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Cold Cases and Serial Offenders: A Case Study Examining Practical and Legal Issues That Can Make or Break Prosecutions

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ABSTRACT

As technological advancements increase the probative value of DNA evidence (by revealing matches between suspects and evidence that could not be made with the use of older technology), cold case prosecutions will likely increase. At the same time, while DNA evidence can often lead to the identification of a guilty suspect, the prosecution of that suspect may be challenging, if not impossible. Some of these crimes were committed before DNA was used—or even considered—as an investigative tool. Oftentimes, rules governing the admissibility of evidence in such cases were drafted by individuals who likely (and quite reasonably) never contemplated the possibility of a case being prosecuted more than forty years after the crime was committed. For these reasons, practical and legal issues that rarely arise in typical investigations and prosecutions are far more likely to arise in cold cases.

The present article examines such issues, with a focus on a cold case involving a suspected serial sex offender. It begins with a description of the crimes connected to the defendant and the initial investigations into those crimes. It then describes the cold case investigation and prosecution. Finally, the article examines both practical and legal issues that arose in the context of this prosecution and that should be increasingly anticipated as

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cases age; these issues relate to (among other things) ex post facto *laws, hearsay and the Confrontation Clause, the admissibility of evidence of the defendant's uncharged bad acts, biological evidence, the scope of search warrants, and anticipated defenses.*

INTRODUCTION

As the probative value of DNA evidence increases due to technological advancements revealing matches between suspects and evidence that could not be made with the use of older technology, cold case prosecutions will likely increase. News stories about decades-old cases being solved have become common.[1] While DNA evidence can often lead to the identification of a guilty suspect, the prosecution of that suspect may be challenging, if not impossible.

Due to the passage of time, a characteristic inherent in cold cases, there is an increased risk that key witnesses pass away or cannot be located. Available witnesses' memories fade. Cognitive decline is a concern. There is an increased risk that evidence will be lost. Even when such evidence is available (including essential DNA evidence), the witnesses needed to lay the foundation for its admission may not be available to do so. Simply put, prosecutions tend to become more challenging as cases age.

This article is intended to illustrate and analyze some of the challenges common of cold cases, focusing on those committed by suspected serial sex offenders. It does so by examining them in the context of the prosecution of a forty-plus-year-old murder case. Evidence from that case suggests that the defendant—Charles Sullivan—was a serial offender. While the present case study examines Sullivan's prosecution (initiated in 2019) for the 1979 murder of twenty-year-old Julia Woodward, other crimes tied to him played a role in his prosecution for that 1979 murder. Accordingly, this article discusses all those crimes.

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1. *See e.g.*, Zenebou Sylla, *Nearly 50-year-old Cold Case in Canada Solved Through DNA Link to West Virginia Man*, CNN (May 24, 2023, 2:05 PM), https://www.cnn.com/2023/05/24/us/quebec-cold-case-dna-west-virginia/index.html [https://perma.cc/5DZH-ZJZB]; Lilly St. Angelo, *A 24-year-old Teacher was Murdered in 1971. DNA on a Cigarette Butt Just Solved the Case*, USA TODAY (Feb. 22, 2023, 1:49 PM), https://www.usatoday.com/story/news/nation/2023/02/22/cold-case-solved-dna-cigarette-rita-curran/11320406002/ [https://perma.cc/YAZ3-BMPC].

This article begins with a description of the crimes connected to Sullivan, and the initial investigations into those crimes. Rather than address those crimes in chronological order, this article addresses them in the order that will best provide readers with an understanding of how cold case investigations can unfold. It then describes the cold case investigation and prosecution of Sullivan. Finally, this article examines both practical and legal issues that arose in the context of Sullivan's prosecution and may arise in other such cold case prosecutions of suspected serial sex offenders.

I. THE CRIMES AND INITIAL INVESTIGATIONS

A. Ann Ellis[2]

In September 2007, Ann Ellis, an attractive five foot eight inch tall, 130 pound woman in her mid-twenties with long brown hair,[3] traveled with her family from California to Utah to attend her aunt's funeral.[4] After the funeral, Ann decided to hitchhike back to California.[5] She successfully hitched a ride from Utah to Nevada County, California.[6] It was late when she arrived in Nevada County, so she found a quiet place off of the road to camp for the night.[7]

Early the next morning, Ann found a piece of cardboard and scribbled "Yuba City"—her intended destination—on it.[8] A van heading in the opposite direction made a U-turn, and the driver offered her a ride.[9] The driver—later identified Charles Sullivan—explained that he was going Ann's direction and had only been going in the opposite direction because he first wanted to stop and get some coffee.[10] Ann found the explanation reasonable and accepted his offer for a ride.[11]

2. Because this victim is still alive, she is identified by a pseudonym.

3. The physical characteristics of the victims discussed herein are relevant to evidentiary issues discussed below.

4. Grand Jury Transcript at 160:6–18, 160:24–161:12, *In re* Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 14, 2019).

5. *Id.* at 161:11–16.

6. *Id*. at 161:15–23.

7. *Id.* at 162:8–13.

8. *Id*. at 162:24–163:4.

9. *Id*. at 163:19–164:11.

10. *Id*. at 164:7–11.

11. *Id*. at 164:12–165:8.

As the ride proceeded, Sullivan and Ann chatted freely with each other.[12] At some point, the conversation turned to geology.[13] Sullivan informed Ann that he knew a spot to mine turquoise.[14] He offered to show it to her, and after he assured her the spot was not far off the main road, she agreed to go with him.[15]

Eventually, Sullivan turned off the highway and onto Bowman Lake Road.[16] The further they went, the more remote the area became.[17] The paved road morphed into an unpaved pathway.[18] When they reached a point deep in the woods, Sullivan stopped his van, and he and Ann began to hike to the purported location of the turquoise.[19]

After a short distance, Ann crouched down to tie the lace to one of her boots.[20] Suddenly, she felt a hand on her shoulder.[21] Ann looked up and saw Sullivan standing over her while gripping a handgun.[22] Sullivan ordered her to lay down.[23] He used zip ties and handcuffs to bind her wrists together.[24] He removed her boots and also zip-tied her ankles together.[25]

Ann began to cry and asked Sullivan what he had planned.[26] Sullivan informed her that "the only thing that's going to be involved is sex, and we're just going to be out here for a few days having some fun."[27]

Throughout the ordeal, Sullivan maintained a calm demeanor, except when Ann spoke to him or looked at him.[28] Sullivan told her that if she did not stop looking at him and talking to him, "he would have to knock [her] out."[29]

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12. *Id*. at 165:23–166:4.
13. *Id.* at 166:1–14.
14. *Id*. at 166:17–19.
15. *Id*. at 166:20–167:9.
16. *Id*. at 167:10–21, 201:11–202:3.
17. *Id.* at 167:22–169:10.
18. Evidentiary Hearing Transcript at 101:4–7, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Feb. 24, 2021).
19. Grand Jury Transcript at 169:9–173:10, *In re Sullivan*, No. CR19-1607 (Aug. 14, 2019).
20. *Id.* at 174:20–24.
21. *Id*. at 175:1–4.
22. *Id*. at 175:4–5.
23. *Id*. at 176:13–14.
24. *Id.* at 178:12–17.
25. *Id.* at 178:18–20.
26. *Id.* at 177:13–15, 178:3–4.
27. *Id.* at 177:16–18.
28. *Id.* at 175:14–15, 177:23–178:11.
29. *Id.* at 178:4–6.

Once Sullivan successfully bound Ann's wrists and ankles, he directed her to stay put and started to walk away, presumably to retrieve something from his van.[30] At that point, Ann was able to contort her body to retrieve a pocket knife she kept in her pocket and used it to cut the binding at her ankles.[31] Too terrified to take the time to put her boots on, she ran barefoot through the rough terrain.[32]

After a short time, Ann—still barefoot and handcuffed—ran into two men riding an ATV.[33] Crying and shaking, Ann pleaded for their help.[34] The men obliged and started to drive her toward a cabin that had a telephone.[35] On the way, the three ran into a roving Nevada County power plant operator who happened to be driving his work truck in the area and assisted in tracking down Sullivan.[36] When they reached the cabin, one of the men called 911 and summoned the local police.[37]

Subsequently, the police detained Sullivan, and Ann identified him as the man who bound her with the intention of raping her.[38] Sullivan changed his clothes before the police apprehended him.[39] Additionally, Sullivan moved his van from the location Ann had last seen it, and he attempted to discard the personal belongings Ann left in the van, haphazardly tossing them into the surrounding wilderness.[40]

As police drove Sullivan to the Nevada County Jail, he did not act as one might expect someone arrested for a sex offense would act; he was so relaxed that he fell asleep approximately ten minutes into the ride.[41] Subsequently, Nevada County authorities obtained and executed a search warrant authorizing the collection of Sullivan's DNA.[42]

California prosecutors charged Sullivan with the crimes of: (1) Kidnapping to Commit Another Crime, namely, Forcible Rape; (2)

30. *Id.* at 178:24–179:8.

31. *Id.* at 180:1–5.

32. *Id.* at 182:13–21.

33. *Id.* at 186:7–21.

34. *Id.* at 186:24–187:2.

35. *Id.* at 187:3–6.

36. *Id.* at 187:19–188:1; Evidentiary Hearing Transcript at 113:3–117:8, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Feb. 24, 2021).

37. Grand Jury Transcript at 188:2–8, *In re Sullivan*, No. CR19-1607 (Aug. 14, 2019).

38. *Id.* at 190:23–191:16.

39. *Id.* at 191:17–20.

40. *Id.* at 192:2–22, 195:19–196:9.

41. *Id.* at 210:10–211:4.

42. Grand Jury Transcript at 52:1–54:20, *In re* Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 15, 2019).

Kidnapping; and (3) Criminal Threats.[43] The jury found him guilty of Criminal Threats, as well as False Imprisonment (a lesser-included offense relating to the remaining charges).[44]

The court imposed an aggregate sentence of imprisonment totaling three years and eight months.[45] The court also ordered Sullivan to register as a sex offender, having found that he committed these crimes for sexual gratification (a ruling that, as explained below, would prove important for the subsequent prosecution of Sullivan for the 1979 murder that is the focus of this article).[46] During the sentencing hearing, the presiding judge addressed the danger Sullivan posed to the community:

> This [factor] really sticks out for me. And here it's connecting the dots from making the U-turn to pick up this young woman to the handcuffing and zip tying her and leaving her in the forest to go get whatever it was you went to get. This may well have been a case where we found bleach[ed] bones out in the middle of the forest for all I know.[47]

Unfortunately, bleached bones were all that was found of Jeannie Smith when her remains were discovered in Reno—a mere forty-five-minute drive from the Nevada County crime scene—in 1979.[48]

B. Jeannie Smith

In the late-1970s, Reno—the self-proclaimed "Biggest Little City in the World"—was (and still is) the largest city in Northern Nevada—was home to approximately 100,000 residents employed by the city's numerous casinos, a major university (the University of Nevada), and various other businesses one would expect from a mid-sized U.S. city at the time.[49] Lake Tahoe is a short drive south of the city. North of the city is remote, desert

43. First Amended Felony Complaint, People v. Sullivan, No. F07-360 (Super. Ct. of Cal. of Nev. Cnty. Sept. 19, 2007).

44. Abstract of Judgment, People v. Sullivan, No. SF07-360 (Super. Ct. of Cal. of Nev. Cnty. Jan. 29, 2008); *see* People v. Magana, 281 Cal. Rptr. 338, 340 (Cal. Ct. App. 1991) ("[F]alse imprisonment is a necessarily lesser included offense of kidnapping . . . .").

45. Abstract of Judgment, *Sullivan*, No. SF07-360.

46. Sent'g Hearing Transcript at 1227:3–9, People v. Sullivan, No. SF07-360 (Super. Ct. of Cal. of Nev. Cnty. Jan. 28, 2008).

47. *Id.* at 1221:23–1222:1.

48. Evidentiary Hearing Transcript at 83:20–22, 119:21–23, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Mar. 1, 2021).

49. *See* U.S. DEP'T OF COM., 1980 CENSUS OF POPULATION, VOL. 1, CHAPTER A, PART 30 at 3, 10 (Oct. 1981).

terrain rarely traversed by anyone aside from the occasional hunter or dirt biker—the type of place one might stumble across the remains of a murder victim.

In 1978, seventeen-year-old Jeannie Smith lived with her family and her best friend, Charlene.[50] Both young women dropped out of high school and worked as waitresses at the Circus Circus Hotel and Casino in downtown Reno.[51] Jeannie was an attractive brunette, just over five feet tall, weighing approximately 100 pounds.[52] In the summer or fall of 1978, she and her boyfriend, Tom, broke up.[53]

Later that fall, Jeannie and Charlene were home when their supervisor at Circus Circus called and asked if they were interested in working that night.[54] Charlene agreed to go in;[55] Jeannie did not feel like working.[56] Both girls planned to go to a party after Charlene's shift ended.[57]

At approximately 9:30 PM that evening, Jeannie visited Charlene at Circus Circus.[58] Charlene's shift was nearly finished.[59] Jeannie told Charlene that she was going to "score some drugs" for the party and would return.[60] She left with a man named "Chuck," a bearded man Charlene did not know.[61] That was the last time any of Jeannie's acquaintances saw her.[62]

During the initial investigation into Jeannie's disappearance, Reno police created a composite sketch of the man named "Chuck" who was last seen with her at Circus Circus.[63] The appearance of the man in the sketch is remarkably similar to the appearance of Charles Sullivan around that same period of time.[64] The witness who provided the description of

50. Evidentiary Hearing Transcript at 91:1–11, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Feb. 26, 2021).

51. *Id.* at 93:8–16, 108:9–12.

