ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 49087

KIRSTIN BLAISE LOBATO

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Appeal from a Judgment of Conviction
Eighth Judicial District Court, Clark County
The Honorable Valorie Vega, District Judge

APPELLANT'S OPENING BRIEF

David M. Schieck
Special Public Defender
JoNell Thomas
Deputy Special Public Defender
State Bar No. 4771
Office of the Special Public Defender
330 South Third Street Suite 800
Las Vegas, NV 89155
(702) 455-6265
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 49087

KIRSTIN BLAISE LOBATO

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Appeal from a Judgment of Conviction
Eighth Judicial District Court, Clark County
The Honorable Valorie Vega, District Judge

APPELLANT'S OPENING BRIEF

David M. Schieck
Special Public Defender
JoNell Thomas
Deputy Special Public Defender
State Bar No. 4771
Office of the Special Public Defender
330 South Third Street Suite 800
Las Vegas, NV 89155
(702) 455-6265
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Authority

///

///

Statutory and Rule Authority

I. INTRODUCTION

Appellant Kirstin Lobato was convicted of voluntary manslaughter with use of a deadly weapon and sexual penetration of a dead human body, despite the fact that there was absolutely no physical evidence implicating her in those offenses, the fact that no eyewitness or informant testimony suggested that she was guilty, and the fact that there were substantial differences between an incident described by Lobato to police officers and the facts surrounding the death at issue here. Moreover, substantial alibi evidence existed which established that Lobato was not the perpetrator of the crime at issue. Her conviction must be vacated because the State failed to present sufficient evidence to support her conviction. In the alternative, she is entitled to a new trial because of the substantial errors and constitutional violations committed by the district court. Finally, the sentence imposed by the district court violated Lobato's double jeopardy rights and must be modified.

II. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of voluntary manslaughter with use of a deadly weapon and one count of penetration of a dead human body.

III. STATEMENT OF THE ISSUES

A. The State failed to present any physical evidence suggesting that Lobato killed Bailey. It also failed to present any eyewitness identification of her or her car, failed to establish that her numerous alibi witnesses were not credible, and failed to establish that Bailey was the person that Lobato admitted slashing. Given the incredible inconsistencies between details provided by Lobato about the man who attacked her and the details concerning Bailey's death and the complete lack of other evidence, is there insufficient evidence to support Lobato's conviction?

B. Detective Thowsen was allowed to testify that there were no incidents of any other penis stabbings based upon telephone calls allegedly made by his secretary to unnamed persons at unnamed medical facilities. WereLobato's constitutional right of Confrontation and her statutory right against use of hearsay testimony violated as a result?

C. Detective Thowsen was allowed to give his opinion as to why Lobato's statements to the police were inconsistent with the physical evidence and was permitted to testify that Lobato was minimizing her involvement based upon her methamphetamine use. Was this testimony improper and did it usurp the jury's role?

D. The district court refused to allow Lobato's witnesses to testify that Lobato confided in them regarding her cutting of a man's penis prior to the date of Bailey's death. In doing so, did the district court prohibited Lobato from presenting her defense and violate her constitutional rights?

E. The district court allowed the State to introduce highly prejudicial evidence that Lobato's car had the license plate, "4NIK8ER." Did the court violate Lobato's rights admitting this inflammatory evidence?

F. The district court allowed the State to introduce evidence of positive luminol tests on Lobato's car, even though there was no confirmatory tests that established the presence of blood. Did the district court abused its discretion in admitting this evidence?

G. The State threw away important evidence and failed to make reports about crucial matters. Did the district court abused its discretion in denying Lobato's motion to dismiss charges based on the State's bad faith and gross negligence in failing to preserve and collect potentially exculpatory evidence?

H. Should this Court reconsider its holdings as to issues raised in Lobato's first appeal?

I. Did the sentence imposed by the district court violates Lobato's double jeopardy rights under the state constitution.

IV. PROCEDURAL HISTORY

On August 9, 2001, the State charged Appellant Kirstin Blaise Lobato with one count of murder with use of a deadly weapon and one count of sexual penetration of a dead human body. 1 App. 1. The State alleged that Lobato killed Duran Bailey with a blunt object and/or by stabbing and/or by cutting him with a knife and that she then inserted a knife into and/or cut Bailey's anal opening. 1 App. 1-2. She entered a plea of not guilty and received a jury trial on the charges. The first jury returned a guilty verdict on both charges. 1 App. 5. She was sentenced to consecutive 20 to 50 year sentences for first-degree murder with use of a deadly weapon and a concurrent 5 to 15 year sentence for sexual penetration of a dead body. 1 App. 11. On appeal, this Court reversed the judgment after finding that the trial court erred in precluding Lobato from introducing extrinsic evidence to impeach the testimony a witness for the State. 1 App. 6; Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004).

Following the remand from this Court, several motions were filed which are relevant to this appeal. Lobato filed a motion in limine to exclude the contents of her license plate. 1 App. 21-33. The State opposed the motion. 2 App. 374-78. Lobato replied to the State's opposition. 2 App. 480-83. Following argument from counsel, the district court ruled that

the probative value of the license plate outweighed the prejudicial impact of the evidence and that the State could therefore introduce the evidence. 4 App. 918-23.

Lobato filed a motion in limine to exclude statements she made during the course of the July 20, 2001, interrogation. 1 App. 91-123. The State opposed the motion. 2 App. 462-65. Lobato replied to the State's opposition. 3 App. 501-04. Following argument from counsel, the district court denied the motion. 4 App. 926-29.

Lobato filed a motion in limine to exclude testimony of Laura Johnson based on double hearsay. 1 App. 124-42. The State opposed the motion. 2 App. 466-69. Lobato replied to the opposition. 3 App. 505-08. Following argument from counsel, the district court ruled that the motion was premature and should be raised at trial. 4 App. 913-18.

Lobato filed a motion to admit the former testimony of deceased witness Diane Parker. 2 App. 239-94. The State did not oppose the motion but did indicate its intent to present the testimony during its case in chief. 2 App. 477-79. The district court ruled that the testimony would be admitted, either in the defense case or as a joint witness in which defense counsel conducted the direct examination. 4 App. 902-05.

Lobato filed a motion in limine to exclude evidence of presumptive blood tests. 2 App. 298-333. The State opposed the motion. 2 App. 379-438. Lobato replied to the State's opposition. 2 App. 485-90. Following argument from counsel, the district court denied the motion. 4 App. 932-35.

Lobato filed a motion to dismiss based on State's failure to preserve and collect exculpatory evidence. 2 App. 334-73. The State opposed the motion. 2 App. 470-76. Lobato replied to the State's opposition. 3 ROA 509-19. Following argument from counsel, the district court denied the motion. 4 App. 935-39.

The second trial began on September 11, 2006. Following selection of the jury, testimony began on September 14, 2006. 6 App. 986A. Jury instructions were provided to the jury on October 6, 2006. 4 App. 720-60. That same day, the jury returned a verdict of guilty of voluntary manslaughter with use of a deadly weapon and a verdict of guilty of sexual penetration of a dead human body. 4 App. 761-62.

Prior to the sentencing hearing, Lobato submitted to the court a sentencing memorandum which set forth her personal history and the support she has from family members and friends. 4 App. 763-99. She urged the court to impose concurrent time based upon the fact that she received concurrent sentences for his first judgment of conviction that was reversed on direct appeal. 4 App. 781-82.

The district court entered its judgment of conviction on February 14, 2007. 4 App. 800. The court sentenced her to serve two consecutive terms of 48 to 120 months for the conviction of voluntary manslaughter with use of a deadly weapon and a consecutive term of 60 to 180 months of sexual penetration of a dead human body. 4 App. 801. A timely notice of appeal was filed on March 12, 2007. 4 App. 803. This Opening Brief now follows.

V. STATEMENT OF FACTS

Kirstin Blaise Lobato was charged via Information with first-degree murder with the use of a deadly weapon and sexual penetration of a dead human body in connection with the death of Duran Bailey. Bailey was found dead in a bank parking lot on the west side of Las Vegas on July 8, 2001 at around 10:00 p.m., next to a dumpster where he was known to sleep. 6 App. 1000, 1003. He had been severely beaten, he had been stabbed numerous time, and he suffered a fracture to his skull. 6 App. 1145-46. His pants were pulled down and his penis was severed. 6 App. 1017. His rectal area was slashed. 6 App. 1146. Stab wounds to the front of the neck (which cut the carotid artery), the left side, abdomen, rectum and penis were postmortem. 6 App. 1149. The coroner believed that many of the wounds were inflicted with a sharp instrument, such as a knife, but it was possible that they were caused by scissors.[1] 6 App. 1146, 1155. The blunt force trauma on the head was more consistent with Bailey falling down and hitting his head on a curb than being hit by a bat as there was no depressed skull fracture. 6 App. 1160. The coroner estimated that the death occurred 8 to 24 hours prior to an examination of the body, which took place on July 9th at 3:50 a.m.

