KIRSTIN BLAISE LOBATO,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 49087



# RESPONDENT'S ANSWERING BRIEF

**Appeal From Judgment of Conviction**
**Eighth Judicial District Court, Clark County**

DAVID M. SCHIECK
Special Public Defender
Nevada Bar #000824
JoNELL THOMAS
Deputy Special Public Defender
Nevada Bar #004771
Office of Special Public Defender
330 South Third Street, Suite 800
Las Vegas, Nevada 89155
(702) 455-6265

Counsel for Appellant

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar No. 003926
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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Counsel for Respondent

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## STATEMENT OF THE ISSUES

1) Whether the evidence adduced at trial was sufficient to support Appellant's conviction.

2) Whether Detective Thowsen's testimony contained inadmissible hearsay evidence and whether Detective Thowsen's testimony violated Appellant's rights under the Confrontation Clause.

3) Whether Detective Thowsen's testimony regarding Appellant's statements to police invaded the province of the jury.

4) Whether the district court prevented Appellant from presenting her defense.

5) Whether the district court erred in admitting evidence regarding Appellant's license plate ("4NIK8ER").

6) Whether the district court abused its discretion in admitting evidence of positive Luminol tests from Appellant's car.

7) Whether the district court abused its discretion in denying Appellant's Motion to Dismiss Charges based on the State's alleged acts of bad faith and gross negligence.

8) Whether this Court should reconsider its holdings as to issues raised in Appellant's first appeal.

9) Whether Appellant's sentence violates the Double Jeopardy clause.

## STATEMENT OF THE CASE

Appellant, Kirstin Blaise Lobato, was originally charged on August 9, 2001, with Murder With Use of a Deadly Weapon and Sexual Penetration of a Dead Human Body. Appellant's Appendix ("AA"), Vol. 1, p. 1. Appellant entered a not guilty plea and proceeded to a jury trial. AA, Vol. 4, p. 800. Appellant was found guilty on both counts. AA, Vol. 4, p. 800. Appellant appealed the conviction and sentence to the Nevada Supreme Court. On September 3, 3004, the Nevada Supreme Court reversed Appellant's conviction, primarily because the defense was not allowed to use extrinsic evidence to impeach the credibility of a prosecution witness.[1] AA, Vol. 1, pp. 5-19; Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004).

Appellant received a second trial, and was convicted on October 6, 2006, Appellant was found guilty of Voluntary Manslaughter With Use of a Deadly Weapon and Sexual Penetration of a Dead Human Body. AA, Vol. 4, p. 761-762. Appellant was sentenced as to Count I: to a maximum of one hundred twenty (120) months with a minimum parole eligibility of forty eight (48) months, plus and equal and consecutive term for the deadly weapon enhancement. Appellant was sentenced as to Count II: to a consecutive term of a maximum of one hundred eighty (180) months with a minimum parole eligibility of sixty (60) months. AA, Vol. 4, p. 801. A Judgment of Conviction was filed on February 14, 2007. AA, vol. 4, p. 800. Appellant then filed the instant appeal. The State's response follows.

## STATEMENT OF THE FACTS

On July 8, 2001, Richard Shott was "dumpster diving" and discovered a dead body. AA, Vol. 6, p. 1000. Mr. Shott left the dumpster area, went to a payphone to call the police. AA, Vol. 6, p. 1001. Officer James Testa, Las Vegas Metropolitan Police Department (LVMPD) responded to the scene. AA, Vol. 6, p. 1014. Officer Testa testified that the trash dumpster was located in the parking lot of the Nevada

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[1] The witness, Korinda Martin, did not testify at the second trial.

State Bank in the vicinity of Arville and West Flamingo. AA, Vol. 6, p. 1014. Crime Scene Analysts (CSA's) and LVMPD Detectives Thomas Thowsen and James LaRochelle responded to the crime scene. AA, Vol. 7, p. 1219; Vol. 7, p. 1323. Crime Scene Analysts carefully and meticulously removed and processed the mounds of trash covering the body of the victim, who was later identified as Duran Bailey, a homeless man. AA, Vol. 7, p. 1224, 1263. While removing the trash and debris that covered and surrounded the victim's body, the CSA's discovered the victim's severed penis and several of the victim's teeth. AA, Vol. 7, p. 1226.

The victim's body was removed from the scene and Dr. Lary Simms performed an autopsy. AA, Vol. 6, p. 1145. At trial, Dr. Simms testified regarding the condition of the victim's body. AA, Vol. 6, p. 1145. Dr. Simms testified that there was bruising to the back of the victim's head, a slash wound, four and a half inches in length, on the left side of the victim's neck, on the left side of the victim's face, there was blunt force injury composed of abrasions and contusions, including a patterned abrasion (indicating that the face came into contact with some kind of pattern surface. AA, Vol. 6, p. 1145. The right side of the victim's face had similar findings of blunt force injury as well as abrasions, contusions and scratches. AA, Vol. 6, p. 1145. There were multiple incised wounds on the victim's face and multiple lacerations of the lips associated with fractures of the victim's teeth. AA, Vol. 6, p. 1145. There were four stab wounds at the junction between the victim's chest and abdomen, a long, irregular slash wound in the victim's rectal area, a stab wound in the scrotum, and the victim's penis was amputated at the base. AA, Vol. 6, p. 1146. There were also defensive wounds to the victim's fingers and palms. AA, Vol. 6, p. 1146.

Dr. Simms also testified about the victim's internal injuries. AA, Vol. 6, p. 1148. Dr. Simms testified that the victim had a large area of hemorrhage on the back of the victim's head, blood all over the surface of his brain, a fracture that went from the side through to the back of the skull, and hemorrhages to the victim's tongue. AA, Vol. 6, p. 1148. Dr. Simms testified that the wound to the scrotum occurred before

the victim was killed and the severing of the penis occurred after the victim was killed. AA, Vol. 6, p. 1149. Dr. Simms testified that the cause of the victim's death was a combination of the injuries to the victim's head and the severing of the victim's carotid artery. AA, Vol. 6, p. 1162.