52. *Id.* at 92:8–12.

53. *Id.* at 114:6–23, 126:9–15; Evidentiary Hearing Transcript at 167:8–10, *Sullivan*, No. CR19-1607 (Mar. 1, 2021).

54. Evidentiary Hearing Transcript at 94:3–4, *Sullivan*, No. CR19-1607 (Feb. 26, 2021).

55. *Id.*

56. *Id.*

57. *Id.* at 111:5–9.

58. *Id.* at 94:24–95:1.

59. *See id.* at 110:8–10.

60. *Id.* at 114:3–5.

61. *Id.* at 96:4–12; *see also id.* at 118:18–119:7 (clarifying that the "Chuck" Jeannie left with is different than the Chuck they were friends with).

62. *Id.* at 99:7–9.

63. *Id.* at 69:8–71:13; *see supra* note 61.

64. *See* Evidentiary Hearing Transcript at 194:14–195:13, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Mar. 3, 2021).

"Chuck" described him as five feet seven inches to five feet eight inches tall.[65] Sullivan is closer to six feet tall.[66]

On November 2, 1979, local hunters discovered Jeannie's skeletal remains in a shallow grave located in an area known as Hungry Valley, located in the remote stretches of land just north of Reno.[67] The zipper to her jeans had been forcibly opened.[68] Jeannie's clothes—as well as other cloth, tape, and rope—were discovered within 155 feet of her remains.[69] The tape appeared to be medical in nature and was torn into pieces the approximate length of Band-Aids.[70] Some of those pieces of tape were found entangled in Jeannie's hair and appeared to have been used to blindfold her.[71] There was no sign of Jeannie's underwear or ID.[72] She had been killed by extreme blunt force trauma to her head.[73] Officially, the case of Jeannie Smith's murder is still unsolved.[74]

C. Linda Taylor

Approximately four months after Jeannie disappeared, Charles Sullivan became a person of interest in the disappearance of twenty-three-year-old Linda Taylor.[75] On March 7, 1979, Linda Taylor met Charles Sullivan while they both waited in line at a First National Bank branch in Reno.[76] Linda's appearance was similar to that of Ann Ellis—five foot nine

65. Evidentiary Hearing Transcript at 71:22–24, *Sullivan*, No. CR19-1607 (Feb. 26, 2021). This description is largely consistent with the description of Sullivan (five feet eight inches to five feet ten inches tall) a witness provided police in relation to Sullivan's connection to the 1979 disappearance of Linda Taylor (described below). *Id.* at 16:14–19.

66. Def.'s Ex. 1 at 4988:21, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct.).

67. Evidentiary Hearing Transcript at 119:9–120:18, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Mar. 1, 2021).

68. Evidentiary Hearing Transcript at 17:10–13, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Mar. 2, 2021).

69. Evidentiary Hearing Transcript at 18:1–21:18, *Sullivan*, No. CR19-1607 (Mar. 1, 2021).

70. Evidentiary Hearing Transcript at 195:21–24, 179:13, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Mar. 3, 2021).

71. *See id.* at 182:5–6, 195:19–20.

72. *See* Evidentiary Hearing Transcript at 21:19–22, 160:12–14, *Sullivan*, No. CR19-1607 (Mar. 1, 2021); Grand Jury Transcript at 156:11–13, *In re* Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 14, 2019).

73. *See* Evidentiary Hearing Transcript at 133:10–136:10, *Sullivan*, No. CR19-1607 (Mar. 1, 2021).

74. *See id.* at 168:10–13.

75. Evidentiary Hearing Transcript at 22:18–23:1, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Feb. 26, 2021).

76. *Id.* at 15:2–13, 24:1–7.

inches tall, 140 pounds, long brown hair.[77] Though Linda was less than enamored with Sullivan's bearded appearance, she agreed to a lunch date at a local Marie Callendar's Restaurant.[78] Little is known of Linda's movements following the lunch date, though a police report notes that two individuals saw Linda (apparently alone) near her apartment the following two days.[79]

On March 9, 1979, Linda's roommate reported her missing, and the Reno Police Department launched an investigation into her disappearance.[80] Linda's brothers traveled from Minnesota to Reno to assist with the investigation.[81] On March 18, 1979, they discovered Linda's Plymouth station wagon abandoned in the parking lot of a Raley's grocery store approximately ten miles from the location where Jeannie Smith's skeletal remains were found later that same year.[82]

Charles Sullivan's employer led Reno police to question Sullivan in connection with Linda Taylor's disappearance.[83] At the time, Sullivan worked as a locksmith for a locksmith shop located in Reno.[84] After Sullivan's employer saw a newspaper article describing the bearded person-of-interest at the center of the investigation, the employer informed the Reno Police Department that, when he applied for the locksmith job, Sullivan indicated he would only accept the position if he was allowed to keep his beard.[85] The employer grew suspicious when Sullivan suddenly shaved his beard shortly after the article appeared in the newspaper.[86] When asked about Sullivan's whereabouts, the employer directed Reno police to the address of Tom—the same Tom who dated Jeannie Smith shortly before her disappearance.[87]

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77. Evidentiary Hearing Transcript at 143:16–18, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Feb. 25, 2021).

78. Evidentiary Hearing Transcript at 15:14–18, 25:17–19, *Sullivan*, No. CR19-1607 (Feb. 26, 2021).

79. *Id.* at 45:1–48:1.

80. *Id.* at 8:12–11:9.

81. Evidentiary Hearing Transcript at 145:21–146:14, *Sullivan,* No. CR19-1607 (Feb. 25, 2021).

82. Evidentiary Hearing Transcript at 17:22–21:2, *Sullivan*, No. CR19-1607 (Feb. 26, 2021); *see* Evidentiary Hearing Transcript at 169:12–180:6, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Mar. 2, 2021).

83. State's Opp. to Def.'s Motion to Suppress Nev. Cnty. Buccal Swab at 9:16–20, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Apr. 29, 2021).

84. *Id.* at 9:21–10:2.

85. *Id.* at 9:18–23.

86. *Id.* at 9:21–25.

87. *Id.* at 9:25–26.

Sure enough, on March 30, 1979, Reno police located a freshly shaven Sullivan at Tom's apartment.[88] The police interviewed Sullivan on March 30, 1979 and April 2, 1979.[89] Sullivan admitted he met Linda at the bank and had a lunch date with her, though he claimed to remember few details of the date that took place just weeks earlier.[90]

When the police attempted to get a photograph of Sullivan with a beard—requesting from him the Washoe County Sheriff's Office work card required of all locksmiths—Sullivan responded "that things had been too busy lately around the office and his boss could not send him to the Washoe County Sheriff's Office to obtain a work card."[91] This statement contradicted information provided by Sullivan's employer, who informed the Reno Police Department:

> He had sent . . . Sullivan to the Washoe County Sheriff's Office approximately two months ago to obtain a Washoe County Card. [The employer] stated that he had personally seen [Sullivan] leaving the Washoe County Sheriff's Office and had asked [Sullivan] if he had taken care of the application and [Sullivan] had replied in the affirmative.[92]

When the Reno police attempted to question Sullivan's two girlfriends, both refused to speak with them or take a polygraph examination.[93] Shortly thereafter, Sullivan and his girlfriends fled Reno.[94] To this day, Linda Taylor's body has not been found, and the case of her disappearance is still (officially) unsolved.[95]

D. Julia Woodward

In January 1979—within the short period of time between the disappearances of Jeannie Smith and Linda Taylor—twenty-year-old Julia

88. *See* Evidentiary Hearing Transcript at 23:3–6, 26:2–23, 59:17–19, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Feb. 26, 2021).

89. *Id*. at 57:11–19.

90. *Id.* at 24:4–26:1.

91. State's Opp. to Def.'s Motion to Suppress Nev. Cnty. Buccal Swab at 9:27–10:2, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Apr. 29, 2021) (citation omitted).

92. *Id.* at 10:3–6 (citation omitted).

93. Evidentiary Hearing Transcript at 28:1–29:16, *Sullivan*, No. CR19-1607 (Feb. 26, 2021).

94. *Id.* at 29:22–24; State's Opp. to Def.'s Motion to Suppress Nev. Cnty. Buccal Swab at 10:7–10, *Sullivan*, No. CR19-1607.

95. *See* State's Motion for Admission of Evidence Relating to 1979 Murder of Linda Taylor at 5:16, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 4, 2020).

Woodward, an attractive, five foot eight inch to five foot ten inch tall, 130 to 150 pound, white brunette, prepared for her move from the Bay Area (San Rafael, to be specific) to either Reno or the Lake Tahoe area.[96] Her exact intended landing spot was unknown, as she did not reveal the details of her plans to friends or family.[97]

Julia's former lover—a female who goes by the name of Jules—drove Julia to the San Francisco International Airport to help Julia move.[98] When they got to the airport, they got drunk and went into one of the airport bathrooms to get frisky with each other and lost track of time.[99] When they emerged from the bathroom, they discovered that Julia missed her flight.[100] The following day, Julia's friend, Pam, took Julia back to the airport.[101] Julia had told Jules and Pam that she would call them soon after arriving in Nevada.[102] That call never came.[103]

In the late afternoon hours of March 25, 1979, a local resident took his motorbike for a ride through the remote Hungry Valley trails, located ten to fifteen miles north of Reno.[104] At approximately 6:15 PM, he looked to his left and saw what he believed to be a mannequin.[105] It turned out to be the remains of Julia Woodward, discovered approximately 1.3 miles from the location where Jeannie Smith's remains would be discovered later that same year.

When the body was discovered, the identity of the victim was not known.[106] She was found lying on her left side, wearing clothing Julie recognized as consistent with that typically worn by Julia.[107] Additionally, Jules—Julia's ex—later recognized jewelry found on the body as Julia's.[108]

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96. Grand Jury Transcript at 15:9–16:1, 17:9–22, 102:2–5, *In re* Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 14, 2019).

97. *See id.* at 17:23–18:2.

98. *Id.* at 23:10–20, 29:3–17.

99. *Id*. at 29:18–30:2.

100. *Id*. at 29:24–30:2.

101. *Id.* at 30:18–31:2, 36:23–37:2, 43:23–44:5. Pam believed that she took Julia to the airport in or around November of 1978. *Id.* at 43:23–44:5. However, the testimony of Jules and Julia's mother made clear that Julia left for Nevada in February of 1979. *Id*. at 17:9–18, 42:16–22.

102. *Id*. at 31:15–23, 44:6–12.

103. *Id*. at 31:23, 44:6–12.

104. *Id*. at 51:5–52:18, 52:21–53:2.

105. *Id.* at 55:24–58:3.

106. *Id*. at 131:7–139:13.

107. *Id*. at 26:21–27:7, 102:13–14.

108. *Id*. at 33:9–34:3.

Band-Aids covered Julia's eyes in a manner as to operate as a blindfold.[109] A piece of cloth that appeared to have been used as a gag was discovered around her neck.[110] One of her shoes had been removed and holes had been worn through her bare sock, suggesting that she had been dragged or forced to walk through the rough desert brush.[111] The missing shoe and a zip tie were found some distance from the body.[112] Another zip tie had been secured around Julia's other ankle.[113] Julia's head was caked with blood, and investigators observed obvious traumatic injuries to her head.[114] Investigators observed rocks, thought to be the weapons used to kill Julia, blotted with blood and hair.[115] During the autopsy, investigators discovered that she was missing her underwear.[116]

At the same time, Julia's friends and family in San Rafael were worried that no one had heard from her.[117] Eventually, Julia's mother filed a missing person report with the San Rafael Police Department.[118] In November 1979, the Washoe County Sheriff's Office was able to identify the body they discovered on March 25 of that year as that of Julia Woodward.[119] Despite the extensive efforts of Washoe County Sheriff's Office detectives, the case went cold and remained that way for decades—until a tip led cold case investigators to Charles Sullivan.[120]

II. THE COLD CASE INVESTIGATION AND PROSECUTION

The tip came from Tom—the man who briefly dated Jeannie Smith in Reno in 1978.[121] He called it in after he saw a story about Sullivan's 2007 abduction of Ann Ellis.[122] Tom thought Sullivan's 2007 crime sounded similar to the crimes perpetrated against Jeannie, and he informed law

109. *Id.* at 102:19–20, 120:6–9.
110. *Id.* at 102:20, 105:9–12, 124:10–24.
111. *Id.* at 102:16–18, 102:21–23, 104:18–19, 127:5–9.
112. *Id.* at 106:8–17, 107:10–13.
113. *Id.* at 101:16–17, 104:5–8.
114. *See id.* at 101:15–16, 111:23–24.
115. *Id.* at 106:20–107:13, 123:1–3.
116. *Id.* at 156:11–13.
117. *Id.* at 18:23–19:1, 32:10–33:1, 46:22–23.
118. *Id.* 19:15–19.
119. *Id.* at 138:19–139:13.
120. *Id.* at 112:13–15; Grand Jury Transcript at 100:4–16, *In re* Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 15, 2019).
121. *See* Evidentiary Hearing Transcript at 127:15–128:11, 137:14–138:3, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Feb. 26, 2021).
122. *Id.* at 137:14–138:3.

enforcement authorities of as much.[123] At this point, Sullivan had been charged with crimes relating to the 2007 abduction of Ann Ellis.[124] While he was questioned in relation to the disappearance of Linda Taylor, police were unable to build a case against him.[125] His connections to the murder of Jeannie Smith were unremarkable; while his good friend Tom had dated her shortly prior to her death, and Jeannie had been last seen with a man named Chuck, those facts alone were not enough to consider him a person-of-interest, let alone a suspect.[126] He had no known connection to the murder of Julia Woodward.