---

[1]A defense expert opined that injuries were inflicted with scissors. 7 App. 1347-62. No weapon was ever recovered.

6 App. 1163. Bailey had a blood alcohol level of .11 and his blood also included a breakdown product of cocaine. 6 App. 1165. There was semen in his rectum. 7 App. 1177. Dr. Simms testified that this crime was not characteristic of a female crime and that none of the other murders with similar characteristics were committed by women. 7 App. 1168.

A woman named Diane Parker arrived at the crime scene on foot from her home and asked whether the man was Bailey and whether he was dead. 7 App. 1328, 8 App. 1403. She had previously reported to police that Bailey repeatedly raped her a week prior to his death, on July 1, 2001. 7 App. 1328, 8 App. 1410, 1418. Even though Bailey's attack of her happened a week prior to his death, Parker still had injuries. 7 App. 1328. Parker lived in an apartment complex that was a short distance from where Bailey's body was found. 8 App. 1403. She testified that on the day Bailey raped her, some Hispanic men who lived in Parker's apartment complex saw Bailey slap Parker. 8 App. 1419. They told Bailey to leave and said some other things that Parker did not hear, and then Bailey left. 8 App. 1419. Bailey later returned, pushed himself into her apartment and then raped her. 8 App. 1419-20. She ran outside to get help but he grabbed her and threw her back into the apartment. 8 App. 1420. During the attack he kicked her, beat her, held a knife against her throat and tried to rape her anally but was unable to do so. 8 App. 1420, 1425. He tried to sodomize her three or four times and told her that he was going to kill her. 8 App. 1420. She did not immediately report the rape to the police, but did make a report on July 4th, after he banged on her door and window. 8 App. 1420. Police officers came to her apartment on July 5th and she gave a statement at that time. 8 App. 1420. They took her to UMC and they took photographs, including a photograph of her neck wound which was inflicted with his knife. 8 App. 1421. Photographs of injuries to her shoulder, leg arm, eyes and face were also shown to the jury. 8 App. 1421. He made a puncture would on the right side of her carotid artery. 8 App. 1422. Parker informed the police that Bailey usually stayed behind Nevada State Bank near Flamingo and Arville. 8 App. 1422. She offered to take the police to that area and they said "later." 8 App. 1422. The police did not ever take her to the place where he stayed. 8 App. 1422.

Parker had known Bailey for four or five months and previously had a consensual sexual relationship with him. 8 App. 1424. Bailey used crack cocaine, marijuana and alcohol, but she did not ever know him to use methamphetamine. 8 App. 1423. The two Hispanic men watched out for Parker after Bailey's attack, but she did not know their names and did not know if they ever did anything to Bailey. 8 App. 1423-24. Although she did not tell the men that Bailey had raped her, they knew what happened. 8 App. 1424. Parker told the police that reporting Bailey to them was going to get her killed and that if they did not catch him that she would be dead. 8 App. 1428. The police officer told her "you gotta do what you gotta do to protect yourself." 8 App. 1428. She also told them that she was scared to walk outside of her home, but she acknowledge that she walked to the scene where Bailey was killed. 8 App. 1428. When she reported Bailey for rape, she asked the police officers for protection but they did not give her any. 8 App. 1430.[2]

Lobato, a resident of Panaca, was an 18 year old girl who had just graduated high school and worked for a couple of months with a friend in Las Vegas. 6 App. 1042; 9 App. 1622. She sometimes stayed at the Budget Suites on Nellis and Flamingo, near Boulder Highway and sometimes stayed with friends. 6 App. 1084; Exhibit 125A at 3.[3] She was

---

[2]Dective Thowsen testified that he met with Parker and her roommate and based upon their demeanors concluded that they were not suspects in Bailey's death. 7 App. 1328. He admitted that he did not take a crime scene analyst to her apartment, as he had done when he arrested Lobato, and he did not inspect Parker's shoes or apartment with Luminal. 8 App. 1403. The manager of Parker's apartment complex told Thowsen about some Hispanic individuals who lived in the complex who might have known about Bailey being rough with Parker. 8 App. 1404. Thowsen ran their names, learned that they did not have criminal histories, and decided not to talk with them or inspect their footwear. 8 App. 1404, 1410. He did not keep a record on the names of the men. 8 App. 1404.

[3]Filed contemporaneously with this brief is a motion for transmission of Exhibit 125A, which is an audio tape of the interrogation. It appears that the transcript of the tape was not admitted at trial, but was presented to the jury by video display. 8 App. 1376. For the Court's convenience, a transcript of the audiotape is attached to the motion for transmission of Exhibit 125A and the page numbers above refer to that transcript.

using methamphetamine while in Las Vegas when she was sexually attacked. 6 App. 1086; 9 App. 1707; Exhibit 125A at 3-5. While in Las Vegas she sometimes worked with a friend on the west side of Las Vegas. 6 App. 1084.

She returned to Panaca and sought help with her drug problem confiding to her friends in Panaca that she had used a knife to defend herself from her attacker. She sought help from her Panaca high school counselor, Dixie Teinken, but she did not report the attack to the police because in the past she had reported being raped but the police did nothing until her attacker victimized another girl. Lobato told Teinken that the man who attacked her was similar in size to Teinken's grandson, who was 6 foot tall and over 200 pounds.[4] 6 App. 1043. Lobato stated that she stabbed the man in the abdomen and penis, but did not state that she had punched him, used a baseball bat, knocked his teeth out, or cut off his penis after he was dead. 6 App. 1044. She did not ever state that the man who attacked her was homeless. 6 App. 1049. Lobato and Tienken reviewed newspapers back to June 1 to see if there were any articles about the matter. 6 App. 1047. Tienken later contacted her friend Lara Johnson, a Panaca Probation Officer, who called the Las Vegas Metropolitan Police Department ("LVMPD") inquiring whether they had any cases where a man suffered an injury to his penis. 6 App. 1038, 1129, 1137, 1138; 7 App. 1331. At no time did Johnson personally speak with Lobato, so she had only second hand information. 6 App. 1142.

Lobato also confided in Michele Austria about an incident that happened in Las Vegas. 6 App. 1098. Lobato did not tell Austria a specific date as to when she was attacked and slashed a man's penis, but Austria believed that it happened within the first couple of weeks before Lobato returned to Panaca. 6 App. 1100. Austria understood the attack to have happened sometime in June 2001. 6 App. 1104. Lobato stated only that she slashed the man's penis and did not say that she repeatedly stabbed him in other locations, beat him, gave him two black eyes, cut off his penis or beat him with a baseball bat. 6 App. 1104.

---

[4]At the time of the autopsy, Bailey was 5 foot 10 inches tall and weighed 133 pounds. 7 App. 1177.

On July 20, 2001, LVMPD detectives and a crime scene analyst drove to Panaca and interrogated Lobato. 7 App. 1330-31. They advised her they were aware she had been a victim of a sexual assault as a 6 year old child. 7 App. 1333, 8 App. 1393-94. Lobato began to sob and cry. 7 App. 1333. She continued crying while she described her attack in Las Vegas which occurred at the Budget Suites water fountain on the east side of Las Vegas and her attempt to defend herself with her knife. 8 App. 1393; 8 App. 1407; Exhibit 125A at 2.