Detective Thowsen testified that he received a phone call from a probation officer from Lincoln County, Laura Johnson, who asked him if he had a case involving someone who was murdered and their penis was severed. AA, Vol. 7, p. 1330. Detective Thowsen then asked Ms. Johnson what she knew about the case, and Ms. Johnson told him that she had received information from, a teacher in Panaca, Dixie Tienken, who had been contacted by Appellant and told that she (Appellant) had cut off a man's penis. This was important because the fact of the penis severance had not been released to the press and was not public knowledge. AA, Vol. 7, p. 1331.

Detective Thowsen went to Lincoln County to meet with Ms. Johnson. AA, Vol. 7, p. 1331. After conducting an interview with Ms. Johnson, Detective Thowsen contacted local law enforcement who accompanied him to Appellant's home. AA, Vol. 7, p. 1332. Upon arrival at Appellant's home, Appellant's sister informed him that Appellant was in the shower and that she'd be out in a moment. AA, Vol. 7, p. 1333.

When Appellant came to speak with Detective Thowsen, he introduced himself and his partner and told Appellant that they were there to investigate what happened a short time ago in Las Vegas. AA, Vol. 7, p. 1333. Detective Thowsen mentioned to Appellant that her car and her license plate were very distinct. Appellant responded by saying that someone could have been borrowing her car. AA, Vol. 7, p. 1333. Detective Thowsen told Appellant that he knew that she had been hurt in the past, to which Appellant responded by crying and stating, "I didn't think anybody would miss him." AA, Vol. 7, p. 1333. Detective Thowsen informed Appellant of her Miranda rights and asked her if she was willing to speak with them. AA, V. 8, p. 1372.

Appellant agreed to speak with Detective Thowsen and also provided a recorded statement. AA, Vol. 8, pp. 1372-1375. Appellant was then placed under arrest. AA, Vol. 8, p. 1376.

When Detective Thowsen was walking Appellant out of the house, Appellant's mother arrived at the home. After Detective Thowsen explained to the mother that Appellant was under arrest, Appellant said to her mother, "Mom, I did it, now I have to do what I have to do." AA, Vol. 8, p. 1378. Shortly thereafter, Appellant's father arrived and Appellant said to her father, "I'm sorry daddy. Told you I did something awful." AA, Vol. 8, p. 1378. Appellant was then transported to Las Vegas and placed into custody. AA, Vol. 8, pp. 1379-1380.

Detectove Thowsen also testified regarding the provisions of NRS 629.041, requiring healthcare providers to report non-accidental shootings and knife injuries and that he, and others under his command, had search the NRS 629.041 reports for the months of May, June and August, 2001 and there was no report of any penis injuries or a severed penis. AA, Vol. 8, pp. 1384-89.

The defense involved three premises. First, Appellant had been sexually attacked prior to July 8th and had stabbed her attacker in the abdomen and penis, but left him alive. This attack took place by East Flamingo and Boulder Highway, across down from the murder at West Flamingo and Arville. Second, the victim had attacked a woman a few days prior to the murder and that woman's friends killed the victim in retaliation. Third, the Appellant was not in Las Vegas at the time of the murder. AA, Vol. Vol. 6 pp. 992-997.

## ARGUMENT

### I.

### THE EVIDENCE ADDUCED AT TRIAL WAS SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION.

In determining whether there is sufficient evidence to support a finding of guilty, it is for the finder of fact to determine what weight and credibility to be given various testimony. Hutchins v. State, 110 Nev. 103, 107, 867 P.2d 1136, 1139 (1994).

"Furthermore, when the sufficiency of the evidence is challenged on appeal in a criminal case, the relevant inquiry for this Court is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. (Internal citations omitted). "Circumstantial evidence alone can certainly sustain a criminal conviction.

Appellant claims that there was insufficient evidence to sustain her convictions because there was no physical evidence connecting Appellant to the crime scene. However, the prosecution presented sufficient circumstantial evidence to convince the jury, beyond a reasonable doubt, that no one other than Appellant committed these crimes.

Appellant makes much of the argument that there was physical evidence found at the crime scene that "may have belonged to the perpetrator". However, this argument is far from persuasive, as the victim's body was found in an **enclosed area that contained an industrial trash dumpster, covered with mounds and mounds of trash.**

Perhaps the most compelling evidence were Appellant's statements to law enforcement and her friends in Panaca about the attack:

Dixie Tienken: Appellant went to Ms. Tienken, a teacher in Panaca, and told her about the attack. AA, Vol. 6, p. 1031. Appellant told Ms. Tienken that she "cut off" a man's penis. AA, Vol. 6, p. 1032. Appellant also told Ms. Tienken that after she cut off the man's penis, she threw it. AA, Vol. 6, p. 1033. Appellant also told Ms. Tienken that the attack occurred to the west of the I-15 freeway on a "major hotel street" (Mr. Bailey's mutilated body was found on West Flamingo). AA, Vol. 6, p. 1033. Ms. Tienken also testified that in her statement to police, she told police that Appellant told her, "I'm not driving that car. I don't want anybody to see it." AA, Vol. 6, p. 1036.

Michele Austria: Appellant told Ms. Austria that when she was in Las Vegas, she was attacked by someone and she "proceeded to grab onto him and slash at his penis." AA, Vol. 6, p. 1099. Appellant also told Ms. Austria that she was having a hard time dealing with her conscience, that she was depressed because of the attack, and that she didn't know whether or not she had killed the man. AA, Vol. 6, pp. 1100-1101.

Paul Brown: Paul Brown is Michele Austria's live-in boyfriend. Mr. Brown testified that he overheard Appellant tell Michele that she "reached down and cut a man's penis off". AA, Vol. 6, p. 1113.

