, the prejudice in this case is orders of magnitude more serious and pervasive than in *Gillespie*.

C. The trial court's decision was not premature and there was no other viable remedy for the prejudice to the defense.

For all its criticism of Judge Herndon's decision, Appellant never attempts to show that a fair trial is still possible in this case. Instead, its main point appears to be that the judge should have waited until trial to decide whether it is possible to afford Browning a retrial that is consistent with due process. AOB 11, 13, 16-17.

As noted above, the cases that the State cites in support of that argument are distinguishable from this one for many reasons, the most important of which is the irreversible prejudice that has already been shown here.

The State is wrong and misleading when it says Judge Herndon found only "potential" prejudice. AOB 18. To support that the State quotes a single Finding of Fact—one that followed a half dozen other Findings which identified specific, named witnesses who were certain to be unavailable at trial, and who actually, not potentially, would have given exculpatory testimony. 11AA 2609-10. Finding 13 referenced those previous Findings in a sentence which the State leaves out of its quotation: "This [previous] list is not comprehensive." 11AA 2610.

Nowhere did the "previous list" suggest that the lost testimony involved was only "potentially" exculpatory, and it wasn't. It is not just possible but certain that Det. Levos wrote what he did about Josy Elsen's statements on the night of the murder, and there is no doubt that neither is alive to be asked about it. There is also no doubt that those statements are exculpatory—as the State made clear by serving notice that it intends to "hotly contest" them and "prove beyond a reasonable doubt" they are incorrect. Similarly, what Minoru Aoki was asked to test for, and what he wrote in his lab reports, is not just possible but known; and as the trial court found, its most plausible reading "would be exculpatory to the defendant." 11AA 2610. The same is true for the other named missing witnesses: for each there is concrete evidence, not just speculation, that if available they would have given testimony helpful to the defense. See pages 41-60, above.

It is true that there was only a potential that some of the "other" witnesses—"other" than the seven key witnesses the Findings listed just before—would have been exculpatory. For example, there is no way to know whether Mr. Hoffman would have testified that the Cuban he saw lurking outside Mr. Elsen's store had "loosely curled" "wet looking," "shoulder length" hair. That is because that description was not disclosed or discovered before Mr. Hoffman testified. Even though that is a direct result of the constitutional violations at trial, alone that might not tip the balance. But combined with the loss of evidence already known or proved by a preponderance to be helpful to the defense, it does.

The State has never suggested how the facts presented below would change if the case proceeded to trial. Obviously, the dead witnesses are not going to appear and testify, and there is no reason to expect any new evidence will emerge about what they would say if they did testify. The State's arguments below gave no reason to believe it was going to concede any points in the defendant's favor—to the contrary, as noted, the prosecutor repeatedly said that he intended to dispute and disprove every exculpatory point the lost witnesses might have made.[18] Despite that, the State now says that "lesser remedies" are available.

[18] The State's Brief says that in the final hearing below "the State argued that the court had other remedies than dismissal. 11 AA 2574-75, 2580-85." AOB 29. A review of the cited pages shows that in the arguments recorded there the State not only failed to suggest any "other remedies," it reiterated its position that the lost testimony was inconsequential or it would prove it false.

> The trial court can: 1) allow or exclude former testimony of a now-unavailable witness (*Passarelli v. State*, 93 Nev. 292, 564 P.2d 608 (1977)); 2) order curative instructions based on lost evidence claims (*Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991)); and 3) allow the parties' stipulations to be presented to the jury.

AOB 28. Judge Herndon did consider the first of these alternatives and correctly decided to exclude the trial transcripts.[19] But although that was a necessary remedy the denial of Browning's right to effectively confront adverse witnesses,[20] he recognized that it was not sufficient to cure the prejudice because it would do nothing about the defendant's inability to call witnesses who would have "give[n] exculpatory testimony." 11AA 2614.[21]

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[19] The State's Brief puts form over substance when it says "the court did not rule on the motion to admit prior testimony as to Elsen and the Wolfes prior to dismissing the case." AOB 29. Judge Herndon said clearly "based on everything that I've read so far and my same concerns that I have right now, I would … say that I would have excluded those transcripts." 11AA 2599. The State does not explain why it would make any difference if he had formally so ruled.

[20] *See, e.g, Ohio v. Roberts*, 448 U.S. 56, 73 n.12, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) (prior testimony inadmissible if infected by ineffective counsel); *Mancusi v. Stubbs*, 408 U.S. 204, 216, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972) (ineffectiveness of prior counsel makes previous testimony inadmissible if it resulted in a failure to bring out relevant facts) (dictum).

[21] In response to Judge Herndon's statement about excluding the transcripts, Mr. DiGiacomo said he could convict without using any of the prior testimony, but he never said how he could do that, and neither does the State's Brief. Even if that were plausible, it wouldn't cure the problem—because every possible item of circumstantial evidence the State might muster would raise issues that the defense could not fairly meet because of the lost witnesses and evidence.