Many of the details included within Lobato's statement to the police were inconsistent with the evidence concerning Bailey's death. The coroner testified that the victim continued to be attacked even after he was dead and that several injuries were post-mortem. 6 App. 1148, 1153; 8 App. 1396. However, Lobato consistently said she left her assailant alive and crying. Exhibit 125A at 7; 8 App. 1396. Lobato told officers that she did not move her assailant and that she did not cover him up with anything. Exhibit 125A at 7-8. The testimony at trial was clear that Bailey had been moved and had been covered up with trash and a cardboard box. 6 App. 1015; 7 App. 1326. Lobato stated that she used a butterfly knife when she stabbed a man. Exhibit 125A at 5, 11; 8 App. 1387, 1396. A butterfly knife is sharp on both edges. 8 App. 1387. Bailey's wounds were made with a single edged knife or weapon. 6 App. 1148, 9 App. 1689. She told the police that she cut the man's penis and tried to cut it off, but did not know if she actually did. Exhibit 125 A at 6. Bailey's penis, however, was clearly severed and was found away from his body. 7 App. 1226. Lobato told the police that she did not remember hitting the man who attacked her with anything, Exhibit 125A at 6, while it was clear that Bailey was severely beaten. 6 App. 1145-46, 1148. In her statement to the police Lobato stated that the person who attacked her smelled of alcohol and dirty diapers, while Detective Thowsen concluded that this meant that he smelled like old socks that had not been changed. Exhibit 125A at 4; 8 App. 1388. There was no testimony suggesting that Bailey smelled of either alcohol or dirty diapers. Lobato described the man who attacked her as being really big and a giant, while Bailey weighed only 136 pounds. Exhibit 125A at 5; 8 App. 1395. Lobato stated that she was attacked in a parking lot and that there was a dumpster not far from where it happened. Exhibit 125A at 7, 16; 8 App. 1395.

This was consistent with the Budget Suites property. 8 App. 1462. She stated that it happened near the fountain at the Budget Suites on Boulder Highway, and did not mention Nevada State Bank or West Flamingo.[5] Exhibit 125A at 20; 8 App. 1395. There was no fountain anywhere near the bank parking lot dumpster enclosure where Bailey was found. 8 App. 1396. Lobato stated that she discussed the attack with a person called Mumblelina and that the conversation took place over a month prior to her interrogation by the detective on July 20, 2001. Exhibit 125A at 27; 8 App. 1397. Bailey had been killed only 12 days prior to the interrogation. 8 App. 1397. Lobato stated that the attack was late at night, or probably more into the early morning, but the coroner testified to a reasonable degree of medical certainty that the time of death was between 9:30 a.m. and 3:50 p.m. Exhibit 125A at 4; 7 App. 1173. Lobato stated to the police that after the attack she left her car at Jeremy Davis' house for about a week. Exhibit 125A at 8. Davis testified that Lobato left her car at his house in May of 2001. 6 App. 1122. Likewise, Stephen Psyzkowski testified that Lobato hid her car at an apartment complex near his house, because she was afraid that someone might recognize her car, and that her car was towed from that apartment complex on June 6, 2001. 6 App. 1089, 1092-93. As set forth below, numerous witnesses stated that Lobato's car was in Panaca from July 2nd through her arrest on July 20th. Finally, Lobato was abusing methamphetamine, not crack cocaine, in Las Vegas during the time that she was attacked, however, Bailey did not use methamphetamine, only crack cocaine, marijuana and alcohol. 6 App. 1165, 7 App. 1202, 8 App. 1423. There was no evidence that Bailey sold methamphetamine and no methamphetamine was found in Bailey's blood or at the scene.

---

[5]An assistant general manager of the Budget Suites reported that he security officer reports from May, June and July 2001 and did not see any reports regarding a man with an injured penis. 8 App. 1459. There were no reports regarding blood being found on the ground near the fountain area. 8 App. 1459. On cross-examination Robinson acknowledged that he did not who was the general manager in 2001 and he did not have conversations with that person about events in 2001. 8 App. 1461. He also did not know what policies were in place in 2001. 8 App. 1461. He did not know what many security officers were employed in 2001 and did not know information about their shifts. 8 App. 1461.

Even though the crime they were investigating occurred less than two weeks earlier on the west side of town in a bank parking lot, detectives did not conduct additional questioning of Lobato about these discrepancies and instead took her into custody on the murder charges in which Bailey was identified as the victim.[6] 7 App. 1330, 8 App. 1394-95. The police stopped looking for any other suspects. Lobato was then charged with Murder with the Use of a Deadly Weapon and Sexual Penetration of a Dead Human Body.

During trial, there was no physical evidence presented linking Lobato to either the murder scene or the victim. No eyewitness placed Lobato in the area near the bank on the west side of Las Vegas. In fact, not a single person testified as to seeing Lobato in Las Vegas during the relevant time period and no one testified as to seeing Lobato or her car on the road between Las Vegas and Panaca. Tire prints were left in the parking lot and over a planter median in the immediate vicinity of the scene, but they did not match Lobato's car. 7 App. 1229, 1309. Bloody footwear impressions were left from the dumpster out to the parking lot, but they were two and a half sizes larger than Lobato's shoe size and the print did not match any of her shoes. 7 App. 1170, 1228, 1263-64, 1295-96; 8 App. 1505. The coroner testified that it was probable that the person who killed Bailey would have left bloody footprints at the scene based upon the amount of blood loss caused by Bailey's injuries. 7 App. 1169. Fingerprints were identified on the edge of the dumpster enclosure and on garbage found near Bailey, but they did not match Lobato's prints. 7 App. 1234, 1252, 1267, 1308. DNA was found on a piece of gum that was covered with Bailey's blood, but Lobato was excluded as the source. 6 App. 1062. Two cigarette butts which were found near Bailey's body contained DNA but Lobato was excluded as a source: one butt contained DNA from an unknown male and the other contained a mixture in which the major profile

---

[6]Detective Thowsen testified, over a defense objection, that it was very common for people to minimize their involvement in an offense when they give a statement and that several suspects he interviewed, who were under the influence of methamphetamine when they committed their crimes, jumbled things together when they gave him statements. 8 App. 1387-88.

was consistent with Bailey and the minor profile was from an unknown person. 8 App. 1521. No blood was found on a bat that was kept in Lobato's car and the coroner testified that it was unlikely that a baseball bat caused the injury to Bailey's head. 6 App. 1063; 7 App. 1174, 1244. Fingernail clippings and swabbings from Bailey's hands did not reveal any foreign DNA. 6 App. 1069. A pubic hair from Bailey's sexual assault kit showed a DNA mixture: the major portion was from Bailey and the minor portion was from an unknown person. 7 App. 1317. Lobato was not the source of the minor portion. 7 App. 1317. Lobato's car was impounded but no evidence tying the car to Bailey's crime scene was found.[7] 7 App. 1235. Simply stated, there was no physical evidence of any type associating Lobato with the crime or the crime scene. 8 App. 1540-46.

Indeed, other than her statement to the police, the primary evidence admitted against Lobato was the hearsay testimony of Detective Thowsen that his secretary had contacted unknown persons at Las Vegas hospitals and was told that no one had reported the stabbing or severing of a penis during the months of May, June and July of 2001. 8 App. 1385-86, 8 App. 1398-1400.

The coroner testified that he believed to a reasonable medical certainty that the time of death was 12 to 18 hours prior to the examination of the body, or in other words, between 9:30 a.m. and 3:50 p.m. on July 8, 2001. 7 App. 1171, 72. Substantial evidence was presented in support of Lobato's contention that she was in Panaca from July 2nd through the early morning of July 9th.[8] Stephen Pyszkowski testified that he hoped to celebrate July 4th with Lobato, but she cancelled their plans because she wanted to return home before that

---

[7]As set forth in detail below, the car was tested with Luminol, which can detect the presence of blood and other reactives such as copper salts and some household cleaners, and there were a few areas which showed a positive reaction, but tests which would have proved the presence of blood did not confirm the presence of blood and no DNA or other evidence related to Bailey was present. 7 App. 1238-41, 1246, 1285.