Detective Thowsen: Appellant made several incriminating statements to Detective Thowsen. In fact, one of the most damning things Appellant said was, "I didn't think anybody would miss him." AA, Vol. 8, p. 1372. Appellant made this statement without being given any information about the victim, or even any information indicating that the detectives were investigating a murder. AA, Vol. 8, p. 1372. Appellant also became defensive when Detective Thowsen mentioned that Appellant's car and license plate were unique, telling Detective Thowsen that someone could have been borrowing her car. AA, Vol. 8, p. 1372. After providing a voluntary recorded to statement to Detective Thowsen, Appellant was placed under arrest. AA, Vol. 8, p. 1376. When Detective Thowsen was walking Appellant out of the house, Appellant's mother arrived at the home. After Detective Thowsen explained to the mother that Appellant was under arrest, Appellant said to her mother, "Mom, I did it, now I have to do what I have to do." AA, Vol. 8, p. 1378. Shortly thereafter, Appellant's father arrived and Appellant said to her father, "I'm sorry daddy. Told you I did something awful." AA, Vol. 8, p. 1378. While Appellant was being placed into custody she looked around the room where she was being photographed and then told Detective Thowsen that the room looked similar to the location where the attack occurred in that she could look up and see covered parking. AA, Vol. 8, p. 1383. Detective Thowsen had been to the crime scene and he testified

that a parking structure was visible from inside the enclosed dumpster area[2], that the enclosed dumpster area and the room at the jail were about the same size, and that the room at the jail and the enclosed dumpster area had a similar floor area (painting and curbing). AA, Vol. 8, p. 1383.

In addition to this testimony, a recording of Appellant's statement to Detective Thowsen was played at trial for the jury. The jury, as trier of fact, was able to hear the details contained in the statement for themselves and then determine whether or not it was "cryptic" or inconsistent. The jury heard all of the arguments regarding the credibility of the witnesses and their ability to pinpoint exact dates as well as the differences in the witnesses' testimony since the first trial and their desire to be helpful to the Appellant. Having heard all of this, the fact is that this jury (and the jury in the first trial) rejected Appellant's alibi defense. This was a factual determination supported by the evidence. The prosecution presented sufficient evidence to sustain Appellant's convictions. Therefore, the convictions should be affirmed.

## II.
## DETECTIVE THOWSEN'S TESTIMONY WAS NOT HEARSAY AND DID NOT VIOLATE THE CONFRONTATION CLAUSE.

Appellate counsel claims that the district court erred in permitting the State to present testimony from Detective Thowsen. Appellate counsel claims that Detective Thowsen improperly testified about the "absence of records from medical facilities concerning knife wounds to penises from May through July 2001," and that this testimony was hearsay and it also violated Appellant's rights pursuant to the Confrontation Clause. Appellant's Opening Brief, pp. 16-17.

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[2] Iain Anderson, Palm's Casino Security Guard, also testified that a parking structure was visible from inside the enclosed dumpster area. AA, Vol. 6, p. 1009.

On direct, Detective Thowsen testified, pursuant to NRS 51.175 (absence of public record or entry) that healthcare providers are required to report non-accidental knife wounds pursuant to NRS 629.071 and that these records are maintained by the Las Vegas Metropolitan Police Department. He also stated he is one of the persons designated to review such records. AA, Vol. 8, pp. 1384-1389. A review of the reports indicated no penis injuries, let alone a severed penis. No objection was made to this testimony, if fact an objection was withdrawn. Id at 1385. However, defense counsel apparently made an objection at a bench conference at was overruled.

The testimony that Appellant now complains about did not occur on direct examination, but instead was elicited by defense counsel during his cross examination of Detective Thowsen. The argument appears to be that because the district court errored in allowing the direct testimony, defense counsel was forced to elicit even more information on cross-examination. This issue is better illuminated by a review of the following portion of the record:

> "MR. SCHIECK: Just so the Court knows, Your Honor, and I know the Court's got to go and we can do this tomorrow also, but we approached the bench and objected to Detective Thowsen testifying concerning the reports of other people that have had cuts in that area and then were reporting. We'd object that it's hearsay and the Court allowed him to testify. We want to renew that motion [sic] and make a motion to strike his testimony in that regard because, in our opinion, clearly based completely on hearsay where he's talking to urologists and things like that. We can address that tomorrow. I just wanted to make you totally aware I needed to make a record.
>
> MS. DIGIACOMO: We might be need to address that because if that's the case we do have custodians from every hospital that were contacted and they had no incidents of a penis being cut. We'll need to call all those witnesses then, which probably would be another 10 witnesses. Because we did go to each hospital emergency room in the Valley, do our own investigation and ask regarding any injury to any penis and there wasn't one, so. I mean we could leave it with Detective Thowsen or we can, you know, go that route. We just need to know.

MR. SCHIECK: Well, there's a lot more --

THE COURT: The --

MR. SCHIECK: -- healthcare providers than 10.

THE COURT: -- objection at side bar was as to hearsay and we had discussion at side bar that -- [']cause my initial impression was that Detective Thowsen himself had called the hospitals and was going to rely [sic] what the hospital personnel had told him and Mr. Kephart said, no, that that was not the case. That he had internally reviewed reports from Metro that we negative. And that is what Detective Thowsen initially testified to so I want to go back to my notes.

MS. DIGIACOMO: **It was on cross examination, the rest you know.**

THE COURT: **And that was solicited by the defense rather than --**

MS. DIGIACOMO: **That's correct.**

THE COURT: -- **you can't object to what you solicit yourself.**

MR. SCHIECK: I solicited his information that he testified to as if it was his own knowledge, was in fact based totally on hearsay.

MS. DIGIACOMO: We didn't ask him about contacting the hospitals.