The case was assigned to a Washoe County Sheriff's Office cold case detective.[127] Little could be done to compare Sullivan's DNA profile (generated in connection to his 2007 case) to DNA from evidence obtained in the Jeannie Smith investigation, as Jeannie's remains had been exposed to the elements for the year that elapsed from the time of her disappearance to the time her remains were discovered. The same was not true with respect to Julia Woodward. Given the time and geographic proximity of the murders of Jeannie and Julia—as well as evidence indicating that both had been killed in a similar manner (i.e., blunt force trauma to the head)—it was reasonable for cold case investigators to conclude that the same individual was responsible for both deaths.

Biological analyses were requested from the Biology Section of the Washoe County Sheriff's Office.[128] A criminalist with the Washoe County Sheriff's Office made the following findings:

(1) For a Band-Aid swab with a low level of DNA, Sullivan was excluded as the source of said DNA.[129]

(2) Initially, Sullivan was excluded as the source of low-level DNA discovered on a vaginal slide swab;130 however, the criminalist

123. *Id.* at 138:5–9.

124. Complaint at 1–2, People v. Sullivan, No. SF07-360 (Super. Ct. of Cal. of Nev. Cnty. Sept. 17, 2007).

125. *See* Evidentiary Hearing Transcript at 22:18–21, *Sullivan*, No. CR19-1607 (Feb. 26, 2021).

126. *Id.* at 106:12–107:3, 111:10–17, 140:3–4.

127. Evidentiary Hearing Transcript at 168:16–24, 169:23–170:3, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Mar. 3, 2021).

128. Grand Jury Transcript at 224:16–225:1, 235:10–24, *In re* Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 14, 2019).

129. *Id.* at 247:19–248:1.

130. *Id.* at 260:16–21.

analyzing the DNA evidence ultimately concluded that DNA was likely the product of contamination.[131]

(3) For spermatozoa DNA discovered on the crotch of Julia's jeans, the estimated frequency that a random individual, unrelated to Sullivan, was the source of said DNA was 1 in 13,440 individuals.[132]

Because the Washoe County lab did not (at the time) have the best-available equipment to analyze degraded DNA, evidence directly related to Julia Woodward's murder was shipped to the California Department of Justice (DOJ), which did have such equipment.[133] In follow-up analyses, a California DOJ criminalist made the following findings:

(1) A cutting from the crotch of Julia's jeans tested positive for the seminal protein P30, suggesting that the jeans had not been laundered after the protein had been deposited on them.[134]

(2) When examining a quarter-size piece of denim from the crotch of Julia's jeans, she observed "greater than a hundred sperm per field when viewing it on microscopic examination, which is a lot of sperm."[135]

(3) With respect to the primary contributor of the foreign DNA found on the crotch of Julia's jeans, the probability it belongs to a random individual, unrelated to Sullivan, is "estimated to be approximately 1 in 720 quadrillion African Americans, 1 in 41 quadrillion Caucasians, and 1 in 17 quadrillion Hispanics."[136]

(4) With respect to the primary contributor of the foreign DNA found on a vaginal swab taken from Julia at the time of her autopsy, the probability it belongs to a random individual, unrelated to Sullivan, is "estimated to be approximately 1 in 2 African Americans, 1 in 2.1 Caucasians, and 1 in 1.9 Hispanics."[137]

(5) With respect to the primary contributor of the foreign DNA found on a rectal swab taken from Julia at the time of her autopsy, the probability it belongs to a random individual, unrelated to

131. *Id.* at 261:3–265:9.

132. *Id.* at 271:6–13.

133. *Id.* at 272:5–273:7.

134. Grand Jury Transcript at 122:23–124:3, *In re* Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 15, 2019).

135. *Id.* at 124:4–17.

136. *Id.* at 129:19–130:14.

137. *Id.* at 140:6–23.

Sullivan, is "estimated to be approximately 1 in 420,000 African Americans, 1 in 130,000 Caucasians, and 1 in 58,000 Hispanics."[138]

(6) For two of the Band-Aids found on Julia, Sullivan was excluded as the low-level DNA source, though those results may be attributable to contamination.[139]

In January 2018, law enforcement also recovered a laptop computer Sullivan abandoned when he moved out of a California residence the month prior.[140] A search of the computer revealed several pictures of bondage-related pornography, depictions of violence perpetrated against women, and a young boy with black tape covering his eyes, similar to the manner in which Band-Aids were used to blindfold Julia Woodward and, presumably, the medical tape found entangled in Jeannie Smith's hair was used to blindfold her.[141]

In 2019, Sullivan was indicted in Washoe County, Nevada, for the murder of Julia Woodard with the use of a deadly weapon committed: (1) "with premeditation, deliberation, and malice aforethought, and/or" (2) "in the perpetration or attempted perpetration of a sexual assault."[142] Thereafter, the parties engaged in substantial motions practice, raising numerous issues relating to (among other things) cold cases and serial offenders that serve as the bases for several of the legal issues examined below.[143] Ultimately, Sullivan pled "no contest" to second degree murder, pursuant to

138. *Id.* at 129:19–130:14, 141:24–143:9.

139. *Id.* at 159:24–160:4, 160:13–23, 161:20–162:6.

140. Evidentiary Hearing Transcript at 125:15–130:21, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Mar. 2, 2021).

141. *See* Evidentiary Hearing Transcript at 38:11–14, 41:4–6, 195:15–196:4, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Mar. 3, 2021).

142. Indictment at 1:24–26, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 15, 2019).

143. *See, e.g.*, Def.'s Motion to Suppress Nev. Cnty. Buccal Swab, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Apr. 19, 2021); Def.'s Motion to Preclude Bad Act Evidence Re: State's Theory, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Apr. 19, 2021); Def.'s Motion to Quash Nev. Cnty. Search Warrant No. 2672 and Motion to Suppress All Evidence Seized During the Execution of Said Search Warrant, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. May 20, 2021); State's Motion for Admission of Evidence Relating to Def.'s 2007 Abduction of Woman in Nev. Cnty., Cal., State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 4, 2020); State's Motion for Admission of Evidence Relating to the 1978 Murder of Jeannie Smith, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 4, 2020); State's Motion for Admission of Evidence Relating to the 1979 Murder of Linda Taylor, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 4, 2020).

North Carolina v. Alford.[144] The court sentenced him to a term of imprisonment of up to fifteen years.[145]

III. THE PRACTICAL AND LEGAL ISSUES

A. Charging Decisions

1. Ex Post Facto *Clause Concerns*

a. Overview

Due to the passage of time, a characteristic inherent in cold cases, there is an increased risk of issues relating to *ex post facto* laws. "The Constitution's two *Ex Post Facto* Clauses prohibit the Federal Government and the States from enacting laws with certain retroactive effects."[146] More specifically, the U.S. Supreme Court has identified four categories of *ex post facto* laws: (1) "Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action";[147] (2) "Every law that aggravates a crime, or makes it greater than it was when committed";[148] (3) "Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed";[149] and (4) "Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender."[150] For cold cases involving sex offenses, multiple potential *ex post facto* law issues may implicate the ability to charge underlying offenses, the ability to charge enhancements, and sentencing.

144. Change of Plea Transcript at 12:18–19, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. June 21, 2023); North Carolina v. Alford, 400 U.S. 25 (1970). "An *Alford* plea is a guilty plea accompanied by a denial of the facts constituting the offense." Tiger v. State, 654 P.2d 1031, 1033 (Nev. 1982). "In *Alford*, the Supreme Court held that such a plea is constitutionally sound if it is knowingly entered for a valid reason, for instance, to avoid the possibility of a harsher penalty." *Id.*

145. Sent'g Hearing Transcript at 44:11–14, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. June 27, 2023).

146. Stogner v. California, 539 U.S. 607, 610 (2003) (citing U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1).

147. *Id.* at 612 (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798)).

148. *Id.* (quoting *Calder*, 3 U.S. at 390 (emphasis omitted)).

149. *Id.* (quoting *Calder*, 3 U.S. at 390).

150. *Id.* (quoting *Calder*, 3 U.S. at 390 (emphasis omitted)).

b. Charging Sexual Assault

The #MeToo movement prompted legislatures throughout the country to amend laws relating to sex offenses,[151] including the lengthening of statutes of limitations for initiating both criminal and civil actions in such matters.[152] Such amendments are of limited assistance in criminal prosecutions, as "a law enacted after the expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution," though extensions of unexpired statutes of limitations do not run afoul of the Clause.[153] In Sullivan's case, the statute of limitations applicable to crimes committed in 1979 allowed the State to prosecute him for murder, but not sexual assault or any other crime.[154]

c. Charging the Deadly Weapon Enhancement

Retrospective application of a statute implicates the *Ex Post Facto* Clause when it "disadvantage[s] the offender affected by it by altering the definition of the criminal conduct or increasing the punishment for the crime."[155] Thus, the *Ex Post Facto* Clause must also be considered when determining whether an enhancement can be charged along with the underlying crime.

At the time of Julia Woodward's murder, Nevada law provided that a defendant who used a deadly weapon to carry out a crime was to be sentenced to a term of imprisonment equal to that of the underlying crime, and that the sentences were to run consecutively to one another.[156] Thus, the prosecution had to determine whether it could charge Sullivan with using a deadly weapon in the form of the rock found next to Julia Woodward's body to carry out her murder.

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151. *See, e.g.*, Jamillah B. Williams & Elizabeth Tippett, *Five Years on, Here's What #MeToo has Changed*, POLITICO (Oct. 14, 2022, 11:16 AM), https://www.politico.com/newsletters/women-rule/2022/10/14/five-years-on-heres-what-metoo-has-changed-00061853 [https://perma.cc/ZBR2-VLY8] ("Between 2017 and 2021, states introduced 2,324 #MeToo-related bills and passed 286.").

152. *See, e.g.*, S.B. 9, 2019 Leg., 80th Sess. (Nev. 2019) (amending Nevada law to provide no time limitation for the prosecution of "a sexual assault arising out of the same facts and circumstances as a murder").

153. *Stogner*, 539 U.S. at 618, 632–33.

154. *See* NEV. REV. STAT. § 171.080 (1977) (amended 2019); NEV. REV. STAT. § 171.085 (1977) (amended 2019).

155. Lynce v. Mathis, 519 U.S. 433, 441 (1997) (internal quotation marks and citation omitted).

156. *See* NEV. REV. STAT. § 193.165 (1973) (amended 2007).

The applicability of the deadly weapon enhancement turned on the definition of "deadly weapon" applicable at the time of Julia's murder. Before the legislature defined the term "deadly weapon,"[157] the Supreme Court of Nevada (in 1988) adopted a "functional test of how an instrument is used and the facts and circumstances of its use" to make that determination.[158] In that case, the court rejected a challenge to the deadly weapon enhancement where the defendants burned the victim with a "heated electric iron and red hot table fork."[159] Because Sullivan used a large rock—an item that could function as a deadly weapon just as easily as a fork and iron—to cause even greater harm to Julia Woodward, the prosecution could properly charge him with the deadly weapon enhancement.

d. Sentencing

As noted above, the *Ex Post Facto* Clause is implicated where retrospective application of a statute increases the punishment for a crime.[160] Because statutes enacted after 1979 increased the punishment for second degree murder[161]—the crime to which Sullivan ultimately pled guilty—the *Ex Post Facto* Clause had to be taken into consideration for plea negotiations. Any sentence imposed for second degree murder would have to be in accordance with the sentencing statutes in effect in 1979.

2. Charging Issues Relating to the Admissibility of Evidence

While the applicable statute of limitations precluded the State from charging Sullivan with sexual assault, the State was able to charge him with murder committed "in the perpetration or attempted perpetration of a sexual

157. In 1995, the Nevada legislature expressly defined "deadly weapon." NEV. REV. STAT. § 193.165(5) (1995).

158. Clem v. State, 760 P.2d 103, 106–07 (Nev. 1988).

159. *Id.* at 107.

160. *See Lynce*, 519 U.S. at 441.

161. In 1979, Nevada law provided: "Every person convicted of murder of the second degree shall be punished by imprisonment in the state prison for life or for a definite term of not less than 5 years." NEV. REV. STAT. § 200.030(7) (1977). At the time Sullivan was charged with Julia Woodward's murder, Nevada law provided:

A person convicted of murder of the second degree is guilty of a category A felony and shall be punished by imprisonment in the state prison:

(a) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or

(b) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

NEV. REV. STAT. § 200.030(5) (2023).

assault."[162] This was important because, as explained below, it lowered the State's burden in getting evidence of Sullivan's other sexual offense—the abduction of Ann Ellis—admitted into evidence at trial (had the case proceeded to trial).