[8]The route from Las Vegas to Panaca is 165 miles and takes approximately three hours to travel. 8 App. 1483.

day. 6 App. 1088. Michelle Austria testified that she saw Lobato in Panaca on July 4th, which was on a Wednesday, and that they went four-wheeling together the weekends before and after July 4th. 6 App. 1098. She specifically recalled going four wheeling with Lobato in Panaca on July 8th. 6 App. 1105. Paul Brown, another Panaca resident, recalled seeing Lobato on July 7th and 8th. 6 App. 1115. Christopher Carrington testified that he saw Lobato in Panaca on July 5th, 6th, 7th and in the afternoon and evening of July 8th. 7 App. 1190-91, 1194, 1195. His testimony was corroborated by the testimony of his grandmother. 7 App. 1203-05. Jo Wouri testified that she lived next door to Lobato in Pananca. 8 App. 1473. They were acquaintances, but not friends. 8 App. 1475. She recalled seeing Lobato between 11:00 a.m. and 1:00 p.m. on July 8th. 8 App. 1473. Lobato was on a 4-wheeler and was with a tall man. 8 App. 1474. Shayne Kraft, Lobato's step-cousin, recalled that Lobato returned to Panaca from Las Vegas a couple of days before the 4th of July, they spent time together at Lobato's house on July 4th, and she saw her again on July 8th from about 6:30 p.m. until 8:00 p.m. 8 App. 1493. Shayne's husband, John Kraft, testified that he saw Lobato on July 8th at around 7:00 a.m. and later that day around 8:00 p.m. 8 App. 1501, 1502. Clint Hohman recalled seeing Lobato around July 2nd and again on July 8th at around 11:30 a.m. 9 App. 1600. Lobato was four-wheeling with Austria when he saw her. 9 App. 1601. Kendre Thunstrom saw Lobato on July 8th right before sunset. 9 App. 1606.

Lobato's sister, Ashley, testified that Lobato returned to Panaca from Las Vegas a couple of days before the 4th of July. 9 App. 1609. She recalled that Lobato was sick, slept a lot, and did not eat well. 9 App. 1609. She saw Lobato around 3:00 p.m. or 4:00 p.m. on July 8th and stayed with her for a couple of hours. 9 App. 1611. Ashley returned home about midnight and saw that Lobato was getting ready to go to Las Vegas and learned that Lobato's friend Doug was picking her up. 9 App. 1611. She last saw Lobato at about 12:20 a.m. on July 9th. 9 App. 1611. Lobato's father, Lorenzo, testified that Lobato returned to Panaca on July 2nd and stayed until July 9th at about 1:00 a.m. 9 App. 1623, 1627. He saw Lobato every night when he came home from work and every morning when he awoke. 9 App. 1625. Lobato was tired and ill most of that week and stayed in best most of the time.

9 App. 1624. Lobato's step-mother, Rebecca, testified that Lobato returned to Panaca from Las Vegas on July 2nd. 9 App. 1649. Rebecca saw her at their house every day through July 8th. On July 5th she took Lobato to the doctor and then stayed home with her on July 6th. 9 App. 1653. During the doctor visit on July 5th, Lobato discussed the fact that she suffered from depression and anxiety. 9 App. 1668. Lobato was picked up by Doug Twining on July 9th at around 1:00 a.m. 9 App. 1656. She stayed with Doug in Las Vegas on July 13th, when she returned to Panaca. 9 App. 1656. Rebecca reviewed telephone bills which were admitted as exhibits. 9 App. 1657. The bills reflected telephone calls from her home phone to Twining on July 6, 7 and 8. 9 App. 1657. Lobato was the person who called Twining. 9 App. 1657. The last two calls were on July 8th at 5:06 pm and 6:38 p.m. 9 App. 1665. Twining testified that Lobato left Las Vegas on July 2nd and that he picked her up in Panaca late on July 8th or early on July 9th. 9 App. 1702. His cell phone record was introduced as an exhibit and it reflected calls that he made to Lobato in Panaca on July 2, 3, 4, 5, 7 and 8. 9 App. 1704.

Several Panaca residents testified that Lobato's car was parked in the same position after her return to Panaca in early July and that it did not ever move until it was seized by the police. 7 App. 1200 (Carrington); 8 App. 1512-13 (next door neighbor Robert McCrosky); 8 App. 1516 (next door neighbor Jeanette McCrosky); 9 App. 1623 (Lorenzo Lobato).

Despite the complete lack of physical evidence, the incredible inconsistencies between details provided by Lobato about the man who attacked her and the details concerning Bailey's death, the lack of any eyewitness, and the numerous alibi witnesses who testified on Lobato's behalf, the jury convicted Lobato of voluntary manslaughter with use of a deadly weapon and sexual penetration of a dead human body. Lobato respectfully submits that the jury's verdict is not supported by the evidence and that she was convicted based upon numerous errors committed by the district court.

VI. ARGUMENT

A. The State failed to present any physical evidence suggesting that Lobato killed Bailey. It also failed to present any eyewitness identification of her or her car, failed to establish that her numerous alibi witnesses were not credible, and failed to establish that Bailey was the person that Lobato admitted slashing. Given the incredible inconsistencies between details provided by Lobato about the man who attacked her and the details concerning Bailey's death and the complete lack of other evidence, there is insufficient evidence to support Lobato's conviction.

There was insufficient evidence for the jury to convict Lobato on the charges of voluntary manslaughter with use of a deadly weapon and sexual penetration of a dead human body. Her right to a fair trial and due process were denied as a result. U.S. Const. amend. V, VI, XIV; Nevada Const. art. I, sec. 1, 3, 6, 8.

Lobato's conviction is infirm and unconstitutional because of the absence of constitutionally sufficient evidence to support a finding that she attacked and killed Bailey. No rational trier of fact could have found beyond a reasonable doubt that Lobato was present when Bailey was killed or that she was in any other way responsible for his injuries.

The constitutional standard for sufficiency of the evidence established by the Supreme 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." Smith v. Mitchell, 437 F.3d 884, 889 (9th Cir. 2006) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)). When reviewing the sufficiency of the evidence, this Court considers "'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.'" Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). See also In re Winship, 397 U.S. 358 (1970). While it is possible for a conviction to be sustained based solely on circumstantial evidence, the circumstances proved must be unequivocal and inconsistent with innocence. Woodall v. State, 97 Nev. 235, 627 P.2d 402 (1981); State v. Weaver, 371 P.2d 1006 (Wash. 1962); State v. Jones, 373 P.2d 116 (Wash. 1961). This Court held in Woodall, that a jury is obligated to afford the defendant the benefit of all reasonable doubt. The

standard enunciated in Woodall, was whether a rational trier of fact could reject a plausible explanation consistent with the defendant's innocence. Additionally, it must be determined whether the defendant was inferred to be guilty based upon evidence from which only uncertain inferences may be drawn. Conald v. Sheriff, 94 Nev. 289, 579 P.2d 768 (1968); State v. Luchette, 87 Nev. 343, 486 P.2d 1189 (1979).

The evidence presented here failed to establish beyond a reasonable doubt that Lobato was guilty of either offense. As noted in the Statement of Facts above, there was absolutely no physical evidence tying Lobato to either Bailey or the crime scene: none of her DNA, no evidence of her fingerprints or shoe prints, no tire tracks that matched her car, no pieces of hair or clothing, none of Bailey's blood was found on her clothing or in her car, nothing. 7 App. 1169, 1170; 8 App. 1540.

In contrast, physical evidence was found at the scene which may have belonged to the perpetrator, but Lobato was excluded as a source of that evidence: bloody shoe prints were found leading from the dumpster area but they did not match Lobato's shoe size or the shoes of the first responders; fresh tire marks were made over a planter median near the dumpster enclosure, but the tire marks did not match Lobato's car; a piece of chewing gum was covered in blood which belonged to Bailey but also contained the DNA of an unknown person who was not Lobato; a pubic hair that was found in Bailey's sexual assault kit had a DNA mixture which included Bailey's DNA and the DNA of an unknown person, who was not Lobato; two cigarette butts were collected from Bailey's body, one contained DNA from an unknown male and the other contained a DNA mixture, the major profile of which was consistent with Bailey and the minor profile of which was from an unknown person who was not Lobato; fingerprints were recovered from the door of the dumpster enclosure, a box and a beer can, but they did not belong to Lobato; 6 App. 1022, 1023, 1062; 7 App. 1228, 1229, 1234, 1240, 1252, 1260, 1264, 1266, 1308, 1309, 1317, 1328; 8 App. 1521, 1541-44. Both the State's medical examiner and the defense expert agreed that the Bailey's injuries were typical of a male on male case and were inconsistent with the kind of injuries normally inflicted by a female. 7 App. 1168; 8 App. 1540, 1549.