(Pause in the proceedings)

THE COURT: **His testimony on direct was that he looked for reports through May, June and July anywhere in Clark County and found none. Found no other report.**

(Pause in the proceedings)

THE COURT: **That was where the State left it. It was on -- it wasn't [sic] on cross examination that he indicated that he had delegated some of the research to the secretary who reported back to him. That he had called hospitals and he had call urologists. That was information that was solicited by the defense so.**

MR. SCHIECK: On cross examination of his statement that he had examined reports and that's what he was basing his testimony. His testimony on cross was he didn't examine any reports, he talked to people. He talked -- he had his secretary talk to people and didn't document any of it, of course, but.

THE COURT: No, he didn't say he didn't refer to any reports. He said he did refer to the reports and he did additional things as well which --

MS. DIGIACOMO: The question was posed generally.

MR. KEPHART: **As I recall specifically in that area because I knew what Mr. Schieck was objecting to. His testimony on direct was the searched for reports and that and found -- and within the department and nothing had been reported and it was left at that. Mr. Schieck went into, well, what did you do? Did you make the phone calls yourself? Did you talk to hospital personnel? Did -- and then he got to the point where they talking about -- to urologists and how many urologists did you talk to? Do you know all the urologists? That's all cross examination. That's Mr. Schieck's questions as to what he did in talking to people, but he testified on direct that he found no reports. And my specific direct was aimed as to the statute as to whether or not there was any reports made resulting in information about a person being stabbed or cut with a knife and we talked here specifically about in the groin area slashed with a knife or whatever and he said nothing was reported like that. And now Mr. Schieck said, well, what, did you talk to -- you know, he went on beyond reports based on cross examination.**

THE COURT: **The motion to strike is denied. The State limited either [sic] examination to avoid the hearsay. The hearsay that was brought out was solicited by the defense so the motion to strike is not appropriate.**

MR. SCHIECK: Your Honor, for the record I would note that when we did approach the bench I indicated that the contents of reports would also be hearsay, that those reports in fact are based on hearsay. So it's much broader than just who he talked to --

MR. KEPHART: The testimony --

THE COURT: But the --

MR. SCHIECK: And I'm comfortable with the record as it stands.

MR. KEPHART: Well, I'm not.

THE COURT: The State's position --

MR. KEPHART: The --

THE COURT: -- was that it was a negative. That there were no reports --

MR. KEPHART: Right.

THE COURT: -- that is not hearsay. So --
MR. KEPHART: That's our position.
THE COURT: Okay. We'll see everybody at 1 o'clock tomorrow."

AA, Vol. 8, pp. 1414-1415 (emphasis added).

The record indicates that, mindful of defense counsel's concerns on this issue, the prosecutor limited his questions on direct examination to Detective Thowsen's search for internal police reports from medical facilities. This is not hearsay pursuant to NRS 51.175 and the district court did not abuse its discretion in admitting it. "A district court's decision to admit or exclude evidence rests within its sound discretion and it will not be disturbed unless is manifestly wrong." Vallery v. State, 118 Nev. 357, 371, 46 P.3d 66, 76 (2002) (citing Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999)).

Defense counsel, on cross examination, questioned Detective Thowsen about his additional investigation. This was defense counsel's tactical decision and not error by the trial court. Therefore, this claim is belied by the record.[3] As such, Appellant's conviction should be affirmed.

## III.
## DETECTIVE THOWSEN'S TESTIMONY WAS PROPERLY ADMITTED.

### A. THIS ISSUE WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW.

Objections to alleged errors must be lodged at trial in order to preserve appellate review. McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983); see also State v. Taylor, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998), Emmons v. State, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991). "When an appellant fails to **specifically** object to questions asked or testimony elicited during trial, but complains

[3] It appears that appellate counsel's misrepresentation of the record on this issue was a deliberate attempt to mislead this Court. If the Court agrees, the State requests that this Court consider imposing appropriate sanctions.

about them, in retrospect upon appeal, [this Court does] not consider his contention a proper assignment of error." Greene v. State, 113 Nev. 157, 931 P.2d 54, 65-6 (1997) (quoting Wilson v. State, 86 Nev. 320, 326, 468 P.2d 346, 350 (1970)) (emphasis added).

Appellant claims that Detective Thowsen's opinion testimony usurped the jury's role. Appellant claims that defense counsel objected to Detective Thowsen's testimony at trial. However, a review of the record shows that the grounds upon which defense counsel objected at trial are not in line with Appellant's claims in the instant appeal.

Specifically, Appellant claims that at trial, defense counsel objected to Detective Thowsen's testimony that he has investigated 400 to 500 homicides and that he has taken hundreds of statements from homicide suspects. The record indicates that trial counsel objected to this testimony on the grounds of relevance, but not that it was improper opinion, usurping the jury's role. AA, Vol. 8, p. 1387 (XIII-69). Appellant also references Detective Thowsen's testimony that it is very common for people to minimize their involvement in an offense when giving a statement to law enforcement, however, defense counsel did not object at all to this testimony at trial. Next, Appellant claims that defense counsel objected to Detective Thowsen's testimony that several suspects have claimed that they were under the influence of methamphetamine during the commission of a crime. The record indicates that defense counsel objected to this testimony on the grounds of relevance. AA, Vol. 8, p. 1388 (XIII-70). Finally, Appellant claims that defense counsel objected to Detective Thowsen's testimony that it is not uncommon for people who claim that they were under the influence of methamphetamines during the commission of a crime to "jumble things together and take something over it and put it together with something completely unrelated and especially if it's a situation where an individual has been on a binge for several days which is pretty common." The record shows that

defense counsel objected to this testimony on the grounds that it was outside the scope of his expertise. AA, Vol. 8, p. 1388 (XIII-70-71).

Defense counsel objected to Detective Thowsen's testimony at trial on the grounds that it was not relevant and that it was outside the scope of his expertise. As Appellant now objects, for the first time, to Detective Thowsen's testimony on the grounds that it "usurped the jury's role", this issue was not properly preserved for review by this Court. However, if this Court finds that the grounds used to object to this testimony at trial are sufficiently broad so as to encompass Appellant's current claim, the merits of the issue are addressed below.