The State's second proposed remedy, curative jury instructions, was never suggested below. Although it was held to be available in *Sanborn v. State*, it makes no sense here. *Sanborn* involved a single issue—the failure of the police to test a weapon for blood and fingerprints—which the Court held was curable by a single instruction requiring the jury to draw inferences adverse to the State about what the testing would have shown. *Sanborn*, 812 P.2d at 128. To come close to doing the same thing here and instruct the jury to accept all the facts and inferences the lost testimony could have supported, the jury would have be told, for example:

- Mrs. Elsen saw killer run out the front door before she went for help, minutes before Ms. Coe looked out her store window. (Mrs. Elsen, Det. Levos, scene)
- Hugo Elsen was lucid and told police the killer had hair that was "shoulder length" "loosely curled" and "wet looking." (Mrs. Elsen).
- The bloody shoeprints near the body and out the door were there before first responders entered. (Mrs. Elsen)
- The bloody shoeprints were not made by Mrs. Elsen or Ms. Coe, and did not match the shoes Mr. Browning was wearing when he was arrested. (Mrs. Elsen)
- The pants and shoes Browning was wearing when he was arrested had no blood on them. (Mr. Aoki)
- The knife in evidence was tested 1985 and did not have blood on it. (Mr. Aoki)
- Browning was in Elsen's jewelry shop the day before the crime and put his hands on the counters. (Marsha Gaylord)

- Vanessa and Randy Wolfe were prosecution informants and were rewarded for their testimony against Browning. (Vanessa and Randy Wolfe)

- Less than a week after Browning's arrest, Vanessa and Randy Wolfe falsely accused another man of a robbery in order to cover up a knifepoint robbery they committed themselves. (Vanessa and Randy Wolfe, Gerald Morrell)

- Randy Wolfe was seen with unusual amounts of jewelry after the crime. (Martha Hager, Thomas Stamps)

- Randy Wolfe had a dark skinned associate who could have been Cuban. (Marsha Gaylord, Ms. Hager).

- While in jail, Randy Wolfe asked for protection from "Cubans." (Randy Wolfe)

- Frederick Ross saw a Cuban man and Randy Wolfe fleeing from the crime scene. (Ross).

The list goes on. The State never suggested it would agree to such instructions, and it is unimaginable that it would, because with such instructions only jury nullification could prevent a verdict finding reasonable doubt and acquitting.

The State's final, newly suggested remedy, "the parties' stipulations," is similarly vague and unrealistic. When the subject of agreeing to documents was raised, defense counsel pointed out that "having someone on the stand and really testing them … it's one of the most important principles in our justice system." 11AA 2554-55; see 10AA 2340-41. "[T]estimony by paper instead of in person" is, at least, "constitutionally-disfavored." *State v. Kaufman*, 304 So. 2d 300, 305 (La. 1974); see, e.g., *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (prohibiting admission of laboratory reports in

lieu of live expert testimony). The Sixth Amendment guarantees the right of a criminal defendant "to be confronted *with the witnesses* against him" and "to have compulsory process for obtaining *witnesses* in his favor," not documents. And a trial in which the defense had to rely on pieces of paper rather than witnesses could hardly be considered "untainted" by the constitutional violations that caused it.

In any event, the State never suggested below, and does not say here, what if anything it would be willing to stipulate to. To the contrary, as we have noted, in the hearings below the State made it clear it would hotly contest everything the defense claimed the missing witnesses would say. See page 16-17, above; 11AA 2554-55. Nowhere in its Brief does it indicate it is willing to do anything different now, or if so what that would be.

The State's proposed remedies are also inadequate to meet the requirement of the federal habeas order that any retrial be "untainted by the constitutional violations" that infected the first trial. 7AA 1600. The trial they would afford would not be the sort of criminal trial the Sixth Amendment contemplates. The taint would persist, just in a different form.

Judge Herndon was therefore faced with a difficult choice. After extensively reviewing the record and hearing repeated arguments, he became convinced that it was no longer possible to conduct a fair trial in this case. 11AA 2614. According to the State (AOB 13-14), despite that he should have forced the

parties to continue to hire experts, prepare witnesses, empanel a death qualified jury and let the State present what is left of its case in chief[22] and continue to hear ongoing arguments about whether compliance with due process is no longer possible—when he had already concluded it was not.

The lot of a trial judge is not so unhappy. Having read 21 briefs relating to the issue (11AA 2611-12) and heard argument four times, Judge Herndon was not required to read a 22nd or 23rd memorandum or hear argument a fifth or sixth time before making a final decision. The evidence and authority before him compelled the decision he made and there was no reason to further delay making it.

As the State itself recognizes, a key consideration in determining whether an issue is ripe for decision is the "hardship to the parties caused by withholding court consideration." AOB at 12, citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). Having determined that "evidentiary rulings could not guarantee a fair trial" (AOB 16), it made no sense for the judge to continue to expend the court's already overtaxed resources[23]—and allow the State

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[22] The State's Brief does not explain how "determin[ing] if the State can present its case-in-chief" (AOB 16) could in any way inform a trial court's decision about whether the *defense* has been unfairly prevented from developing and presenting *its* case, which is the issue that matters.

[23] See Fererra, *Team of homicide judges aims to speed up cases in Las Vegas*, LAS VEGAS *REVIEW JOURNAL* (7/3/2017) (https://www.reviewjournal.com/crime/courts/ team-of-homicide-judges-aims-to-speed-up-cases-in-las-vegas, last visited 6/10/2019).

to continue to hold Paul Browning in prison for a thirty fourth year—before issuing an order he had concluded was inevitable.

CONCLUSION

The dismissal order was not an abuse of discretion but a constitutionally necessary and proper disposition of a uniquely flawed case. It should be affirmed.

Dated this 11th day of June, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(B)(ii) because, excluding the parts of the brief exempted by NRAP32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 20,530 words.

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

Dated this 11th day of June, 2019.

Respectfully submitted

__*/s/ Dan Albregts*_____
DANIEL J. ALBREGTS