No eyewitness placed Lobato or her distinctive car in the bank parking lot where Bailey's body was found. Likewise, no eyewitness placed Lobato or her distinctive car in Las Vegas, on the road between Las Vegas and Panaca on the day the offense was committed. 7 App. 1172. For that matter, not a single person testified that Lobato's car was moved from the front of her parent's home between July 2nd until July 20th, when it was seized by the police. 7 App. 1200; 8 App. 1513, 1516. Critically, numerous people from Panaca testified that Lobato was in Panaca on the day that Bailey was killed. 6 App. 1105 (Austria); 6 App. 1115 (Brown); 7 App. 1190-91 (Carrington); 8 App. 1473 (Wouri); 8 App. 1493 (Shayne Kraft); 8 App. 1501-02 (John Kraft); 9 App. 1600 (Hohman); 9 App. 1606 (Thunstrom); 9 App. 1610-11 (Ashley Lobato); 9 App. 1623-25 (Lorenzo Lobato); 9 App. 1650 (Rebecca Lobato); 9 App. 1701 (Twining).

The State's only evidence against Lobato was her statement to the detectives, which was similar in most respects to her statement to Dixie Thienken, that she had cut a black man's penis after he tried to attack her. Exhibit 125A at 6. As set forth above, however, there were numerous and substantial inconsistencies between Lobato's statement and the actual facts concerning Bailey's death. Under these circumstances, Lobato's cryptic statements are insufficient to establish guilt beyond a reasonable doubt.

The State failed to prove beyond a reasonable doubt that Lobato killed Bailey and that she was the person responsible for injuries to his rectum. There is insufficient evidence to support the convictions for voluntary manslaughter and sexual penetration of a dead human body. Accordingly, Lobato's judgments must be vacated.

B. Detective Thowsen was allowed to testify that there were no incidents of any other penis stabbings based upon telephone calls allegedly made by his secretary to unnamed persons at unnamed medical facilities. Lobato's constitutional right of Confrontation and her statutory right against use of hearsay testimony were violated as a result.

Detective Thowsen was allowed to testify as to the absence of records from medical facilities concerning knife wounds to penises from May through July 2001. This testimony should not have been admitted as it violated Lobato's state and federal constitutional rights of confrontation and cross-examination and her right of due process, and because this hearsay

testimony was not admissible under the Nevada Rules of Evidence. U.S. Const. amend. V, VI, XIV; Nevada Const. art. I, sec. 1, 3, 6, 8.

Detective Thowsen was permitted to testify, over repeated objection by defense counsel, that no Clark County hospitals or emergency rooms reported any instances of a slashed or severed penis during May, June and July of 2001. 8 App. 1385-86, 1414-15. The State informed the jury of NRS 629.041, which provides:

> Every provider of healthcare to whom any person comes or is brought for treatment of an injury which appears to be inflicted by means of a firearm or knife, not under accidental circumstances, shall promptly report the person's name if known, his location, and the character and extent of the injury to an appropriate law enforcement agency.

8 App. 1385. Thowsen stated that he reviewed police records to see if reports had been filed in compliance with NRS 629.041 and found none. 8 App. 1385-86. This testimony was based upon information alleged gathered by his secretary after she allegedly telephoned unnamed medical care facilities. 8 App. 1398. Thowsen acknowledged that he did not personally go to each individual hospital in Clark County and did not review all of the relevant records, but he instead delegated that job to other people who reported back to him. 8 App. 1398. His secretary performed part of the research by placing telephone calls to various hospitals. 8 App. 1399. Thowsen called various locations in Clark County and asked whether their record bureaus had reports of stab wounds to the groin area. 8 App. 1400. They did not report to him in writing, but just called him. He did not write any reports about this investigation and did not know the names of the persons who gave him this information. 8 App. 1400. The district court denied a defense motion to strike Thowsen's testimony after finding that because defense counsel elicited the fact that Thowsen's research was based upon hearsay, that defense counsel could not object to the testimony.[9] 8 App. 1415.

---

[9]Thowsen also testified that he based his information upon conversations with some urologists because he believed that they would have been involved in any reconstructive surgery and that none of them reported any severed penises. 8 App. 1399. He acknowledged that he did not talk with all urologists in the valley, but did talk with several of them and believed that they would communicate amongst themselves at their various conferences and

The district court's ruling was clearly erroneous and admission of this testimony violated Lobato's state and federal constitutional rights to confrontation, cross-examination, due process, and a fair trial were violated as a result. Moreover, admission of this testimony violated her statutory rights which prohibit the admission of hearsay evidence.

NRS 51.135 provides the following:

> A memorandum, report, record or compilation of data, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian or other qualified person, is not inadmissible under the hearsay rule unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

NRS 51.145 provides the following:

> Evidence that a matter is not included in the memoranda, reports, records or data compilations, in any form, of a regularly conducted activity is not inadmissible under the hearsay rule to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record or data compilation was regularly made and preserved.

There appear to be no published cases in Nevada which address NRS 51.145, but it is similar to its counterpart provisions in the Federal Rules of Evidence.[10] FRE 803 (6) and (7) provide:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule

---

discuss matters such as severed penises. 8 App. 1399. He did not know the number of urologists in Las Vegas and did not document this portion of his investigation. 8 App. 1399.

[10]In Flores v. State, 121 Nev. __, 120 P.3d 1170 n.33 (2005), this Court noted in dicta that it did not appear that Crawford v. Washington, 541 U.S. 36 (2004) would affect the admissibility of evidence concerning the absence of entry in records of regularly conducted activity, but this Court did not address the standards for admissibility of evidence under this rule and did not explore the implications of Crawford under the facts presented here.

902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. (7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness."

Evidence under the business records exception to the hearsay rule is not admissible unless the custodian of records or other qualified witness identifies the records. Hamm v. Sheriff, Clark County, 90 Nev. 252, 254, 523 P.2d 1301, 1302 (1974). A witness is a qualified if he has acquired knowledge of how the records are kept and can testify that they are kept in the ordinary course of business activity. United States v. Child, 5 F.3d 1328, 1334 (9th Cir. 1993). See also United States v. Riley, 236 F.3d 982, 984-85 (8th Cir. 2001) (police officer was not qualified to testify about a crime lab report because he had no personal knowledge as to how lab reports were prepared or maintained); Tongil Co. v. The Vessel "Hyundia Innovator", 968 F.2d 999, 1000 (9th Cir. 1992) (hearsay evidence may not be used to lay foundation for admission of business records). The proponent of the record must produce a witness with personal knowledge of how the records were kept. United States v. Pelullo, 964 F.2d 193, 200 (3rd Cir. 1992). The proponent must also show that the information recorded is the type of information that is recorded in the ordinary course of a regularly conducted activity, and that it is the regular practice of the business to record such an event. If the event recorded is an isolated incident, or if it is a recurring event that is not recorded as a matter of regular practice, the guarantees of reliability supporting the business records exception do not exist. Waddell v. Commissioner, 841 F.2d 264, 267 (9th Cir. 1988). The requirements of "ordinary course" and "regular practice" are important guarantees of the trustworthiness of the record. Pierce v. Atchison T. & S.F. Ry., 110 F.3d 431, 444 (7th Cir. 1997). Also be noted that documentary hearsay evidence generally provides greater indicia of reliability than oral hearsay." United States v. Redd, 318 F.3d 778, 784 (8th Cir. 2003).

Here, Thowsen's testimony failed the standards for admissibility on every ground. First, he testified based upon information provided by his secretary and other unnamed persons. This is classic hearsay, which violated both NRS 51.065 and Crawford, 541 U.S. 36. Second, Thowsen was not a custodian of records or qualified witness as he had no personal knowledge of how the hospitals or other medical facilities kept their records and no ability to testify that these records were kept in the ordinary course of business activity. Third, the State failed to establish that the reports mandated by NRS 629.041 are in fact recorded in the ordinary course of a regularly conducted activity, and that it is the regular practice of the business to record such an event. Fourth, the State failed to establish that such records are not isolated incidents of non-reoccurring events. In short, none of the guarantees of reliability supporting the business records exception exist under the facts presented here and the testimony should not have been admitted through Thowsen's testimony. Likewise, Thowsen's secretary would also have not been a qualified witness. If the State wished to present this testimony, it needed to do so from appropriate representatives of each of the healthcare providers and urologists at issue. Its failure to present these witnesses rendered the testimony inadmissible.

This testimony was also inadmissible under Crawford v. Washington, 544 U.S. 36 (2004), as Lobato was not able to cross-examine and confront either Thowsen's secretary or the unnamed sources from the unnamed healthcare facilities. It was clear here that Thowsen requested that this information be gathered for the purpose of litigation as it was part of his preparation of this case, thus rendering the reports testimonial in nature. Lobato's Sixth and Fourteenth Amendment rights were violated as a result of the district court's decision to admit this testimony over objection from Lobato's counsel.