**B. ADMISSION OF DETECTIVE THOWSEN'S OPINION TESTIMONY WAS NOT IMPROPER.**

The admissibility of expert or non-expert testimony is within the discretion of the trial court. Watson v.State, 94 Nev. 261, 264, 578 P.2d 753, 755-756 (1978). "It is within the district court's sound discretion to admit or exclude evidence, and this court reviews that decision for an abuse of discretion or manifest error." Thomas v. State, ___ Nev. ___, 148 P.3d 727, 734 (2006) (citing Means v. State, 120 Nev. 1001, 1008, 103 P.3d 25, 29 (2004)).

NRS 50.275 provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge." While there was no express finding that Detective Thowsen's testimony was offered as expert testimony, the foundational questions implied that the State offered his testimony as such.[4] See Watson at 264, 755-756.

Admission of Detective Thowsen's testimony was proper under NRS 50.275, as it was offered to assist the trier of fact in understanding the evidence. Further, the

[4] AA, Vol. 7, p. 1326 (XI-183, lines 4-8).

testimony did not "usurp the jury's role", as the jury was instructed to assign whatever credibility it deemed appropriate to expert testimony. AA, Vol. 4, p.755. Thus, the jury's role as ultimate fact finder was preserved; therefore, Appellant's claim is without merit. The district court did not abuse its discretion in allowing Detective Thowsen's testimony. Therefore, Appellant is not entitled to relief on this issue.[5]

## IV.
## THE DISTRICT COURT PROPERLY EXCLUDED INADMISSIBLE HEARSAY EVIDENCE.

"A district court's decision to admit or exclude evidence rests within its sound discretion and it will not be disturbed unless is manifestly wrong." Vallery v. State, 118 Nev. 357, 371, 46 P.3d 66, 76 (2002) (citing Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999)).

Here, Appellant claims that the district court erred in prohibiting defense counsel from eliciting improper hearsay evidence from two witnesses, thereby violating her right to present a defense. Specifically, Appellant claims that during cross examination of Stephen Psyzkowski, defense counsel asked, "You told the police you had heard about an attack on Blaise [Appellant] the month before, correct?" AA, Vol. 6, p. 1089. The district court sustained the prosecutor's hearsay objection to defense counsel's question. AA, Vol. 6, p. 1089. Then on direct examination of Heather McBride, defense counsel asked, "Was she talking to you about something personal?"[6] AA, Vol. 8, p. 1529. The district court sustained the

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[5] Appellant refers to Detective Thowsen's testimony as hearsay. Appellant's Opening Brief, p. 21, line 13. However, the testimony that Appellant references does not contain any out of court statements offered for the truth of the matter asserted, as such, that testimony is not hearsay. Appellant makes no argument that any other portion of Detective Thowsen's testimony contained hearsay, therefore, the State was not able to respond to this "claim".

[6] This question was one of a series of questions regarding whether or not Appellant "confided" in this witness. AA, Vol. 8, pp. 1528-1529.

prosecutor's hearsay objection. AA, Vol. 8, p. 1529. Appellant claims that this testimony was necessary in order to present evidence that she told these two witnesses about an alleged attack that occurred prior to July 8, 2001, during which she cut the attacker's penis, therefore, Appellant claims the man whose penis she confessed to police to cutting off was not Duran Bailey because the alleged attack occurred before Mr. Bailey was brutally murdered.

However, "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 1264 (1998). "A defendant's interest in presenting such evidence may thus 'bow to accommodate other legitimate interests in the criminal trial process' ". Id. (citing Rock v. Arkansas, 483 U.S. 44, 55, 107 S.Ct. 2704, 2711 (1987)). "As a result, **state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials**. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " Id. (citing Rock). Exclusion of evidence is unconstitutionally arbitrary or disproportionate **only** where it has infringed upon a weighty interest of the accused. Id. (emphasis added).

Here, the evidence was excluded because it violated the rules of evidence. NRS 51.065. The district court properly found that the statements did not fall under any of the hearsay exemptions under NRS 51.035. AA, Vol. 8, p. 1531. Defense counsel sought to introduce this evidence to prove the truth of the matter asserted, that Appellant was attacked prior to July 8th and that her statements to police referred to that attack, not the instant murder. Therefore they were properly excluded. The purpose of the hearsay rules is to ensure the reliability of testimonial evidence presented at trial. There was nothing inherently reliable about the testimonial evidence at issue that would make the application of the hearsay rule "arbitrary".

Further, application of the hearsay rule was not "disproportionate" in that the district court's ruling did not infringe upon a weighty interest of the accused because Appellant was free to take the stand to testify to these alleged conversations herself. It did not interfere with Appellant's ability to present her theory of the case. Heather McBride was able to testify that Appellant came to her before the murder and talked to her about something she was very upset about even though the witness could not present the substance of the testimony. AA, Vol. 8, pp. 1527-1530. In addition, Appellant presented testimony, either through cross-examination or in the defense in chief, to support the alibi defense. Several witnesses testified Appellant was in Paneca rather than Las Vegas at the time of the murder.

Because the district court's decision to exclude this evidence was not an abuse of discretion or a manifest error, exclusion of the evidence was not improper. Therefore, this Court should affirm Appellant's conviction.

## V.

## THE DISTRICT COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT'S PERSONALIZED LICENSE PLATE.

"It is within the district court's sound discretion to admit or exclude evidence, and this Court reviews that decision for an abuse of discretion or manifest error." Thomas v. State, 148 P.3d 727, 734 (2006) (citing Means v. State, 120 Nev. 1001, 1007-1008, 103 P.3d 25, 29 (2004).