Nevada—like many other jurisdictions, including the federal government[163]—has made it easier for the prosecution to introduce evidence of a defendant's other uncharged[164] sexual offenses in a trial for another sexual offense committed by the defendant. Generally, evidence of other bad acts committed by a defendant are presumed to be inadmissible.[165] To overcome the presumption of inadmissibility, the prosecution must request a hearing and establish that: (1) the other bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity;[166] "(2) the act is proven by clear and convincing evidence[;] and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."[167]

"In prosecutions for sexual offenses," however, Nevada law "allows for the admission of evidence of a prior bad act constituting a sexual offense 'to prove the character of a person in order to show that the person acted in conformity therewith,'" i.e., propensity evidence.[168] Moreover, as noted

162. Indictment at 1:25–26, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 15, 2019).

163. FED. R. EVID. 413.

164. For the purposes of the present article, the term "uncharged" is used to describe a sexual offense other than the sexual offense for which the defendant is on trial, regardless of whether the defendant had ever been charged with that other sexual offense in the past.

165. Tavares v. State, 30 P.3d 1128, 1131 (Nev. 2001).

166. Those other purposes include, but are not limited to, proving "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NEV. REV. STAT. § 48.045(2) (2023).

167. Bigpond v. State, 270 P.3d 1244, 1249 (Nev. 2012) (citation omitted).

168. Franks v. State, 432 P.3d 752, 755 (Nev. 2019) (quoting NEV. REV. STAT. § 48.045(3)). While the *Franks* Court considered the admission of a defendant's other bad acts that took place *prior to* the charged crime, the statute governing the admissibility of such conduct applies to other bad acts that took place both prior to and subsequent to the charged crime. *See* NEV. REV. STAT. § 48.045. This is consistent with the laws of other jurisdictions. *See, e.g.*, Dowling v. United States, 493 U.S. 342 (1990) (holding that admission of evidence of an alleged robbery occurring two weeks *after* the charged robbery offense to prove identity was proper despite defendant's acquittal on charges relating to that *subsequent* robbery); United States v. Hadaway, 681 F.2d 214 (4th Cir. 1982) (approving of the use of *subsequent* bad acts to prove intent and knowledge); United States v. Delgado, 56 F.3d 1357, 1365 (11th Cir. 1995) ("[P]rinciples governing what is commonly referred to as other crimes evidence are the same whether the [charged] conduct occurs before or after the offense charged." (footnote omitted)); Regina v. Forster, 169 Eng. Rep. 803 (1855) (English Crown Court of Criminal Appeal approving the use of subsequent bad acts as evidence to prove knowledge).

above, the prosecution faces a lower burden in getting such evidence admitted, as the prosecution need only: (1) request the court's permission to introduce the evidence, explaining how the proffered evidence "tends to make it more probable that the defendant engaged in the charged conduct"; (2) establish that "the prior sexual offense is relevant for propensity purposes, and that a jury could reasonably find by a preponderance of the evidence that the bad act constituting a sexual offense occurred"; and (3) have the court determine that the evidence is not unfairly prejudicial.[169] These standards are discussed in greater detail below;[170] for the purposes of the prosecution's charging decisions, the point here is that charging that a murder was committed in the perpetration or attempted perpetration of a sexual offense makes it easier for the prosecution to present evidence of a defendant's uncharged sex offenses against him than it would be if the prosecution charged a defendant with a murder not expressly connected to a sex offense.

The Nevada Legislature recently enacted a law regarding the admissibility of evidence relating to a defendant's uncharged sex offenses.[171] Whether such a law applies in a case charging a crime committed prior to its enactment depends on the legislature's intent.[172] In Nevada, the legislature expressly stated that the law "appl[ies] to a court proceeding that is commenced on or after October 1, 2015."[173] The Supreme Court of Nevada has noted the same and applied the law as the legislature intended.[174]

Finally, the applicability of such an evidentiary law does *not* hinge on whether the prosecution can prove, *without the aid of the other bad acts*

169. *Franks*, 432 P.3d at 756.

170. *See* discussion *infra* Section III.E.

171. A.B. 49, 2015 Leg. 78th Sess. (Nev. 2015).

172. *See* Town of Eureka v. State Eng'r, 826 P.2d 948, 951 (Nev. 1992) ("[A]bsent clear legislative intent to make a statute retroactive, this court will interpret it as having only a prospective effect.").

173. Nev. A.B. 49.

174. *See Franks*, 432 P.3d at 755. Application of such a statute does not implicate the *Ex Post Facto* Clause. *See, e.g.*, Carmell v. Texas, 529 U.S. 513, 550 (2000) (making clear that laws that "alter the degree, or lessen the amount or measure, of proof" required for a conviction implicate the *Ex Post Facto* Clause, while "laws that merely respect what kind of evidence may be introduced at trial" do not); Schroeder v. Tilton, 493 F.3d 1083 (9th Cir. 2007) (rejecting an *Ex Post Facto* Clause argument challenging the retrospective application of a law permitting the admission of evidence of a defendant's prior sexual misconduct); Dibble v. Klee, 373 F. Supp. 3d 846, 856 (E.D. Mich. 2019) (rejecting an *Ex Post Facto* Clause argument challenging the retrospective application of a law permitting "the introduction of evidence of past sexual misconduct to prove a defendant's propensity to commit the charged offense, on the ground that the law[] do[es] not lower the quantum of evidence or burden of proof required to sustain a sexual misconduct conviction.").

sought to be admitted at trial, the charged offense is a sex offense.[175] The Supreme Court of Nevada rejected such a challenge, explaining that "[t]he relevant consideration for determining" whether the law permitting the admission of evidence of the defendant's other sexual offenses "applies to a criminal prosecution . . . is simply whether the defendant has been charged with a sexual offense, not whether there is sufficient evidence to support the charge."[176] Application of such laws is discussed in greater detail below.[177]

3. Charging by Indictment Versus Information

Once the prosecution decides a case should be charged and what charges should be included, it must determine whether to charge that case by an indictment or by a complaint and information.[178] In either case, in Nevada, the prosecution must establish "probable cause to believe that an offense has been committed and that the defendant has committed it."[179]

The nature of the proceedings to establish probable cause through grand jury is quite different from the proceedings to establish probable cause when a case is charged through a complaint and information. Where the prosecution seeks an indictment through grand jury proceedings, the target of the grand jury may appear at the grand jury while accompanied by defense counsel who may advise said target; however, defense counsel may not "[i]n any other way participate in the proceedings of the grand jury."[180] Where the prosecution seeks to charge the defendant through an information, during the preliminary hearing, "[t]he defendant may cross-examine witnesses against him or her and may introduce evidence in his or her own behalf."[181] Both charging methods have benefits.

Given the limited role of judges and defense attorneys in grand jury proceedings, the prosecution has greater control over the scheduling of witness appearances. Additionally, reluctant witnesses may be more forthcoming when testifying outside the presence of the defendant, as they would in grand jury proceedings. Further, if the prosecution is charging multiple defendants, proceeding by grand jury is the best way to ensure that the evidence only has to be presented once to establish probable cause for all defendants. If the prosecution instead sought to charge a defendant through

175. State v. Eighth Jud. Dist. Ct. *ex rel.* Cnty. Of Clark, 521 P.3d 1215, 1221 (Nev. 2022).

176. *Id.*

177. *See* discussion *infra* Section III.E.

178. NEV. REV. STAT. § 173.015 (2023).

179. *Id.* § 171.206.

180. *Id.* § 172.239(2)(c).

181. *Id.* § 171.196(5)(a).

an information, there may be no way to ensure all codefendants are arrested within a time period that would allow the prosecution to present its evidence in a single preliminary hearing to determine probable cause.

Despite these benefits, proceeding through a preliminary hearing may be especially preferable for cold cases. The prosecution of very old cases often requires testimony from very old witnesses. As the U.S. Supreme Court has observed, "[m]emories fade, and witnesses can die or disappear."[182] Should key witnesses pass away or otherwise become unavailable for trial, a case that was once challenging to successfully prosecute may become impossible to successfully prosecute. If such a case is charged via an information, witness testimony taken during the preliminary hearing may be used at trial because the witnesses were subject to cross-examination.[183] Grand jury testimony, on the other hand, cannot be used at trial because those witnesses were not subject to cross-examination.[184] With respect to the prosecution of Charles Sullivan, the State had no choice but to proceed through the grand jury due to the limited jurisdiction of Nevada's Office of the Attorney General.[185]

B. Potential Challenges in Proving Cause and Manner of Death in Cold Cases

The older the case, the more likely it is that the medical examiner or coroner who opined on the cause and manner of the victim's death as part of the initial investigation will be unavailable. In such cases, courts have allowed another medical examiner to testify as to the cause and manner of the victim's death even when that opinion is based on inadmissible evidence, including the autopsy report prepared by the medical examiner who conducted the autopsy.[186] For autopsies conducted before the use of digital cameras, one should expect far less photographic documentation of the autopsies than is typical of those today. Film photography comes with a cost, and taking numerous photographs (as is done today, but with the advantage

182. Stogner v. California, 539 U.S. 607, 631 (2003).

183. *See* NEV. REV. STAT. § 51.035(2)(d) ("'Hearsay' means a statement offered in evidence to prove the truth of the matter asserted unless . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . [a] transcript of testimony given under oath at a trial or hearing or before a grand jury . . . .").

184. *See* U.S. CONST. amends. VI, XIV.

185. *See* Ryan v. Eighth Jud. Dist. Ct. *ex rel*. Cnty. of Clark, 503 P.2d 842, 843 (Nev. 1972).

186. *E.g.*, Commonwealth v. Brown, 139 A.3d 208 (Pa. Super. Ct. 2016); Flowers v. State, 456 P.3d 1037 (Nev. 2020).

of digital cameras) would be cost-prohibitive. Additionally, the longer the case stayed cold, the greater the chance photographic evidence was lost or destroyed.

Nevertheless, with the police reports, a well-written autopsy report, and even limited photographs from the crime scene and autopsy, a medical examiner may be able to form an independent opinion on the cause and manner of the victim's death. Prosecutors may find it far more challenging to present to the factfinder(s) the evidence upon which that independent opinion is based.

To lay a proper foundation for the admission of photographic evidence of that nature, the prosecution must shepherd the photographs in through witnesses who can testify that they are fair and accurate depictions of the crime scene and/or autopsy.[187] In the Sullivan matter, numerous law enforcement officials present at both the crime scene and the autopsy were available to provide such testimony in evidentiary hearings conducted during the course of his prosecution.[188] Thus, the photos from both could be admitted when necessary.

In the event there is not enough evidence for a medical examiner to reach an independent opinion on the cause and manner of death, the prosecution may attempt to introduce the original autopsy report itself as an exhibit. In such an event, the prosecution will likely face an objection based on the Confrontation Clause.[189]

No post-*Crawford*[190] United States Supreme Court opinion has established that autopsy reports are testimonial and, thus, implicate the Confrontation Clause. Moreover, in a concurring opinion issued in *Williams v. Illinois*, Justice Breyer made clear his position that the autopsy reports are not testimonial:

> Finally, to bar admission of the out-of-court records at issue here could undermine, not fortify, the accuracy of factfinding at a criminal trial. Such a precedent could bar the admission of other reliable case-specific technical information such as, say, autopsy reports. Autopsies, like the DNA report in this case, are often conducted when it is not yet clear whether there is a particular suspect or whether the facts found in the autopsy will ultimately prove relevant in a criminal trial. Autopsies are typically conducted soon

187. *See, e.g.*, Burton v. State, 437 P.2d 861, 863 (Nev. 1968).

188. *See, e.g.*, Grand Jury Transcript, *In re* Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 14, 2019).

189. *See* Commonwealth v. Brown, 139 A.3d 208, 215 (Pa. Super. Ct. 2016) (acknowledging "a sharp split in authority on whether autopsy reports are testimonial" for the purposes of the Confrontation Clause).

190. *See* Crawford v. Washington, 541 U.S. 36 (2004).

> after death. And when, say, a victim's body has decomposed, repetition of the autopsy may not be possible. What is to happen if the medical examiner dies before trial?[191]

Because Justice Breyer's opinion is not controlling precedent, that question remains. The answer may be particularly important in cold cases, as the passage of time between a murder and a trial increases the likelihood the prosecution may need to rely on it in the absence of testimony from the medical examiner who conducted the autopsy.

C. Search Warrants and Serial Sex Offenders and Serial Murderers

It is well-established that issuance of a search warrant must be supported by probable cause.[192] "'Probable cause' requires that law enforcement officials have trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for are: seizable and will be found in the place to be searched."[193] Where a defendant carried out a crime that is characteristic of a serial offender, a person of reasonable caution would believe that it is more likely than not that items stored in that offender's home, and on that offender's electronic devices, will reflect as much.

