

CONCURRING OPINION BY NAKAMURA, C.J.

I concur in the majority's opinion. I write separately to further explain my agreement with the majority's decision to affirm the Circuit Court's order denying the amended motion of Petitioner-Appellant Matthew Clement (Clement) to compel DNA testing of the victim's fingernail clippings (Order Denying DNA Testing). As the movant seeking post-conviction DNA testing pursuant to Hawaii Revised Statutes (HRS) Chapter 844D, part XI, Clement had the burden of demonstrating his entitlement to relief. Clement contends that he is entitled to DNA testing because the discovery of the DNA of Duante Sato (Sato), the victim's boyfriend, under the victim's fingernails would support Clement's theory that Sato (and not Clement) murdered the victim. It appears that if, prior to trial, Clement had obtained DNA analysis establishing that Sato's DNA was under the victim's fingernails, it would have provided support for Clement's theory of defense. However, in my view, Clement failed to meet his burden under HRS § 844D-123 (2014) of showing that a "reasonable probability exists" that he would not have been prosecuted or convicted if such DNA analysis had been obtained.

In the post-conviction proceedings, Respondent-Appellee State of Hawai'i (State) referred to evidence showing that Clement committed the murder and explained why Clement could not meet the requirements for post-conviction DNA testing under HRS § 844D-123. Clement did not refute the State's references to the evidence implicating him in the murder. Clement also did not present the trial transcripts to the Circuit Court or make such transcripts part of the record on appeal for our review. The Circuit Judge who decided the Order Denying DNA testing was the judge who presided over Clement's trial. Under these circumstances, I conclude that Clement failed to meet his burden of showing that a "reasonable probability exists" that he would not have been prosecuted or convicted if DNA analysis had been

obtained which revealed Sato's DNA under the victim's fingernails. The Circuit Court did not err in denying Clement's amended motion for DNA testing pursuant to HRS § 844D-123.

*Craig H. Nakamura*