Here, Appellant claims that admission of evidence of her personalized license plate ("4NIK8ER" – fornicator), was in error, as it was irrelevant and highly prejudicial. Appellant claims that because there were no witnesses who testified to seeing Appellant's car at the scene of the crime, that evidence of the distinctive license plate was not relevant. However, the State offered evidence of the license plate, not because a witness testified to seeing a car with a 4NIK8ER license plate at the scene, but rather to corroborate Appellant's statements to law enforcement and other witnesses that she hid her car because she was afraid that someone may have

seen her unique car with its distinctive license plates at the crime scene. AA, Vol. 5, p. 919.

Appellant also argues that admission of the license plate evidence was unnecessary because defense counsel offered to stipulate that Appellant's car had a distinctive license plate. However, as the prosecutor argued during the pre-trial hearing regarding this issue, a stipulation that the license plate was distinctive would not have been sufficient. AA, Vol. 5, p. 923. All personalized license plates are 'distinctive'; describing the license plate as merely distinctive would not have painted a complete picture for the jury as to why Appellant was so concerned about her car and her license plate being spotted and remembered by a potential witness.

Based on the prosecutor's argument, the district court ruled that evidence of the license plate was admissible:

> "Because the car was not a Toyota Camry that there's a billion of them on the road, and the plate was not just a standard plate, the two things together make this a uniquely identifiable vehicle, and what transpired with the vehicle in the time frame in question and how the vehicle was handled is a circumstance that I believe the jury should be able to consider amongst all of the other circumstances in the case. The Court, therefore, finds that the relevance exceeds the potential prejudice and denies the motion pursuant to NRS 48.025 and NRS 48.035."

AA, Vol. 5, p. 920. Defense counsel, upon the district court's ruling, was free to request that the district court provide a limiting instruction to the jury, instructing the jury not to consider the evidence for any of the reasons that Appellant claims were prejudicial. Defense counsel chose not to do so. It is not proper for Appellant now, on appeal, to complain about something that defense counsel made no attempt to avert at trial.

Appellant has not shown that the district court abused its discretion or made a manifest error in admitting the evidence at issue, Appellant's conviction should be affirmed.

## VI.

## ADMISSION OF PRESUMPTIVE BLOOD TESTS WAS PROPER.

"It is within the district court's sound discretion to admit or exclude evidence, and this Court reviews that decision for an abuse of discretion or manifest error." Thomas v. State, 148 P.3d 727, 734 (2006) (citing Means v. State, 120 Nev. 1001, 1007-1008, 103 P.3d 25, 29 (2004).

Appellant claims that the district court erred in admitting evidence of the positive luminol and phenolphthalin. This issue was considered previously by this Court and was found to be without merit. Lobato v. State, 120 Nev. 512, 522, 96 P.3d 765, 772 (2004). The district court nevertheless entertained argument regarding this issue in a pretrial hearing. AA, V. 5, pp. 932-935. The district court held the probative value of this evidence outweighed potential prejudice and that the concerns that defense counsel raised could be addressed through cross examination, presentation of rebuttal testimony, and comment during closing argument. AA, V. 5, p. 935.

Appellant addresses the testimony of three witnesses who testified concerning the presumptive testing done on Appellant's car, Thomas Wahl, Louise Renhard, and Daniel Ford. Appellant claims that during the testimony of the three witnesses the prosecutor emphasized the positive presumptive tests, seemingly implying that the prosecutor attempted to mislead the jury. Appellant's Opening Brief, pp. 29-30. However, the record shows that the prosecutor was quite balanced in the presentation of this evidence. During Thomas Wahl's testimony, prosecutor's elicited the following testimony:

> "Q. [Mr. Kephart] Okay. And so with regards to this particular car, with the items that we'd shown you that you -- that you've actually examined, is it your testimony today that you just -- you can't say it's blood but you can't say it's not blood?
> A. That'd be -- that would be an accurate statement. I can't confirm that what gave a positive chemiluminescent reaction with luminal

and a weak positive with phenolphthalein is blood to any absolute certainty. It's one of the possibilities."

AA, Vol. 6, p. 1069. During cross examination of Mr. Wahl, defense counsel elicited testimony indicating that there were no positive confirmatory tests (AA, Vol. 6, p. 1075) as well as testimony regarding what substances could produce a false positive on a presumptive test (AA, Vol. 6, p. 1076). During Louise Renhard's testimony, the prosecutor elicited testimony that informed that jurors that a positive result on a confirmatory test only indicates only that there is a possibility that the detected substance may be blood. AA, Vol. 7, p. 1239. On cross examination of Ms. Renhard, defense counsel elicited testimony indicating that there are substances that could produce a false positive on a presumptive test. AA, Vol. 7, p. 1246. During Daniel Ford's testimony, the prosecutor elicited no testimony at all regarding presumptive tests conducted on Appellant's car. This information was elicited by defense counsel on cross examination. (AA, Vol. 7, p. 1278. However, the prosecutor, on redirect examination, elicited testimony regarding false positives caused by cleaning agents, and whether or not the positive results from Appellant's car were similar to the false positive caused by cleaning agents. AA, Vol. 7, p. 1284. On recross examination of Mr. Ford, defense counsel elicited testimony regarding what types of substance could produce a false positive on a presumptive test. AA, Vol. 7, p. 1285.

The prosecutor was very clear in presenting testimony to the jury that the positive results were from presumptive tests and that a positive result on a presumptive test meant only that there was a possibility that was blood was present. Defense counsel was able to cross examine each witness and elicit information to address the concerns that they raised in the pretrial hearing regarding the reliability of presumptive tests. Therefore, Appellant's claim that presentation of evidence of presumptive tests to the jury was misleading and confusing is utterly without merit. Therefore, the district court's decision to admit this evidence was not an abuse of

discretion, nor was it manifest error. As such, Appellant's conviction should be affirmed.