Lobato was extremely prejudiced by Thowsen's testimony about the lack of medical records of other cases of a penis being severed or cut. As noted above, there was no physical evidence tying Lobato to Bailey's killing. There also was no eyewitness testimony, testimony of a jailhouse informant, or other similar evidence suggesting that Lobato was guilty of this offense. The State's primary evidence was Lobato's statement that she had cut

a man's penis. Under these circumstances, Thowsen's testimony that no healthcare providers in the Las Vegas valley had any cases in which a penis was cut or severed was highly prejudicial. This testimony was also emphasized during closing arguments. 9 App. 1731, 1740, 1745. Thowsen's testimony contributed to the jury's verdict and it is highly unlikely that the jury would have found Lobato guilty without this testimony. Accordingly, Lobato's conviction should be reversed.

C. Detective Thowsen was allowed to give his opinion as to why Lobato's statements to the police were inconsistent with the physical evidence and was permitted to testify that Lobato was minimizing her involvement based upon her methamphetamine use. This testimony was improper and usurped the jury's role.

Detective Thowsen was allowed to testify as to his beliefs as the reasons why Lobato's statement to the detective was inconsistent with the physical evidence concerning Bailey's death. This testimony should not have been admitted as it violated Lobato's state and federal constitutional rights of due process and a fair trial and because this hearsay testimony was not admissible under the Nevada Rules of Evidence. U.S. Const. amend. V, XIV; Nevada Const. art. I, sec. 1, 3, 6, 8.

Over a defense objection, Thowsen testified that he has investigated 400 to 500 homicides and has taken hundreds of statements from suspects. 8 App. 1387. He finds that it is very common for people to minimize their involvement in an offense when they give a statement. 8 App. 1387. Also over objection, Thowsen testified that several suspects have claimed that they were under the influence of methamphetamine when they committed their crime. 8 App. 1388. Over further objection he testified that "it's not uncommon that they'll 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. That it's not uncommon for them not to be able to remember certain things and to remember things strangely sometimes." 8 App. 1388. He recalled that Lobato said she blacked out and then after was able to give some details regarding the fact that she did not recall putting anyone in a dumpster and did not think she could. 7 ROA 1388. He did not believe that this would be knowledge that somebody would

have if they truly blacked out. 8 App. 1388. He asked her if she remembered what she did with the knife and she said she did not remember if she had thrown it away or sold it for drugs. 8 App. 1388. She also said she did not know the location of her bat. 8 App. 1388. In her statement she said that she got into her car, took off all of her clothes and was basically naked while she drove to her friend's house so she could clean up. 8 App. 1388. He found it significant that she described a smell of alcohol and dirty diapers, which he interpreted to mean a smell like old socks that had not been changed. He concluded that her statement concerned Bailey's attack because she knew the person's penis was severed, he was a black man and older, and there was a strong odor. 8 App. 1389.

On cross-examination he clarified his opinion that by telling the detectives a different place, a different time, a different description and a different location that Lobato was minimizing what she was telling the officers. 8 App. 1397.

It is reversible error for an expert witness to give an opinion as to the guilt of the defendant as it usurps the jury function. Winiarz v. State, 104 Nev. 43, 50-51, 752 P.2d 761, 766 (1988); Lickey v. State, 108 Nev. 191, 196, 827 P.2d 824, 827 (1992). Likewise, it is improper for a lay witness to give an opinion as to the truthfulness of a defendant's statement to the police. Cordova v. State, 116 Nev. 664, 669, 6 P.3d 481, 485 (2000) (citing Flynn v. State, 847 P.2d 1073, 1075-76 (Alaska Ct. App. 1993)). See also State v. Jones, 68 P.3d 1153, 1155 (Wash. Ct. App. 2003) (noting that "a witness may not testify about the credibility of another witness" and reversing a conviction based upon a statement by a police officer that he believed the defendant was lying and did not believe his story); State v. Elnicki, 105 P.3d 1222 (Kan. 2005) (reversing judgment based upon admission of videotapes in which detectives stated that they did not believe the defendant). Federal law is in accord. A witness may not give a direct opinion on the defendant's guilt or innocence. United States v. Espinosa, 827 F.2d 604, 612 (9th Cir. 1987). A police officer's opinion as to the defendant's guilt is irrelevant. United States v. Moore, 936 F.2d 1508, 1522 (7th Cir. 1991). See also United States v. Windfelder, 790 F.2d 576, 582 (7th Cir. 1986) (agent testimony on mental state prohibited under Fed. Rules of Evidence 704(b)); Maurer v. Dept. of

Corrections, 32 F.3d 1286, 1287 (8th Cir. 1994) (denial of due process of law to admit testimony from witnesses, including two police officers, labeling the victim as "sincere"); Cooper v. Sowders, 837 F.2d 284, 287-88 (6th Cir. 1988) (officer improperly allowed to testify as expert on credibility which helped produce a "fundamentally unafair" trial). "Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions as officers of the law." Bowles v. State, 381 So.2d 326, 328 (Fla. 5th DCA 1980).

Thowsen's testimony as to his belief that Lobato's statements were consistent with other suspects who were involved with methamphetamine and who minimized their involvement in an offense amount to "profile" evidence and was inadmissible. See United States v. Hernandez-Cuartas, 717 F.2d 552, 555 (11th Cir. 1983); United States v. Beltron-Rios, 878 F.2d 1208, 1210 (9th Cir. 1989); United States v. Lui, 941 F.2d 844, 848 (9th Cir. 1991). Every defendant "has the right to be tried based on evidence tying [her] to the specific crime charged, and not on general facts accumulated by law enforcement regarding a particular criminal profile." People v. Castaneda, 55 Cal.App.4th 1067, 1072 (1977).

The introduction of unreliable evidence violated Lobato's state and federal constitutional rights to due process, confrontation and cross-examination. See Windham v. Merkle, 163 F.3d 1092, 1103 (9th Cir. 1998); Reiger v. Christensen, 789 F.2d 1425, 1430 (9th Cir. 1986). The absence of fairness fatally infected the trial and prevented a fair trial. Kealohapauole v. Shimoda, 800 F.2d 1463, 1465 (9th Cir. 1986).

Lobato was extremely prejudiced by Thowsen's testimony. He usurped the jury's function by giving his belief as to the believability of Lobato's statement and the reasons for the substantial inconsistencies which existed between the incident described by Lobato and the facts of Bailey's killing. Moreover, this testimony was emphasized during closing arguments:

> And again. Look at her statement to the police. Go through it carefully. Detective Thowsen told you it is not uncommon for somebody who's been on drugs to jumble their stories around, not uncommon at all. And she's jumbling the incident with Jeremy and the incident with Duran Bailey.

9 App. 1725.

> But you know what she's gonna have to do? She's gonna have to minimize when she wants to get this off of her chest. Think about it. She has a lot of guilt, her conscious is getting to her, she's suffering from anxiety and restlessness by the 13th, 5 days after or 6 days after this happened. She needs to talk, she needs to get it off of her chest. So what is she gonna do to do that? She's gonna minimize. . . .

9 App. 1725.

> And Detective Thowsen told you that's very common even when giving confessions. They want to talk about what they did but they need to kinda justify it in their own mind, and that's what she was doing.

9 App. 1726.

As noted at length above, there were substantial differences between the physical evidence and circumstances concerning Bailey's death and the attack described by Lobato in her statement to the detectives. Detective Thowsen was allowed to summarily gloss over these substantial differences by simply claiming that they were merely the product of minimizing and jumbling. The district court erred in admitting this testimony and Lobato is entitled to a new trial as a result of this erroneous decision and violation of her rights to due process and a fair trial.

D. The district court refused to allow Lobato's witnesses to testify that Lobato confided in them regarding her cutting of a man's penis prior to the date of Bailey's death. In doing so, the district court prohibited Lobato from presenting her defense and violated her constitutional rights.

Lobato attempted to present testimony from three witnesses about conversations they had with Lobato prior to July 8th, which was the day Bailey was killed, in which Lobato confided that she had been attacked and cut a man's penis. The district court's refusal to permit introduction of this testimony violated Lobato's state and federal constitutional rights to present a defense, to due process of law, and to a fair trial. U.S. Const. amend. V, VI, XIV; Nevada Const. art. I, sec. 1, 3, 6, 8.