In carrying out his crimes against Ann Ellis, Sullivan demonstrated the type of planning and sophistication one would expect from a serial predator. For example, he was prepared with a firearm, zip ties, and handcuffs concealed in a fanny pack.[194] Additionally, in a clear effort to avoid detection, Sullivan utilized a ruse to lure Ann to a remote area (i.e., leading her to purported turquoise).[195] While fleeing the scene of his crimes, Sullivan had the wherewithal to dispose of much of the evidence of his crimes and change his clothing in an effort to avoid detection.[196] It would have been woefully shortsighted of detectives to proceed with the investigation with the assumption that Sullivan—at sixty-one-years-old—committed such a sophisticated crime for the first time.

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191. Williams v. Illinois, 567 U.S. 50, 97–98 (2012) (Breyer, J., concurring).

192. *See* NEV. REV. STAT. § 179.045 (2023).

193. Keesee v. State, 879 P.2d 63, 66 (Nev. 1994) (citation omitted).

194. Grand Jury Transcript at 175:4–5, 178:12–17, 180:8–19, *In re* Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 14, 2019).

195. *Id.* at 166:17–19, 167:22–169:10.

196. *Id.* at 192:2–22, 195:19–196:9; Grand Jury Transcript at 179:4–7, *In re* Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 15, 2019); *see* Evidentiary Hearing Transcript at 65:24–66:9, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Feb. 24, 2021).

This commonsense analysis is bolstered by an empirical study published in the Journal of Criminal Justice that examines offending patterns of serial sex offenders.[197] The study notes that "serial sex offenders were more frequently strangers to their victims compared to nonserial sex offenders."[198] The study also finds that "serial sex offenders more frequently sexually assaulted in the outdoors or outside (defined as any public space not inside a building, regardless of how secluded the public space was) and in vehicles and less frequently in the offender's residence compared to nonserial sex offenders."[199] The study next explains:

> Sexual assaults committed by serial sex offenders more frequently involved a weapon (e.g., primarily a firearm or a knife, respectively), kidnapping (defined as how the offender was able to "get the upper hand" by using force, threat, or deception to transport or detain a person against her/his will—a separate act/offense from the sexual assault), and verbal/physical threats (e.g., abusive language or threats of physical harm) compared to sexual assaults committed by nonserial sex offenders.[200]

The study further notes that "nonserial sex offenders more frequently punched/slapped victims compared to serial sex offenders."[201] Aside from those particular indicators, the study advises that:

> given the number of serial sex offenders identified and the variety of their offenses, [these] findings suggest that law enforcement should investigate each sexual assault as if it were potentially perpetrated by a serial sex offender, as it is likely that a sexual offender has either previously sexually assaulted or will offend again in the future.[202]

The authors explain that their findings "suggest that law enforcement may be more successful in investigating sexual assaults if the focus of the investigation shifted from a single incident and/or victim to the offender and the offender's other possible sexual assaults."[203]

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197. Rachel Lovell, et al., *Offending Patterns for Serial Sex Offenders Identified via the DNA Testing of Previously Unsubmitted Sexual Assault Kits*, 52 J. CRIM. JUST. 68 (2017).

198. *Id.* at 71.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 76.

203. *Id.*

Probable cause that the defendant is a serial offender provides a legitimate basis for the issuance of a search warrant permitting searches of areas where investigators are likely to discover evidence of crimes committed by such serial offenders.[204] A 2013 study notes that some serial sex offenders "intentionally record, preserve, and archive the details of their sexual crimes."[205] "Their recording methods include videotaping, audiotaping, photographing, sketching, creating journal entries, mapping, making calendar notations, [and] writing story-length descriptions . . . ."[206] The authors discuss numerous cases in which serial sex offenders utilized such recording methods and, after detailing the diary entries of such an offender, explained that they "underscore[d] the investigative significance of this collecting impulse and the importance of the police initiating searches with the conviction that such evidence will exist and can be located in serial sexual crimes."[207] These studies justify the issuance of search warrants to search the home and electronic devices of suspected serial offenders for such evidence, even in cases (such as Sullivan's) where the charged crime was committed years before the search warrants were sought, a substantial distance from the offender's home, and/or in a manner not involving electronic devices.

D. Biological Testing

1. Spermatozoa in the Anal Canal and Rectum

In sex offense cases such as Sullivan's, the significance of biological evidence is not necessarily intuitive. The presence of spermatozoa in the anal canal and rectum is far from conclusive evidence that the rape victim was anally sodomized. "It is during the interval of time between the attack and the examination, when the victim is walking or running to seek help, being questioned by police investigators, and being transported to the hospital, that the vaginal contents can contaminate the anal canal and rectum with a few spermatozoa."[208] Additionally, where a victim of both rape and

204. *See* State v. Multaler, 632 N.W.2d 89 (Wis. Ct. App. 2001) (rejecting a challenge to a search warrant for lack of probable cause and staleness where the warrant authorized the search of a suspected serial killer's home for evidence relating to murders carried out more than two decades before the search warrant was issued).

205. Janet I. Warren, et al., *The Collectors: Serial sexual offenders who preserve evidence of their crimes*, 18 AGGRESSION & VIOLENT BEHAV. 666, 666 (2013).

206. *Id.*

207. *Id.* at 671.

208. W. F. Enos & J. C. Beyer, *Spermatozoa in the Anal Canal and Rectum and in the Oral Cavity of Female Rape Victims*, 23(1) J. FORENSIC SCIS. 231, 232 (1978).

murder is found lying on her back, "the vaginal contents can contaminate the anal canal and rectum following postmortem relaxation of the rectal sphincter."[209] Better evidence of anal sodomy "is based on history, the evidence of uncommon anal trauma, usually manifested by bruising or lineal lacerations with bleeding, and the finding of large numbers of spermatozoa in the anal/rectal smears."[210] Regardless, when the prosecution cannot prove beyond a reasonable doubt the manner in which the defendant sexually assaulted a victim, it can charge alternative theories, as "a jury need not be unanimous as to a particular theory of culpability for a single offense to sustain a conviction."[211]

2. Presence of p30 Along with the Defendant's DNA

While discussion of complex biological principles is beyond the scope of this article, a brief discussion of p30 is relevant to Sullivan's case, as both Sullivan's DNA and p30 were detected on the crotch area of Julia Woodward's jeans.[212] "Prostate specific antigen (PSA, also known as p30), a glycoprotein produced by the prostatic gland and secreted into seminal plasma, is a valid marker for detecting semen in evidence from criminal cases including samples deposited by vasectomized or azoospermic individuals."[213] At least one study has shown that laundering clothing can wash away p30 (especially when the clothing is laundered at high temperatures).[214] At the same time, levels of p30 "can be found in other biological fluids in women, including serum, urine, and amniotic fluid, as well as fluids in the periurethral glands (Skene's gland), breast, ovaries, and endometrium."[215] Depending on an expert witness's analysis of the significance of the presence of p30, such evidence may help undermine an argument that a defendant had consensual intercourse with the victim; prosecutors can explain to the

209. *Id.*

210. *Id.*

211. *See* Anderson v. State, 118 P.3d 184, 186 (Nev. 2005) (finding a jury verdict valid on two out of three theories where the prosecution charged the defendant "on all three statutory theories for DUI criminal liability").

212. Grand Jury Transcript at 121:18–123:15, *In re* Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 15, 2019).

213. Manfred N. Hochmeister, et al., *Evaluation of Prostate-Specific Antigen (PSA) Membrane Test Assays for the Forensic Identification of Seminal Fluid*, 44 J. FORENSIC SCIS. 1057, 1057 (1999) (footnotes omitted).

214. Ragne K. Farmen, et al., *Spermatozoa Recovered on Laundered Clothing*, 1 FORENSIC SCI. INT'L: GENETICS SUPPLEMENT SERIES 418, 419 (2008).

215. Kana Unuma, et al., *The Proportion of False-Positives in Positive Seratec® Prostate-Specific Antigen SemiQuant Test Results in Postmortem Screening for Seminal Fluid*, 62 LEGAL MED. 102243, 102243 (2023) (footnotes omitted).

factfinder(s) the unlikelihood that the victim had consensual intercourse with the defendant and then wandered around in semen-stained pants before some third person murdered her.

3. DNA

In cold cases, the number of potential legal issues relating to DNA is virtually limitless. This article will focus on three concerns that arose in the prosecution of Sullivan: (1) Fourth Amendment concerns relating to the taking and use of a defendant's DNA sample; (2) Confrontation Clause issues relating to an expert witness's reliance on a DNA profile generated by a non-testifying expert; and (3) contamination of DNA evidence.

a. Fourth Amendment Concerns: The Taking and Use of a Defendant's DNA Sample

As explained above,[216] during the course of the investigation into Sullivan's 2007 abduction of Ann Ellis, a Nevada County, California detective obtained and executed a warrant for the collection of Sullivan's DNA for use in the investigation of that same matter.[217] A senior criminalist employed by the California DOJ used Sullivan's DNA sample to generate Sullivan's DNA profile.[218] Years later, the Washoe County Sheriff's Office used that sample to compare the DNA profile from it to the DNA profile generated from DNA found on the crotch area of Julia Woodward's jeans.[219] The same senior criminalist with the California Department of Justice used the same profile she generated to conduct the same type of comparison.[220] The defense filed a motion to suppress the buccal swab used to obtain Sullivan's DNA sample, arguing that the use of said sample for purposes relating to the investigation of Julia Woodward's case was beyond the scope of the warrant and, thus, violated the Fourth Amendment.[221] This argument finds no support in the law.

"The Fourth Amendment, binding on the States by the Fourteenth Amendment, provides that '[t]he right of the people to be secure in their

216. *See* discussion *supra* Section I.A.

217. Grand Jury Transcript at 52:1–54:20, *In re Sullivan*, No. CR19-1607 (Aug. 15, 2019).

218. *Id.* at 129:4–12.

219. Grand Jury Transcript at 247:19–248:1, 260:16–271:13, *In re* Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 14, 2019).

220. Grand Jury Transcript at 122:23–162:6, *In re Sullivan*, No. CR19-1607 (Aug. 15, 2019).

221. Def.'s Motion to Suppress Nev. Cnty. Buccal Swab at 7:17–8:7, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Apr. 19, 2021).

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.'"[222] The issue of whether a defendant is entitled to Fourth Amendment protection turns on whether he "harbored both a subjective and objective expectation of privacy."[223] "A subjective expectation of privacy is exhibited by conduct which shields an individual's activities from public scrutiny," while an objective expectation of privacy is "one which society recognizes as reasonable."[224]

The *initial taking* of a DNA sample from Sullivan's person constituted an intrusion that implicates the Fourth Amendment, as the taking requires a slight intrusion into an area in which Sullivan would have a reasonable expectation of privacy.[225] While California authorities obtained a search warrant for Sullivan's DNA sample,[226] they did not need one, as he was arrested for a sex offense that, under California law, required law enforcement to obtain said sample.[227] The U.S. Supreme Court has made clear that such a taking pursuant to a law requiring "all arrestees charged with serious crimes" to furnish a sample does not require a warrant.[228] At the time of Sullivan's arrest for attempted rape, California law required a DNA sample be taken from those arrested on a sex offense such as that for which Sullivan had been arrested.[229]

The Nevada authorities' subsequent use of the profile generated from Sullivan's DNA sample did not implicate the Fourth Amendment. All jurisdictions that have addressed the issue have made clear that a defendant has no objective expectation of privacy in that DNA sample once it is lawfully possessed by law enforcement, as was the case in Sullivan's investigation and prosecution. The cases discussed below are illustrative of the courts' analyses of such arguments.

In *Bickley v. State*, police used a DNA sample obtained through a search warrant issued in a March 1994 Cobb County (Georgia) rape investigation to identify the defendant as the perpetrator of two 1993 rapes

222. Maryland v. King, 569 U.S. 435, 446 (2013).

223. Young v. State, 849 P.2d 336, 340 (Nev. 1993) (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

224. *Young,* 849 P.2d at 340.

225. *See King*, 569 U.S. at 446.

226. Grand Jury Transcript at 52:1–54:20, *In re* Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 15, 2019).

227. *See* First Amended Felony Complaint, People v. Sullivan, No. F07-360 (Super. Ct. of Cal. of Nev. Cnty. Sept. 19, 2007); CAL. PENAL CODE § 296(a)(2)(A) (West 2004).

228. *King*, 569 U.S. at 447–48.

229. CAL. PENAL CODE § 296(a)(2)(A).

carried out in DeKalb County (Georgia).[230] The Court of Appeals of Georgia described the defense arguments as follows:

> Defendant contends the trial court should have granted his motion to suppress the DNA evidence on two grounds: (a) there was insufficient probable cause to support the warrant to draw his blood for DNA testing in Cobb County, and (b) even if the testing in Cobb County was proper, the authorities should have gotten another search warrant before using his DNA results in connection with crimes which occurred in DeKalb County.[231]

In Sullivan's case, the defense did not dispute that California authorities lawfully obtained the DNA sample at issue.[232] Thus, the first argument raised in *Bickley* was irrelevant in Sullivan's case; however, the second argument raised in *Bickley* essentially mirrored the defense's argument in Sullivan's case.[233] In *Bickley*, the Court of Appeals of Georgia rejected that argument, explaining:

> What defendant is really objecting to is the comparison of his DNA with DNA derived from samples taken from the victims of crimes other than the one specified in the search warrant. We agree with the trial court that [i]n this respect, DNA results are like fingerprints which are maintained on file by law enforcement authorities for use in further investigations. The sharing of the DNA evidence between law enforcement officials in different counties did not require a second search warrant.[234]

Similar arguments have met the same fate in New York. In *People v. King*, the Appellate Division of the Supreme Court of New York, Second Judicial Department, tackled the issue of "whether a blood sample taken from a defendant in the investigation of an uncharged crime may be used as evidence against him in another prosecution."[235] The court answered in the affirmative, explaining:

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230. Bickley v. State, 489 S.E.2d 167, 168–69 (Ga. Ct. App. 1997).