However, even if this Court finds that the district court erred in admitting evidence of the positive presumptive blood tests, it is the State's position that it was harmless error. Pursuant to NRS 178.598, "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Nev. Rev. Stat. §178.598 (Westlaw current through 2005 73rd Reg. Sess.). NRS 177.255 provides that, "(a)fter hearing the appeal, the court shall give judgment without regard to technical error or defect which does not affect the substantial rights of the parties." Nev. Rev. Stat. §177.255 (Westlaw current through 2005 73rd Reg. Sess.). A conviction may stand, even where a constitutional error was committed, if the error is determined to be harmless beyond a reasonable doubt. Obermeyer v. State, 97 Nev. 158, 162, 625 P.2d 95, 97, (1981). Although NRS 178.598 does not provide a standard for determining when errors are harmless, this Court has established certain guidelines to be followed in making this determination. These include: whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged. DeChant v. State, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000).

In consideration of whether the issue of innocence or guilt is close, this Court has previously held that if the verdict would have been the same in the absence of the error, then the error is harmless. Sherman v. State, 114 Nev. 998, 912, 965 P.2d 903, 1010 (1998). Here, given that Appellant confessed to law enforcement and made several incriminating statements to other individuals, there is little doubt that the verdict would have been the same in the absence of the alleged error.

## VII.

## THE DISTRICT COURT'S DENIAL OF APPELLANT'S MOTION TO DISMISS WAS PROPER.

The grant or denial of a motion to dismiss is reviewed on appeal for abuse of discretion. State v. Hancock, 114 Nev. 161, 955 P.2d 183 (1998).

In Daniels v. State, this Court adopted the two-part test to determine whether the State has failed to gather exculpatory evidence as set forth by the New Mexico Supreme Court in Ware v. State, 118 N.M. 319, 881 P.2d 679 (1994) 114 Nev. 261, 267, 956 P.2d 111, 115 (1998). First, the defendant must show that the evidence was material, "meaning that there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different." Id. Then, if the defendant establishes that the evidence was material, "the court must determine whether the failure to gather evidence was the result of mere negligence, gross negligence, or a bad faith attempt to prejudice the defendant's case." Id.

Here, Appellant claims that the district court erred in denying her motion to dismiss based on the State's failure to preserve and collect exculpatory evidence. The district court held a pretrial hearing to address this issue and upon reviewing both parties' motions and hearing argument, the district court denied Appellant's motion pursuant to Daniels, as defense counsel had not satisfied the two-part test therein. AA, Vol. 5, p. 939. On appeal, Appellant claims that the failure by the State, specifically the Las Vegas Metropolitan Police Department (LVMPD), to catalogue, fingerprint, and store every piece of trash found at the crime scene (an industrial trash dumpster and enclosure) was gross negligence and/or a bad faith attempt to prejudice Appellant's case. This unreasonable, unrealistic claim is belied by the record. Several witnesses testified that the Crime Scene Analyst meticulously sorted through the trash at the scene attempting to preserve any potential evidence.

Testimony of Officer James Testa:

"Q. How long do you -- if you recall, how long did it take the crime scene analysts to actually get the trash out and uncover the body?
A. Through most of the shift, that I can remember, ma'am.
Q. So hours?
A. Yes."
(AA, Vol. 6, p. 1024)

Testimony of Louise Renhard, Senior Crime Scene Analyst:

Q. How was it that you went about trying to uncover the body?

A. What we did was we did it basically layer by layer, lifting off the top layers. We were -- it was explained to us by the detectives who interviewed the gentleman who found the body that he had been at the dumpster and he had taken some stuff out and thrown it down on the pile. So we lifted some items, we examined each item. If we found anything that indicated blood, we set it aside to be processed later. So basically we just sifted through item by item. When we got closer to the body we started setting aside more and more items that might be of evidentiary value."

(AA, Vol. 7, p. 1223)

Testimony of Daniel Ford, Senior Crime Scene Analyst:

"Q. And do you recall how you went about processing or going through the trash over the body to get to the body?

A. We pulled the dumpster container out and the slowly started removing trash that was located on top of the body, towards the outside of the enclosure looking again for items we felt was pertinent to the scene, until we got down to the body. Louise Renhard would take photographs along the way, documenting whatever we found or whatever was noticed in that pile."

...

Q. Now, you said that as you brought trash out you'd process it and some you kept and impounded, and others you didn't?

A. We would pull stuff out and look to see whether or not there was blood on the items, blood on the bags or whatever, to see whether blood spatter had gone from the victim onto the other items that appeared -- most of the stuff that we brought out had been placed on top of the victim. There was no blood on the items. It was clean. To us, that had been removed from the dumpster and tossed on top of the victim, and there was no reason to take that for evidence. It was an agreement made and a decision made between the homicide detectives and the crime scene analysts that we there on the scene that night. Other items that we weren't certain about were bagged and then taken back to the lab and processed for possible prints. If prints were located, they were impounded on that list. If not, they were -- their location was noted for later on. But if there were no prints on it, it was discarded."

(AA, Vol. 7, pp. 1263-1264).

Appellant's claims in the instant appeal have no merit. Metro collected anything they thought had evidentiary value. Appellant cannot demonstrate that out of the mounds of garabarge, anything not collected would have generated evidence

with a reasonable probability of a different result at trial. Moreover, to grant a motion to dismiss, the district court had to find that the failure to gather the alleged exculpatory evidence was done in bad faith. The facts do not support such a finding.

Finally, Appellant was able to present testimony that fingerprints, bootprints or other gathered evidence did not match Appellant. The failure to gather all of the trash did not impair Appellant's ability to present this theory of the defense. The district court's denial of Appellant's motion to dismiss was a proper exercise of that court's discretion. Therefore, Appellant's conviction should be affirmed.

## VIII.

## RECONSIDERATION OF ISSUES RAISED IN APPELLANT'S FIRST APPEAL IS BARRED BY THE DOCTRINE OF THE LAW OF THE CASE.

"The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969) (vacated in part by Walker v. State, 408 U.S. 935, 92 S.Ct. 2855(1972). The doctrine of the law of the case is not absolute and this Court has the discretion to revisit prior legal conclusions if such action is warranted. Bejarano v. State, ___ Nev. ___, 146 P.3d 265, 271 (2006). However, the doctrine of the law of the case "cannot be avoided by a more detailed and precisely focused argument." Pertgen v. State, 110 Nev. 554, 557-558, 875 P.2d 361, 363 (1994) (abrogated on other grounds by Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001).