The central issue in this case concerned whether Lobato was describing Bailey or a different person when she made a statement to the police in which she described being attacked and then cutting her attacker's penis. A key point at dispute within this central issue concerned whether Lobato was attacked on July 8th or whether she was attacked on an earlier

date. Lobato repeatedly tried to introduce testimony from witnesses in whom she confided in prior to July 8, 2001, about her attack and her response of cutting her attacker's penis. The district court, however, ruled that this testimony was inadmissible and prohibited Lobato's witnesses from presenting this testimony. Trans. 9/18/06 at 27 (sustaining objection to proposed testimony of Stephen Pyszkowski that he told the police she heard about the attack on Lobato the month before July 9, 2001); 8 App. 1529-31 (district court prohibits Heather McBride from testifying that she saw Lobato prior to July 4, 2001, and that Lobato told her at that time that she had been sexually assaulted and had cut a man's penis). The district court's rulings were erroneous and violated Lobato's state and federal constitutional rights to present a defense.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 689-90 (1986) (quoting California v. Trombetta, 467 U. S. 479, 485 (1984) (citations omitted)). This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate' to the purposes they are designed to serve." United States v. Scheffer, 523 U.S. 303, 308 (1998) (quoting Rock v. Arkansas, 483 U. S. 44, 58, 56 (1987)). See also Abbott v. State, 122 Nev. __, 138 P.3d 462, 476 (2006) (recognizing that an evidentiary rule which renders non-collateral, highly relevant evidence inadmissible must yield to a defendant's constitutional right to present a full defense) (quoting State v. Long, 140 S.W.3d 27, 30, 31 (Mo. 2004)); Williams v. State, 110 Nev. 1182, 1184-85, 885 P.2d 536, 537-38 (1994) (recognizing that the due process clauses in our constitutions assure an accused the right to introduce into evidence any testimony or documentation which would tend to prove the defendant's case) (citing Vipperman v. State, 96 Nev. 592, 596, 614 P.2d 532, 534 (1980); United States v. Nixon, 418 U.S. 683, 711 (1974)). Lobato was entitled to present testimony that she had told her friends that she had been attacked and cut her attacker's penis prior because these statements were made prior to July 8, 2001, which was the date of

Bailey's death, as they supported her defense that she was not referring to Bailey when she described her attacker. The district court violated Lobato's constitutional right to present a defense by prohibiting this testimony.

The district court also erred in prohibiting this testimony under Nevada's rules of evidence. NRS 51.035 limits hearsay to statements offered in evidence to prove the truth of the matter asserted. The proposed testimony here was not offered to prove the truth of Lobato's statement that she was attacked and cut her attacker's penis, but was offered to prove that she made these statements prior to Bailey's death, thus establishing that Lobato was making a statement about a different person. Testimony such as this is admissible as nonhearsay. Wallach v. State, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990).

Lobato's conviction must be reversed because of the district court's erroneous and unconstitutional limitation on her right to present her defense.

E. The district court allowed the State to introduce highly prejudicial evidence that Lobato's car had the license plate, "4NIK8ER." The court violated Lobato's rights admitting this inflammatory evidence.

The district court allowed the State introduced evidence that Lobato had a personalized license plate of "4NIK8ER" or "FORNICATOR" even though that evidence was irrelevant and highly prejudicial. Admission of this evidence violated Lobato's state and federal constitutional rights to due process of law, and to a fair trial. U.S. Const. amend. V, VI, XIV; Nevada Const. art. I, sec. 1, 3, 6, 8.

Lobato's counsel filed a pretrial motion in which they sought exclusion of the fact that her 1984 red Fiero had a personalized license plate of "4NIK8ER." I App. 21-33. They offered to stipulate that Lobato's car had a distinctive personalized plate which identified the vehicle as hers. The State opposed the motion and the district court ruled that evidence concerning the license plate was admissible, even though not a single witness claimed to have seen Lobato, her car, or the license plate anywhere in the vicinity of the location where Bailey was killed. 2 App. 374-78, 4 App. 918-23. Likewise, there was no testimony that anyone identified Lobato based upon her license plate in Las Vegas or on the road to Panaca at the relevant times. Instead, this evidence was admitted solely to inflame the jury.

Extensive evidence about the fact that Lobato's personalized license plate was "4NIK8ER" was introduced at trial. 6 App. 1095 (photograph of the Fiero with the license plate was shown to the jury, the license plate was zoomed in upon, and a picture of the car was circulated); 6 App. 1118 (testimony of Paul Brown); 6 App. 1121 (testimony of Jeremy Davis); 8 App. 1496 (testimony of Shayne Kraft); 9 App. 1636 (State asks Lobato's father about the license plate and how it was that Lobato came up with that name).

Given the fact that Lobato's trial counsel conceded that the license plate was distinctive and clearly identified her fairly unique vehicle, any probative value of testimony or argument of the particular contents of the license plate, "4NIK8ER," was clearly outweighed by the unduly prejudicial effect, as well as the substantial likelihood of confusing the issues and misleading the jury. The presentation of the particular contents of this license plate had the effect of presenting unsubstantiated bad character evidence against. Lobato, which was highly inflammatory, wholly irrelevant, and unduly prejudicial.

This evidence was irrelevant and therefore inadmissible under NRS 48.025. The evidence was also inadmissible under NRS 48.035 as any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury. "'Unfair prejudice'" in this context "speaks to the capacity of some concededly relevant evidence to lure the fact-finder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180-81 (1997). That ground is "'commonly, though not necessarily, an emotional one.'" Id. (quoting Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C. App., p. 860). Inclusion of such irrelevant and prejudicial evidence violates a defendant's rights to due process, equal protection and a fair trial under both the United States and Nevada Constitutions.

This evidence also constitutes evidence of prior uncharged misconduct and bad character evidence. The use of uncharged bad act evidence to convict a defendant is heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges. Walker v. State, 116 Nev. 442, 445, 997 P.2d 803, 806 (2000) (citing Berner v. State, 104 Nev. 695, 696-97,

765 P.2d 1144, 1145-46 (1988)) The principal concern with admitting such acts is that the jury will be unduly influenced by the evidence, and thus convict the accused because it believes the accused is a bad person. Id. Where the jury cannot draw any permissible inferences from the evidence, its admission is a violation of due process. Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991); Renderos v. Ryan, 469 F.3d 788, 798 (9th Cir. 2006) (recognizing claims but finding no prejudice under the facts of that case); Spencer v. Texas, 385 U.S. 554, 558 (1967) (finding no due process violation based upon evidence of other crimes, but only because the jury was given a proper limiting instruction). But see Alberni v. McDaniel, 458 F.3d 860, 866-67 (9th Cir. 2006) (recognizing that every federal circuit has found that introduction of such evidence can violate due process, but finding that because the United States Supreme Court reserved this question in Estelle v. McGuire, 502 U.S. 62 (1991), it has not been clearly established by the Supreme Court, as required by AEDPA, 28 U.S.C. 22544).

Lobato was not on trial for the offense of having a personalized license plate that suggests or promotes fornication. Permitting the State to present this highly prejudicial and inflammatory evidence amounted to nothing more than character assassination of Lobato, which was wholly irrelevant and immaterial to the crimes charged. Her conviction must be reversed as a result.

F. The district court allowed the State to introduce evidence of positive luminol tests on Lobato's car, even though there was no confirmatory tests that established the presence of blood. The district court abused its discretion in admitting this evidence.

The district court allowed the State to introduce evidence of positive luminol tests on Lobato's car, despite the fact that confirmatory tests did not establish the presence of blood. Admission of this evidence violated Lobato's state and federal constitutional rights to due process of law and to a fair trial. U.S. Const. amend. V, XIV; Nevada Const. art. I, sec. 1, 3, 6, 8.

Prior to trial, Lobato filed a motion to exclude all evidence relating to the presumptive or preliminary blood tests, luminol and phenolphthalin, on the ground that this evidence had

no nexus or relevance to the charges against her.[11] 2 App. 298-333. Moreover, any probative value of these tests was substantially outweighed by the danger of unfair prejudice, confusion of issues, and misleading the jury. The State opposed the motion. 2 App. 470-76. The district court denied the motion and permitted the State to introduce this evidence, despite the fact that no tests confirmed the presence of blood. 4 App. 932-35.