231. *Id.* at 169.

232. *See* Def.'s Motion to Suppress Nev. Cnty. Buccal Swab at 10:23–11:4, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Apr. 19, 2021).

233. *See id.*; *Bickley*, 489 S.E.2d at 169 (noting the defendant's two arguments).

234. *Bickley*, 489 S.E.2d at 170 (footnote and internal quotation marks omitted).

235. People v. King, 663 N.Y.S.2d 610, 611 (N.Y. App. Div. 1997) (superseded by statute as stated in People v. K.M., 41 N.Y.S.3d 875 (N.Y. Sup. Ct. 2016)).

> [O]nce a person's blood sample has been obtained lawfully, he can no longer assert either privacy claims or unreasonable search and seizure arguments with respect to the use of that sample. Privacy concerns are no longer relevant once the sample has already lawfully been removed from the body, and the scientific analysis of a sample does not involve any further search and seizure of a defendant's person. In this regard we note that the defendant could not plausibly assert any expectation of privacy with respect to the scientific analysis of a lawfully seized item of tangible property, such as a gun or a controlled substance. Although human blood, with its unique genetic properties, may initially be quantitatively different from such evidence, once constitutional concerns have been satisfied, a blood sample is not unlike other tangible property which can be subject to a battery of scientific tests. In this regard it bears noting that the defendant's sample was contemporaneously tested against all the stain evidence seized during both investigations in a single scientific procedure.
>
> Furthermore, . . . there are no constitutional provisions or legal precedents concerning the disposition of a blood sample, lawfully seized, [which] would immunize the donor from the consequences of its use in unrelated police investigations. Indeed, [a] defendant has no inherent or constitutional right to the return of photographs, fingerprints, or *other indicia of arrest* where charges are dismissed. Moreover, a defendant does not have a right to the automatic return of property seized in any criminal case absent a proper demand or some legal action.[236]

In *Scott v. Werholtz*, the Court of Appeals of Kansas rejected the same argument, articulating a straightforward legal principle applicable in all such matters: "[N]o privacy interest persisted in [the defendant's] blood sample and DNA profile once law enforcement lawfully obtained that evidence through a valid search warrant. The evidence could be used in the investigation of other crimes for identification purposes."[237] Accordingly, in Sullivan's case, the court rejected his Fourth Amendment challenge to the use of his DNA sample.[238]

b. Confrontation Clause Concerns: An Expert Witness's Reliance on a DNA Profile Generated by Another

Due to the passage of time characteristic of cold cases, there is an increased probability that a DNA expert uses a DNA profile generated by another expert for the purposes of comparing that profile to a profile more

236. *Id.* at 614–15 (internal quotation marks and citations omitted).

237. Scott v. Werholtz, 171 P.3d 646, 653 (Kan. Ct. App. 2007).

238. Ord. Denying Def.'s Motion to Suppress Nev. Cnty. Buccal Swab, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 10, 2021).

recently obtained from the defendant or from evidence on which the defendant's DNA was found. By way of example, in the defendant's "bench trial for rape" at issue in *Williams v. Illinois*, "the prosecution called an expert who testified that a DNA profile produced by an outside laboratory . . . matched a profile produced by the state police lab using a sample of [the defendant's] blood."[239] Whether such testimony violates the Confrontation Clause remains undetermined, as the U.S. Supreme Court issued a plurality opinion in *Williams* and has not revisited the issue. Just as the U.S. Supreme Court justices have failed to reach a consensus opinion, "[c]ourts have been almost evenly divided in their opinions as to whether DNA reports—showing the DNA profiles of samples taken from the crime scene and/or whether those profiles match that of the criminal defendant—constitute 'testimonial evidence' so as to trigger the protections of the Confrontation Clause."[240]

Notably, in *Williams*, Justice Alito—who found no Confrontation Clause violation—supported his position with two observations that may not be relevant in many cold case trials (and, thus, may not bolster the arguments of those seeking the admission of such testimony in future cold case trials). First, he noted that the trial was a bench trial, and, thus, that the factfinder (i.e., the judge) was less likely than a jury to give undue weight to any inadmissible evidence upon which the testifying expert relied.[241] Second, he explained that his position on the applicability of the Confrontation Clause "will not prejudice any defendant who really wishes to probe the reliability of the DNA testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial."[242] With the passage of time characteristic of cold cases, however, there is an increased likelihood that the defense will have no such opportunity (due to the unavailability of such witnesses).

c. Contamination

Cold cases are often solved as a result of technological advances that increase law enforcement's ability to identify the perpetrator through DNA he or she left behind at the crime scene or on the victim's person or clothing.[243] Such use of DNA has become so ubiquitous that it is easy to forget

239. Williams v. Illinois, 567 U.S. 50, 56 (2012).

240. Kimberly J. Winbush, *Application of Crawford Confrontation Clause Rule to DNA Analysis and Related Documents*, 17 A.L.R.7th Art. 3, 121 (2016).

241. *Williams*, 567 U.S. at 72–73.

242. *Id.* at 58–59.

243. *See* Sylla, *supra* note 1; St. Angelo, *supra* note 1.

that it was unheard of during the initial investigations of some cases that subsequently went cold.

DNA profiling was first used in a criminal case in the United Kingdom in 1985 and was subsequently adopted as an investigative tool by the Federal Bureau of Investigation (FBI) in 1988.[244] Unsurprisingly, prior to the time DNA profiling became a generally accepted law enforcement tool, investigators did not take the same precautions in handling evidence that they are expected to take today.[245] As a result, DNA contamination is likely to affect the analysis of evidence collected in older cold cases, as explained below.

"In 1910 the French criminologist Edmond Locard formulated what today is known as Locard's exchange principle and which may be paraphrased as 'every contact leaves a trace.'"[246] For the purposes of the present article, that means DNA can be transferred by minimal contact.[247] "[S]everal studies have shown that trace amounts of DNA do not necessarily have to be a result of direct skin contact but can also be transferred to an object via indirect, secondary or even higher order transfer scenarios."[248] Determining the probability of the manner in which DNA was transferred to a piece of evidence requires a complex consideration of multiple variables (e.g., bodily origin, cell/tissue type, age, sex, and previous activities) that is beyond the scope of the present article.[249]

In Sullivan's case, testing on various pieces of evidence revealed small quantities of DNA that did not match Sullivan and were consistent with contamination.[250] One can reasonably anticipate that, under such circumstances, the defense would likely argue that the contributor of those small quantities of DNA—and not the defendant—is the killer.

An investigator from Washoe County Coroner's Office (now, the Washoe County Regional Medical Examiner's Office) previously involved in the autopsy of Julia Woodward indicated that, despite the fact that DNA profiling was not an investigative tool in 1979, investigators typically wore

244. Armstead v. State, 673 A.2d 221, 226 (Md. 1996).

245. *See* Evidentiary Hearing Transcript at 157:17–158:17, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Feb. 26, 2021).

246. Annica Gosch & Cornelius Courts, *On DNA Transfer: The Lack and Difficulty of Systematic Research and How to Do It Better*, 40 FORENSIC SCI. INT'L: GENETICS 24, 24 (2019) (footnote omitted).

247. *Id.*

248. *Id.* at 24–25 (footnotes omitted).

249. *Id.* at 25.

250. Grand Jury Transcript at 148:6–162:6, *In re* Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 15, 2019).

gloves when handling evidence.[251] At first blush, this assertion appears to undermine any argument that contamination could be explained away by an ungloved detective touching the evidence; however, that same investigator explained that, back in 1979, investigators often used the same pair of gloves for multiple cases.[252] They were not used to protect against DNA contamination; instead, they were essentially work gloves, worn so that the investigators did not have to use their bare hands to touch something they would rather not touch with their bare hands (e.g., a decomposing body).[253] Thus, the presence of DNA from someone other than the defendant may be explained away as a product of DNA transfer through an evidence handler's reuse of his or her gloves.

E. Evidence of the Defendant's Other Bad Acts

For limited purposes, at trial, a court can admit evidence of the defendant's other uncharged bad acts (i.e., bad acts for which the defendant is not presently on trial).[254] As discussed above, those purposes are expanded where: (1) the defendant is charged with a sexual offense, and (2) the prosecution offers evidence of other sexual offenses committed by the defendant.[255]

Nevada—similar to other jurisdictions[256]—permits courts to admit evidence of a defendant's uncharged bad acts "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[257] While those purposes are specifically articulated in Nevada's applicable law on the subject, that list is not all-inclusive; for example, such evidence may be proffered "for the purpose of explaining [an] expert opinion."[258]

While evidence of a defendant's propensity to commit the crime with which he is charged is generally inadmissible,[259] as noted above,[260] a court may admit "evidence in a criminal prosecution for a sexual offense that [the

251. Evidentiary Hearing Transcript at 157:17–158:17, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Feb. 26, 2021).

252. *Id.*

253. *Id.* at 158:5–12; *see* Grand Jury Transcript at 112:18–113:18, *In re Sullivan*, No. CR19-1607 (Aug. 15, 2019).

254. *E.g.*, NEV. REV. STAT. § 48.045 (2023); FED. R. EVID. 404.

255. *See* discussion *supra* Section III.A.2.

256. *E.g.*, FED. R. EVID. 404(b)(2).

257. NEV. REV. STAT. § 48.045(2).

258. Bigpond v. State, 270 P.3d 1244, 1249 (Nev. 2012) (citation omitted).

259. NEV. REV. STAT. § 48.045(1).

260. *See* discussion *supra* Section III.A.2.

defendant] committed another crime, wrong or act that constitutes a separate sexual offense."[261] Logically, evidence of the defendant's propensity would also be probative of the identity of the individual who committed the charged crime, probative of the defendant's intent, and probative of other facts for which such evidence might be admitted in cases not involving sex offenses. Thus, there is no merit to an argument that evidence properly admitted for propensity purposes in a trial involving a sexual offense was improperly used to prove any such other facts.

The term "sexual offense" is defined to include numerous such offenses, including "[a]n offense of a sexual nature committed in another jurisdiction, . . . in which the person is or has been required by the laws of that jurisdiction to register as a sex offender because of the offense."[262] Thus, in Sullivan's case, his 2007 crimes constituted sexual offenses because the judge required him to register as a sex offender.[263] Accordingly, the State sought a ruling permitting it to introduce at trial evidence relating to his 2007 abduction of Ann Ellis in California.[264]

The Supreme Court of Nevada established that the following steps must be taken before evidence of a defendant's uncharged sexual offense can be presented during a trial in a case where the defendant is charged with another sexual offense:

> (1) "[T]he State must request the district court's permission to introduce the evidence of the [other][265] sexual offense for propensity purposes outside the presence of the jury" and then "proffer its explanation of how the [other] sexual offense is relevant to the charged offense, i.e., tends to make it more probable that the defendant engaged in the charged conduct";

261. NEV. REV. STAT. § 48.045(3).

262. *Id*. § 48.045(3), 179D.097.

263. Sent'g Hearing Transcript at 1227:3–9, People v. Sullivan, No. SF07-360 (Super. Ct. of Cal. of Nev. Cnty. Jan. 28, 2008).

264. *See* State's Motion for Admission of Evidence Relating to Def.'s 2007 Abduction of Woman in Nev. Cnty., Cal., State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 4, 2020). While the State also moved for a ruling that evidence relating to the murders of Jeannie Smith and Linda Taylor were admissible at the trial relating to Julia Woodward's murder, the court denied said motions. Ord. Granting in Part and Denying in Part State's Motions to Admit Other Crimes, Wrongs, or Acts, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Apr. 30, 2021).

265. The court uses the term "prior," rather than "other." Because the admissibility of the Sullivan's *subsequent* bad acts was at issue in his case, the term "other" is used here to avoid confusion.