Here, Appellant urges this Court to review reconsider its holdings the Appellant's first appeal. Specifically, Appellant asks that this Court reconsider its holdings as to whether Appellant's statements to law enforcement were voluntary and whether NRS 201.450 is unconstitutionally vague and overbroad. However, the argument Appellant puts forth in support of these two claims is simply a more detailed and precisely focused rehashing of the argument set forth in the first appeal. Further, the facts in the instant appeal are the same facts set forth in the first appeal. Therefore, the doctrine of the law of the case applies and Appellant has not demonstrated that this Court should to exercise its discretion to review these holdings.

## IX.
## APPELLANT'S SENTENCE DOES NOT VIOLATE DOUBLE JEOPARDY CLAUSE.

Appellant claims that the sentenced imposed violates the Double Jeopardy Clause. Following the first trial, Appellant was convicted of first degree murder with use of a deadly weapon and sexual penetration of a dead human body. Appellant was sentenced as to count one to a maximum of fifty (50) years and a minimum of twenty (20) years for Murder, plus an equal and consecutive term for the deadly weapon enhancement and as to count two, Appellant was sentenced to a concurrent term of a maximum of fifteen (15) years and minimum of five (5) years. Appellant appealed her conviction to this Court and the conviction was reversed.

Following Appellant's second trial, she was convicted of voluntary manslaughter with use of a deadly weapon and sexual penetration of a dead human body. Thereafter, Appellant was sentenced as to count one to a maximum of one hundred twenty (120) months with a minimum parole eligibility of forty-eight (48) months, plus and equal and consecutive term for the deadly weapon enhancement. As to count two, Appellant was sentenced to a maximum of one hundred eighty (180) months with a minimum parole eligibility of sixty (60) months, to run consecutive to count one. AA, Vol. 4, p. 801.

Appellant cites this Court's recent opinion in Wilson v. State, 170 P.3d 975 (2007), in support of the claim that the district court violated Double Jeopardy in sentencing Appellant to consecutive terms of imprisonment for counts one and two rather than to concurrent terms of imprisonment, despite the fact that Appellant's overall sentence is less than the life sentence she was given initially. However, the point of law in Wilson upon which Appellant relies is not applicable in the instant case.

In Wilson, this Court upheld its holding in Dolby v. State, that "[w]hen a court is forced to vacate an unlawful sentence on one count, the court may not increase a

lawful sentence on a separate count." 106 Nev. 63, 65, 787 P.2d 388, 389 (1990). Both Dolby and Wilson are distinguishable from the instant case in that the change in Appellant's sentence followed a second trial - after a completely vacated conviction and sentence. Dolby and Wilson addressed increases of sentences following appeals that resulted in partially vacated convictions or sentences. In the instant case, Appellant's conviction and sentence were fully vacated and she received a new trial. When a defendant exercises his right to appeal, he waives any expectation of finality in a given sentence. Wilson, at 978. "In effect, when defendants challenge one of several interdependent sentences (or underlying convictions) on appeal, they have challenged the entire sentence. Consequently, following a partially successful appeal, a defendant has no legitimate expectation of finality in any remaining portion of the sentence." Id.

Further, "[w]hen a defendant successfully appeals a conviction and obtains a new trial, 'the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean.' " Wilson, at 978 (citing North Carolina v. Pearce, 395 U.S. 711, 721, 89 S.Ct. 2071 (1969) [Overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201 (1989)]). In Holbrook v. State,, this Court adopted the rule set forth in North Carolina v. Pearce that when a harsher sentence is imposed after a new trial, "the reasons for doing so must affirmatively appear. 90 Nev. 95, 98, 518 P.2d 1243, 1244 (1974) 'Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.' ". 90 Nev. 95, 98, 518 P.2d 1242, 1244 (1974).

In the instant case, at sentencing, the prosecutor presented copies of letters written by Appellant and recordings of Appellant's phone calls showing that Appellant had made very little, if any, progress in learning to manage her emotions and conform her behavior to acceptable societal norms. The prosecutor made the following statement to the district court in presenting the evidence:

> "When you look at the letters that I gave you, where she describes herself as an individual that when she gets pissed off she's a total bitch. She's completely unreasonable and pig headed. When you read through the letters and they talk -- they're replete with sexual connotations. Her actions about wanting to beat people up. Her quick judgment of people, calling you a stupid woman. Talking about popping her roommate[']s head off like a zit. Talking about how she wants drugs and she wants to get more drugs. That in itself is what she's really all about, Judge."

AA, Vol. 9, p. 1757. In addition, the prosecutor informed the district court that Appellant had been bound over in District Court on a criminal charge of sexual contact between prisoners. The district court declined, however, to consider this information, as Appellant had not been convicted of that charge. The information presented by the prosecution at Appellant's sentencing hearing satisfies the requirement set forth on Holbrook. Accordingly, imposition of a consecutive sentence did not violate the Double Jeopardy Clause. Therefore, Appellant's sentence should be affirmed.

## CONCLUSION

Based on the above arguments of law and fact, the State respectfully requests that the judgment of conviction and sentencing be affirmed.

Dated this 25th day of January, 2008.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY _____
NANCY A. BECKER
Deputy District Attorney
Nevada Bar #000145

Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

## CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 25th day of January, 2008.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
NANCY A. BECKER
Deputy District Attorney
Nevada Bar #000145
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

## CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on this 25th day of January, 2008.

DAVID M. SCHIECK
Special Public Defender
JoNELL THOMAS
Deputy Special Public Defender
330 South Third Street, Suite 800
Las Vegas, Nevada 89155

Employee, Clark County
District Attorney's Office

BECKn/Melissa Oliver/mulkn