(2) "[P]rior to the admission of [other] sexual offense evidence for propensity purposes under NRS 48.045(3), the district court must make a preliminary finding that the [other] sexual offense is relevant for propensity purposes, and that a jury could reasonably find by a preponderance of the evidence that the bad act constituting a sexual offense occurred"; and

(3) "[A]fter a defendant challenges the State's intent to introduce [other] sexual offense evidence for propensity purposes, the district court should evaluate whether that evidence is unfairly prejudicial under the [factors set forth by the Ninth Circuit in *United States v. LeMay*,][266] prior to admitting such evidence."[267]

With respect to the first requirement, the State sought admission of evidence of Sullivan's 2007 crimes for four purposes: (1) to identify Julia Woodward's killer;[268] (2) to prove Sullivan's "knowledge of how to bind women in a manner similar to the way Julia was bound"; (3) "to show that the sexual contact between Sullivan and Julia was not consensual"; and (4) to show Sullivan's "general propensity to commit these crimes."[269] With

266. United States v. LeMay, 260 F.3d 1018, 1028 (9th Cir. 2001).

267. Franks v. State, 432 P.3d 752, 756–57 (Nev. 2019) (citations omitted).

268. While the prosecution faces a lower burden in establishing the admissibility of a defendant's uncharged sexual offense in a trial for another sexual offense, where the prosecution seeks to use properly admitted propensity evidence in a trial for a sexual offense for the purpose of establishing the identity of the offender, case law examining the use of other bad acts evidence to prove identity is instructive. Under NEV. REV. STAT. § 48.045(2) (2023), evidence of modus operandi can be used to prove the identity of the offender. "Generally, modus operandi evidence is proper in situations where a positive identification of the perpetrator has not been made, and the offered evidence establishes a signature crime so clear as to establish the identity of the person on trial." Rosky v. State, 111 P.3d 690, 698 (Nev. 2005) (citation and internal quotation marks omitted). "Experience demonstrates that peculiarities of conduct can, in a proper case, be as valid and dependable a basis for identity as is reliance upon the perhaps frail senses and memory of a witness." Nester v. State, 334 P.2d 524, 530 (Nev. 1959), *abrogated on other grounds by* Bigpond v. State, 270 P.3d 1244 (Nev. 2012). Thus, "evidence of prior criminal behavior may be admitted to prove identity 'when that prior behavior demonstrates characteristics of conduct which are unique and common to both the defendant and the perpetrator whose identity is in question.'" Bolin v. State, 960 P.2d 784, 793 (Nev. 1998) (quoting Coty v. State, 627 P.2d 407, 408 (Nev. 1981)), *abrogated on other grounds by* Richmond v. State, 59 P.3d 1249 (Nev. 2002). At the same time, "[t]he behavior of a serial murderer at crime scenes may evolve throughout the series of crimes and manifest different interactions between an offender and a victim." U.S. DEP'T OF JUST., *Serial Murder: Multi-Disciplinary Perspectives for Investigators* 17 (Robert J. Morton & Mark A. Hilts eds., 2005).

269. Evidentiary Hearing Transcript at 8:16–22, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Mar. 5, 2021).

respect to the second requirement, the court conducted an evidentiary hearing and found that the State proved Sullivan's 2007 crimes by a preponderance of the evidence.[270]

Analysis of the third requirement is more complex. In *LeMay*, the Ninth Circuit explained that, when determining whether the admission of the evidence at issue is unfairly prejudicial, the trial court is to consider the following factors:

> (1) the similarity of the [other][271] acts to the acts charged, (2) the closeness in time of the [other] acts to the acts charged, (3) the frequency of the [other] acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of the evidence beyond the testimonies already offered at trial.[272]

An examination of those factors led to the ruling that admission of the evidence at issue would not be unfairly prejudicial to Sullivan.[273]

With respect to the first factor—the similarity of the other bad acts to the acts charged—the State argued that the crimes committed against Ann Ellis are frighteningly similar to those committed against Julia Woodward, and they most likely would have been even more similar, had Ann not been fortunate enough to escape:

(1) The victims of both crimes are white;

(2) They are both women;

(3) They were both in their 20's at the time of the crimes (Julia was 20 years old, while Ann was 25);

(4) They are both brunettes;

(5) They were California residents;

(6) Their builds were remarkably similar—both being approximately 5'8", 130 lbs.;

(7) They were both unmarried;

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270. *See* Ord. Granting in Part and Denying in Part State's Motions to Admit Other Crimes, Wrongs, or Acts at 15:9–12, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Apr. 30, 2021).

271. In *LeMay*, the court uses the term "prior," rather than "other." *Franks*, 432 P.3d at 756 (quoting *LeMay*, 260 F.3d at 1028). Because the admissibility of Sullivan's *subsequent* bad acts was at issue in his case, the term "other" is used here to avoid confusion.

272. *Franks*, 432 P.3d at 756 (quoting *LeMay*, 260 F.3d at 1028).

273. Ord. Granting in Part and Denying in Part State's Motions to Admit Other Crimes, Wrongs, or Acts at 15, *Sullivan*, No. CR19-1607.

(8) They were both known to hitchhike;

(9) Both crimes occurred in remote areas, inaccessible to most vehicles;

(10) The crimes were committed approximately within a 45-minute drive of each other;

(11) Both victims had at least one shoe removed;

(12) Both victims had their feet bound with whitish, opaque zip ties;

(13) Julia was killed by blunt force trauma to the head, and Sullivan threatened to knock out Ann;

(14) Julia was missing her ID, and Sullivan attempted to dispose of Ann's belongings;

(15) Both crimes were sexually motivated; and

(16) During the course of both crimes, Sullivan showed signs of an extreme psychological aversion to having eye contact with the victims, as he blindfolded Julia with Band-Aids, and he threatened to knock Ann out if she looked at him.[274]

While it is true that Julia was killed and Ann was not, the evidence suggests, had Sullivan not made the mistake of momentarily leaving Ann alone, she would have suffered the same fate as Julia. The judge from Sullivan's California case even speculated that, had Ann not escaped, Sullivan may have left little more than her bleached bones behind.[275] Sullivan should not—and did not—benefit (at least with respect to the admission of evidence relating to Ann's abduction) from Ann's good fortune to escape before she likely suffered the same fate as Julia.[276]

With respect to the frequency factor, there was ample evidence that Sullivan's victimization of Ann Ellis was not an isolated incident. More specifically, compelling evidence linked Sullivan to the 1978 and 1979 murders of Jeannie Smith and Linda Taylor.[277]

274. *See* State's Motion for Admission of Evidence Relating to Def.'s 2007 Abduction of Woman in Nev. Cnty., Cal. at 2–4, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 4, 2020).

275. Sent'g Hearing Transcript at 25:23–26:1, People v. Sullivan, No. SF07-360 (Super. Ct. of Cal. of Nev. Cnty. Jan. 28, 2008).

276. *See* Ord. Granting in Part and Denying in Part State's Motions to Admit Other Crimes, Wrongs, or Acts at 15, *Sullivan*, No. CR19-1607.

277. In denying the State's motion to admit evidence relating to the murder of Jeannie Smith, the court found "that although there are a number of similarities between Julia Woodward and Jeannie Smith and possible connections between Mr. Sullivan and Jeannie Smith,

With respect to the intervening circumstances factor, recall that, in March of 1979, law enforcement questioned Sullivan about the disappearance of Linda Taylor.[278] Soon thereafter, he altered his appearance by shaving his beard, and there is evidence that he instructed his two then-girlfriends not to talk to the police.[279] Sullivan then fled the state of Nevada with them.[280] As a result of Sullivan's flight, little is known about his activities between the time of Julia's murder and Ann's abduction. Sullivan should not benefit from his 1979 flight from law enforcement. Instead, Sullivan's flight was an intervening circumstance that, if anything, should weigh in favor of admission of the evidence at issue.

With respect to the necessity factor, the Ninth Circuit stated: "Prior acts evidence need not be *absolutely necessary* to the prosecution's case in order to be introduced; it must simply be helpful or *practically necessary*."[281] In Sullivan's case, two people know who killed Julia Woodward: Julia and her killer. Julia cannot explain the circumstances of her own death, and there is no reason for anyone to believe that, more than forty years after her death, her killer will. Thus, if ever there was a case where admission of other bad acts evidence is "practically necessary," it was Sullivan's case. For this reason, this final factor supported the admission of evidence relating to Sullivan's 2007 crimes at his trial for the murder of Julia Woodward.

While Nevada cases have not explicitly relied upon the doctrine of objective chances for the admission of such evidence, the doctrine is not new, and the Nevada Supreme Court has never rejected it. The rationale behind the doctrine can be summed up in a single sentence: "Innocent persons sometimes accidentally become enmeshed in suspicious circumstances, but

there is no direct evidence that they even met." *Id.* at 20:19–21. With respect to the evidence relating to Linda Taylor, the court stated: "There is no evidence Linda was murdered and such evidence regarding her disappearance and argument regarding her alleged murder is highly prejudicial. The Court finds that the prior bad acts as related to Linda Taylor were not proven by clear and convincing evidence, but rather by coincidence, conjecture, and speculation." *Id.* at 24:9–12. Regardless, evidence relating to those two victims could still be used to support an argument in support of a motion to admit evidence relating to a third victim (here, Ann Ellis), though the court did not use such evidence in that manner in the Sullivan case. *See* United States v. LeMay, 260 F.3d 1018, 1029 (9th Cir. 2001) (using hearsay evidence of additional crimes in analyzing the frequency factor).

278. *See* Evidentiary Hearing Transcript at 27:7–24, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Feb. 26, 2021).

279. *See id.* at 27:14–29:16, 58:19–59:19, 28:1–5, 28:21–29:16.

280. *See id.* at 29:22–24.

281. *LeMay*, 260 F.3d at 1029.

it is objectively unlikely that will happen over and over again by random chance."[282]

Professor Edward Imwinkelried, the most cited scholar on the subject of evidence and one to whom courts often turn for guidance in resolving evidentiary issues, is perhaps the doctrine's most vocal proponent.[283] Imwinkelried has traced the origins of the doctrine back to an opinion issued by the English Crown Court of Criminal Appeal in 1915 in the case of *Rex v. Smith*.[284] He describes that case as follows:

> The accused, George Smith, had gone through a marriage ceremony with a woman named Bessie Mundy. She had inherited a large sum of money from her father. Bessie was later discovered drowned in her own bathtub. The defendant claimed that the death was accidental; he stated that he had no involvement in the death. The prosecution offered uncharged misconduct evidence to rebut the defendant's claim. The testimony was to the effect that two other women the accused had purportedly married "were . . . found in their baths in houses where they were living with" the accused. The defense contended that the testimony constituted blatantly inadmissible bad character evidence. Nevertheless, the trial judge admitted the testimony.
>
> On appeal, . . . the court held that the evidence was properly admissible to shed light "upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental." The court's reasoning focused on the objective improbability of so many similar accidents befalling Smith. Either Smith was one of the unluckiest persons alive, or one or some of the deaths in question were the product of an actus reus.[285]

The doctrine "initially made its advent in American case law in the 1970s."[286] While the United States Supreme Court did not expressly use the phrase "doctrine of chances," the Court clearly analyzed the use of the doctrine, with approval, in the case of *Estelle v. McGuire*.[287] The facts and procedural history of that case are as follows.

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282. Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. RICH. L. REV. 419, 423 (2005).

283. *See, e.g.*, Bigpond v. State, 270 P.3d 1244, 1247 (Nev. 2012) (favorably citing a work on evidence authored by Imwinkelried); Hubbard v. State, 422 P.3d 1260, 1266–67 (Nev. 2018) (same); Newman v. State, 298 P.3d 1171, 1179 (Nev. 2013) (favorably citing a case that cites a work on evidence authored by Imwinkelried).

284. Imwinkelried, *supra* note 282, at 434; Rex v. Smith, 84 L.J.K.B. 2153 (C.A. 1915).

285. *Id.* at 434–35 (footnotes omitted).

286. *Id.* at 423; *see* United States v. Woods, 484 F.2d 127, 134–35 (4th Cir. 1973).

287. Estelle v. McGuire, 502 U.S. 62 (1991).

The defendant, Mark McGuire, faced a murder charge for the death of his infant daughter.[288] The autopsy revealed: (1) seventeen contusions on the child's chest; (2) twenty-nine "contusions in her abdominal area"; (3) "a split liver"; (4) "a split pancreas"; (5) "a lacerated large intestine"; (6) "damage to her heart"; (7) damage to one of her lungs; (8) "rectal tearing, which was at least six weeks old"; and (9) "partially healed rib fractures, which were approximately seven weeks old."[289] At trial, the government presented evidence of the prior rectal tearing and fractured ribs, and based on that evidence (as well as evidence of the more recent injuries), two physicians testified that the victim was a battered child.[290] The trial court observed that such evidence was introduced to prove "battered child syndrome," which "exists when a child has sustained repeated and/or serious injuries by nonaccidental means."[291] McGuire challenged the admission of that evidence, arguing that it was improper propensity evidence.[292]

The United States Supreme Court explained:

> The demonstration of battered child syndrome simply indicates that a child found with serious, repeated injuries has not suffered those injuries by accidental means. Thus, evidence demonstrating battered child syndrome helps to prove that the child died at the hands of another and not by falling off a couch, for example; it also tends to establish that the "other," whoever it may be, inflicted the injuries intentionally.[293]

The Court approved of the use of such evidence to prove intent and lack of accident.[294] In doing so, the Court approved of a jury instruction that had the effect of instructing the jury as follows: "if [the jury] found a 'clear connection' between the prior injuries and the instant injuries, and if it found that McGuire had committed the prior injuries, then it could use that fact in determining that McGuire committed the crime charged."[295] According to the Court, "[t]he use of the evidence of prior offenses permitted by this instruction was therefore parallel to the familiar use of evidence of

288. *Id.* at 64.
289. *Id.* at 65.
290. *Id.*
291. *Id.* at 66 (citation omitted).
292. *See id.*
293. *Id.* at 68 (internal quotation marks, citation, and brackets omitted).
294. *See id.* at 69.
295. *Id.* at 75.

prior [bad] acts for the purpose of showing intent, identity, motive, or plan."[296]

This same rationale would apply with equal force in Sullivan's case. Logic dictates that, if the jury were to believe that Sullivan committed the crimes against Ann Ellis, Jeannie Smith, and/or Linda Taylor, they could also find a "clear connection" between those crimes and the murder of Julia Woodward and conclude that Sullivan is, in fact, her killer. Any instruction permitting the use of such evidence would be counterbalanced by limiting instructions prohibiting the jury from using the other bad act evidence for any improper purpose.

Regardless, in Sullivan's case, the court denied the prosecution's motion seeking the admission of evidence relating to the murders of Jeannie Smith and Linda Taylor on other grounds.[297] While the doctrine of objective chances did not assist in the prosecution of Sullivan, it could be successfully invoked in the prosecution of other serial offenders.

F. Prior Witness Statements and Chain-of-Custody Issues

1. Overview of the Issues

In cold cases such as Sullivan's, the prosecution will likely need to present at trial statements witnesses made decades prior. These may be needed as substantive proof of the defendant's crimes, as well as to establish the foundation for the admission of tangible evidence.

2. Prior Witness Statements Needed as Substantive Evidence

It would be unreasonable to expect witnesses to remember fine details of events decades after those events took place. At the same time, a successful prosecution of a cold case may hinge on evidence of those same fine details. The prosecution's ability to present such evidence can depend on: (1) whether witness statements describing those fine details were recorded (in writing or otherwise); (2) the time such recordings were made or adopted by the witness; (3) the method used to record such statements; and (4) whether the prosecution can otherwise refresh the witness's recollection.[298] The success of prosecution's efforts to admit such evidence will depend on

296. *Id.* (citation omitted).

297. Ord. Granting in Part and Denying in Part State's Motions to Admit Other Crimes, Wrongs, or Acts at 20, 24, State v. Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Apr. 30, 2021).

298. *See* NEV. REV. STAT. § 51.125 (2023) (providing for the admissibility of statements of recorded recollections that would otherwise constitute inadmissible hearsay).

the applicable jurisdiction's hearsay rules relating to the refreshing of a witness's recollection, the admission of a witness's recorded recollection, and the admission of inconsistent statements.

Like other jurisdictions,[299] Nevada's prohibition of hearsay evidence is subject to numerous exceptions.[300] While witnesses may use writings to refresh their recollection of events,[301] it would be unreasonable to expect witnesses to remember fine details such as telephone numbers, license plate numbers, or even physical descriptions of suspects. More likely, witness statements provided long ago will likely have to be presented through a hearsay exception permitting the admission of recollections that were accurately "made when the matter was fresh in the witness's memory."[302]

While this exception is helpful for statements a non-party witness personally made or adopted at the time the events were fresh in the witness's memory, it is unhelpful where a law enforcement officer took the statement from the witness in the officer's handwriting (and did not provide the witness with the opportunity to review and adopt it). The admissibility of such statements will likely depend on the applicable jurisdiction's law regarding the admissibility of a witness's prior inconsistent statements.

In a jurisdiction such as Nevada, a party may have little trouble getting such a statement admitted for substantive purposes. In Nevada, "hearsay" is defined as "a statement offered in evidence to prove the truth of the matter asserted unless," for example, "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . [i]nconsistent with the declarant's testimony."[303] Moreover, "when a trial witness fails, for whatever reason, to remember a previous statement made by that witness, the failure of recollection constitutes a denial of the prior statement that makes it a prior inconsistent statement."[304] Under Nevada law, such a statement is admissible for both its substance and for impeachment of the witness.[305]

In other jurisdictions, however, those seeking admission of such statements may face far greater challenges. In Pennsylvania, for example, a prior inconsistent statement given by a non-party witness can "be used as substantive evidence only when it was given under oath at a formal legal proceeding, or the statement was reduced to writing signed and adopted by the

299. *E.g.*, FED. R. EVID. 803.
300. *See generally* NEV. REV. STAT. §§ 51.075–51.385.
301. *Id.* § 50.125.
302. *Id.* § 51.125.
303. *Id.* § 51.035(2)(a).
304. Crowley v. State, 83 P.3d 282, 286 (Nev. 2004).
305. *Id.*

declarant, or the statement was recorded verbatim contemporaneously with the making of the statement."[306] For that final category—the recorded verbatim statement—"the recording . . . must be an electronic, audiotaped or videotaped recording in order [for the statement] to be considered as substantive evidence."[307] Such limitations may render the successful prosecution of some cold cases impossible.

3. Establishing the Chain-of-Custody for the Admission of Tangible Evidence

The increased risk that witnesses in cold cases are unavailable to testify may also make it challenging for the prosecution to lay the foundation needed to admit crucial pieces of evidence. At the same time, "the obligation of the prosecution to establish the chain of custody, . . . does not mean that everyone who laid hands on the evidence must be called."[308] "[G]aps in the chain . . . normally go to the weight of the evidence rather than its admissibility."[309] Ideally, the witness who discovered the evidence sought to be admitted would be called at trial to provide testimony identifying the evidence as such. The unavailability of such a witness—one who would provide the first link in the chain-of-custody—may not, however, prove fatal to the admission of the item of evidence said witness discovered.

The court decides preliminary questions regarding the admissibility of evidence, and the court is not bound by the rules of evidence (except for rules of evidence relating to privileges) in making those decisions.[310] "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[311] The Advisory Committee Notes accompanying Federal Rule of Evidence 702, citing *Bourjaily v. United States*,[312] explain that "the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."[313]

306. Commonwealth v. Wilson, 707 A.2d 1114, 1116 (Pa. 1998).

307. *Id.* at 1118.

308. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 n.1 (2009) (internal quotation marks and citation omitted).

309. *Id.* (internal quotation marks and citation omitted).

310. FED. R. EVID. 104(a).

311. FED. R. EVID. 901(a).

312. Bourjaily v. United States, 483 U.S. 171 (1987) (applying the preponderance of the evidence standard when determining the admissibility of a statement under the hearsay exception for statements made by a coconspirator).

313. FED. R. EVID. 702 advisory committee's note to 2000 amendments.

Given that low burden of authentication for the party offering an item into evidence, a court could find that the proponent sufficiently authenticated said item even in the absence of the witness who could best provide the initial link in the chain-of-custody. If, for example, a detective who supervised the collection of evidence found at a crime scene can testify that the unavailable witness represented that he or she discovered the item in dispute at the crime scene—and there are no apparent reasons to doubt the representations of both the finder[314] and the supervisor—the proponent will have satisfied its burden of showing that it is more likely than not that said item was found at the crime scene. Any objection that the witness lacks knowledge of the actual discovery of the evidence would go to the weight of the evidence, rather than its admissibility.

G. Rebutting Potential Defenses

1. Attempts to Pin the Blame on Another

Where, as in Sullivan's case, the murder is committed in a distinctive fashion, investigators must be aware of any other murders committed in a similar fashion, especially near the same location and time period as the murder that is the focus of the cold case investigation. The existence of such a similar crime carried out by another could reasonably sow seeds of doubt in the mind(s) of the factfinder(s). No cold case investigator would want to learn of such a similar crime for the first time while being cross-examined by defense counsel.

Relatedly, cold case investigators looking into murders committed in the 1970s and early 1980s should be familiar with a murderer named Henry Lee Lucas, as there is an uncommonly strong possibility that he may have falsely confessed to having committed the murder being investigated. While Lucas did murder at least two victims, he falsely confessed to killing over 600 victims.[315] Quite often, Lucas simply parroted information about the crimes that investigators provided him.[316] While a cold case investigator will need to vet any existing confession from Lucas, doing so may be

314. Given the finder's unavailability in this example, the finder's representations would be presented as hearsay—hearsay the court can properly consider in determining whether an item has been authenticated. *See* FED. R. EVID. 104(a).

315. *See* Ashlie D. Stevens, *Netflix's "Confession Killer" un-solves murders as a ruthless true crime story in reverse*, SALON (Dec. 6, 2019, 5:00 PM), https://www.salon.com/2019/12/06/confession-killer-review-netflix/ [https://perma.cc/SA2G-4DTX].

316. *Id.*

relatively easy, as the geographic spread of his confessions render his purported actions virtually (if not actually) impossible.[317]

2. Process-of-Elimination

As noted above, in sexually motivated murder cases such as Sullivan's, the defense may argue that the defendant had consensual intercourse with the victim, and subsequently, a third person murdered the victim.[318] Absent a confession, eyewitness testimony, or video recording of the crime, undeniably rebutting that argument may be challenging (if not impossible). At the same time, investigators and prosecutors can do much to undermine that defense by introducing evidence aimed at logic, motive, and opportunity. Such evidence can strengthen the prosecution's position by undermining other theories of how the victim met his or her fate; essentially, the prosecution strengthens its own theory by the process-of-elimination. Sullivan's case can be used to illustrate such efforts.

With respect to the issue of logic, during grand jury proceedings, testimony from Julia Woodward's former girlfriend regarding Julia's sexual orientation undermined speculation that she would have consensual intercourse with Sullivan.[319] Prior to her murder, Julia had intimate relationships with two females.[320] All of her known, intimate relationships with men occurred prior to those same-sex relationships.[321] Nevertheless, given the possibility that Julia had previous relationships with men as well, this sexual orientation evidence by itself was not conclusive evidence that any intercourse between Sullivan and Julia was not consensual. Still, it could be used to chip away at the defense.

The prosecution could further chip away at that defense with evidence that there was no apparent motive for the murder other than to prevent the rape victim from identifying the rapist and/or for the rapist's gratification. In Sullivan's case, Julia's mother testified that she had no known enemies.[322] Additionally, evidence that several pieces of gold jewelry left on Julia when her body was dumped was evidence that undermined any claim

317. *Id.* In 1986, the Texas Attorney General Jim Mattox released the Lucas Report, detailing many of the issues that taint Lucas's confessions. *See* JIM MATTOX, LUCAS REPORT (Att'y Gen. of Texas 1986).

318. *See* discussion *supra* Section III.D.2.

319. *See* Grand Jury Transcript at 23:16–20, *In re* Sullivan, No. CR19-1607 (Nev. 2d Jud. Dist. Ct. Aug. 14, 2019).

320. *Id.* at 38:19–39:13.

321. *See id.*

322. *See id.* at 20:3–7.

that the murder was part of a robbery-gone-wrong.[323] The prosecution's theory was weakened, in part, by the fact that no purse or money was found on or with Julia. Nevertheless, the negative impact of that fact could be blunted with witness testimony establishing other reasons no such possessions were found:

(1) Testimony from Julia's acquaintances could establish that she often did not carry a purse;

(2) A witness who is an expert on serial offenders could testify that serial killers are known to keep such objects as souvenirs; and

(3) Such an expert could also testify that killers are known to take objects that could be used to identify the victim for the purpose of slowing the investigation.

On top of all that, Julia was not wearing underwear when her body was found,[324] and a close friend and roommate testified that Julia regularly wore underwear when she went out.[325] It would make little sense for a killer who did not have sex with Julia to steal the underwear from her body; such evidence again points to the killer and the primary source of DNA found on the crotch area of Julia's jeans to be one and the same.

In Sullivan's case, the prosecution could continue to chip away at the potential consent argument with scientific evidence that narrowed the window of opportunity for anyone other than Sullivan to kill Julia. As explained above,[326] the presence of p30 on Julia's jeans—as well as testimony of her close friends and family that she practiced good hygiene—further undermined any defense that she had consensual intercourse with Sullivan and then wandered around in semen-stained pants before some third person murdered her.

Finally, in Sullivan's case, the prosecution could further undermine the consent argument with evidence relating to the similar crime Sullivan committed against Ann Ellis in 2007. While none of these facts in and of themselves conclusively establish that the intercourse between Julia and Sullivan was nonconsensual, collectively, they prove as much beyond a reasonable doubt.

323. *See id.* at 33:10–34:3.

324. *Id.* at 156:11–13.

325. *Id.* at 41:19–22.

326. *See* discussion *supra* Section III.D.2.

CONCLUSION

Just as technology evolves, so too does the law. Some of those reading this article may remember a time few, if anyone, could conceive that the outcome of a criminal case could turn on a piece of DNA evidence. As the related technology improves, the age of cracked cases grows. Judges and lawmakers should consider these advancements to, respectively, make evidentiary rulings and determine whether changes in the law are warranted.

All such stakeholders should take cold cases into consideration when addressing the following types of issues that arose in Sullivan's case:

(1) The admissibility of an autopsy report authored by an unavailable witness;

(2) The admissibility of an expert witness's testimony as to the cause and manner of a victim's death that is largely based on the autopsy report of another;

(3) The means and importance of establishing probable cause that the offender is a serial offender for the purpose of determining the proper scope of a search warrant;

(4) The applicability of the Confrontation Clause in relation to an expert witness's use of a DNA profile generated by another for the purpose of establishing a DNA match;

(5) The likelihood of DNA contamination for evidence discovered before precautions against such contamination were standard (or even considered);

(6) The admissibility of evidence of the defendant's uncharged bad acts;

(7) Whether a witness's prior inconsistent statement should be admitted into evidence as substantive evidence; and

(8) Establishing the chain-of-custody of evidence recovered long ago.

This article does not advocate for any specific changes; instead, it is intended to be a source of information for: (1) policymakers confronted with related issues; (2) cold case investigators; and (3) prosecutors and defense attorneys handling such cases. As technology continues to improve and such prosecutions become more common, this list of issues is likely to grow at a rapid pace.