This evidence comprised a significant portion of the State's case. The State elicited testimony from two forensic examiners from the Las Vegas Metro Police Department, Louise Renhard and Tom Wahl about these presumptive tests. In essence, the testimony established that there was a luminol reaction on the driver's seat slipcover but the phenolphthalin test result was negative, and no further testing was done. 7 App. 1238, 1245. There was a luminol reaction and weak positive with phenolphthalin on both the underlying driver's seat

---

[11]The types of tests used to detect the presence of blood may be divided into two categories:

> [One,] preliminary, or presumptive tests, and [two] confirmatory, or conclusive, tests. Preliminary tests are generally quick, easy to do, and very sensitive. But they are not specific for blood. These tests are useful as searching devices to locate spots and stains that require further, more involved testing .... A positive result indicates that it is worthwhile to continue with further tests; a negative test strongly suggests (but does not absolutely prove) that blood is absent.
>
> ***
>
> A number of compounds have been used for the [presumptive] tests, and in particular the test is often named after the chemical compound that is used. Some of the compounds are Benzedrine, phenolphthalin, leucomalachite green, orthtolidine, tetramethylbenzidene, orthdianisidine, and luminol.
>
> ***
>
> Most authorities agree that positive presumptive tests alone should not be taken to mean that blood is definitely present. A positive test suggests that the sample could be blood and indicates [the need for] confirmatory testing. On the other hand, a negative presumptive test is a reasonably certain indication that blood is absent, although in rare circumstances an inhibiting chemical could be present.

DeForest, Gaensslen & Lee (1983) Forensic Science: An Introduction to Criminalistics, New York: McGraw-Hill, pp. 246-248.

cover (upholstery) and on the left door panel. 6 App. 1067; 7 App. 1238-40. There was also a faint, fleeting positive reaction on the front floorboard. 7 App. 1240. However, subsequent confirmatory testing failed to find any blood on those items. 6 App. 1068; 7 App. 1285.

The State greatly emphasized these presumptive tests and repeatedly insinuated that the failure of the confirmatory test to reveal the existence of any human blood could be due to the use or application of cleaning agents, such as detergent.[12] 6 App. 1068 (testimony of forensic analyst Wahl); 7 App. 1238, 1245 (testimony of Louise Renhard); 7 App. 1284 (testimony of Dan Ford that his experience is that the reaction for luminol with cleaning agents is like a flash and it dissipates immediately, and that the luminol reaction on the seat covers and door panel were consistent with a positive reaction for blood). The prosecution also emphasized the presumptive tests in closing argument:

> You do have physical evidence that links the defendant to that crime scene. You have it with her car. The positive luminol test and the positive phenolphthalein test tell you there was blood in that car. And it wasn't a false positive because you heard Dan Ford and you heard Loise Renhard testify that it causes a flashing, kind of like a sparkle when you get a false positive, not like what you got on this car door.

9 App. 1730.

> That does give you some physical evidence that links her to the crime, that's blood. The fact that they couldn't confirm the DNA doesn't matter. You're not gonna get both of those positive tests with presumptive tests for luminol and phenolphthalein without there hav[ing] been clean blood there. It's not -

9 App. 1730. Defense counsel objected that this misstated the evidence. The objection was sustained. The prosecutor continued:

> It's not reasonable that you're gonna get a positive for luminol, a positive reaction for phenolphthalein where it's not sparkly, it's like what you see here, a constant illumination and have a false positive. It's not copper salts. If it was copper salts, why isn't it everywhere if Panaca is so inundated with copper salts?

9 App. 1730.

---

[12]This argument was made despite the fact that it was acknowledged by the State's witness that old mining towns, such as Panaca and Pioche, could have copper or a variety of salts on the ground which could result in false positive luminol tests. 6 App. 1076; 7 App. 1246. A positive luminol reaction could have also been caused by iron, vegetative materials, and some household cleaners. 7 App. 1238, 1245.

NRS 48.025 states that all relevant evidence is generally admissible, except as otherwise limited, while irrelevant evidence is inadmissible. "Relevant evidence" is that having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. NRS 48.015. When a piece of evidence has no "clear connection" to the alleged crime, it is irrelevant and must be excluded. Beck v. State, 105 Nev. 910, 912, 784 P.2d 983, 985 (1989). Here, the confirmatory tests failed to reveal the presence of blood on the items that tested presumptively positive. Thus, there is no "clear connection" between the presumptive test results and the crime of homicide for which Lobato stands charged.

There is a lack of consensus among state courts regarding the proper standard to apply to the admission of expert testimony regarding presumptive blood tests. See 82 A.L.R. 5th 67, "Admissibility of Results of Presumptive Tests Indicating Presence of Blood on Object." There appear to be no published decision in Nevada addressing the admissibility of results of presumptive blood tests.[13]

Other courts have determined that luminol is not admissible without other factors that related the evidence to the crime because the luminol tests provided too many false positives and the test is not time specific.[14] Houston v. Arkansas, 906 S.W.2d 286, 287 (Ark. 1995);

---

[13]In Jimenez v. State, 112 Nev. 610, 614, 918 P.2d 687, 690 (1996), this Court noted that a luminol test indicated blood on a pair of pants, but it also noted that the blood was later identified as human. This suggests that further confirmatory testing was conducted. The admissibility of this testimony did not appear to be an issue in Jimenez.

[14]In other jurisdictions, some courts look at the reliability of these under the Frye standard of "general acceptance" in the "relevant scientific community." See id., citing Frye v. United States, 293 F. 1013 (App. D.C. 1923). Other courts rely on the United States Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993). Daubert held that Frye was superseded by Federal Rules of Evidence Rule 702, allowing the introduction of scientific, technical or otherwise specialized knowledge by an expert witness is such knowledge "will assist the trier of fact to understand the evidence or to determine a fact in issue." Nevada has not adopted the Daubert standard, but instead holds that scientific evidence is admissible if it will assist the trier of fact in understanding the

Palmer v. Arkansas, 870 S.W.2d 385 (Ark. 1994)[15]; Brenk v. State, 847 S.W.2d 1, 9 (Ark. 1993)[16]; United States v. Hill, 41 M.J. 596, 599-602 (1994)[17]; Hawaii v. Fukusaku, 946 P.2d 32, 66 (Ha. 1997)[18]; State v. Moody, 573 A.2d 716, 722 (Conn. 1990). But see State v.

---

evidence or determining a fact in issue. Krause Inc. v. Little, 117 Nev. 929, 934, 34 P.3d 566, 569 (2001). Lobato submits that the luminol test results, without positive confirmatory tests, should not have been admitted any under standard. She also urges this Court, however, to adopt the Daubert standard as Nevada's current standard for admission of expert testimony is so low that it constitutes a violation of the state and federal constitutional guarantees of due process and a fair trial.

[15]Noting that luminol is not conclusive because it can register positive for bleach, copper, nickel, cobalt and some plant enzymes.

[16]Finding that luminol is only a preliminary test, it is unable to indicate the definite presence of blood, much less determine whether any blood present is human or animal. It reacts with certain metals and vegetable matter, as well as blood. "It is impossible to tell without follow up testing which of the possible reactants is causing the reaction. . . . Luminol testing, without any additional testing, is unreliable to indicate the presence of human blood. Additionally, luminol is not time specific. That is, a reaction will occur even many years after a reacting substance has been in place, so it is impossible to tell how long the substance that is causing the reaction has been in place." Id. "Since we have determined that luminol tests done without follow-up procedures are unreliable to prove the presence of human blood or that the substance causing the reaction was related to the alleged crime, we find it was error to admit the evidence[.]" Id.

[17]Finding that a luminol test did not meet the Daubert reliability test because it is no more than just a presumptive test which could not confirm presence or absence of blood.

[18]The Hawaii Supreme Court affirmed a district court's finding that positive luminol and phenolphthalein results, without confirmatory tests that conclusively determine the test sample to be human blood, were irrelevant and unduly prejudicial based upon the fact that an expert "explained that luminol and phenolphthalein are used as presumptive tests in the field to identify potential blood stains. However, she also testified that the two tests can generate false positive reactions. The tests can react to metal surfaces, cleansers containing iron-based substances, horseradish, and rust. Neither test can distinguish between animal blood and human blood, and they cannot determine how long the substance has been at the scene. When a positive reaction occurs, a criminalist must do a confirmatory test in order to conclusively determine that the test sample is human blood." Id. at 66.

Stenson, 940 P.2d 1239, 1263 (Wn. 1997) and cases cited therein.

The court erred in admitting the presumptive blood test evidence. The State failed to establish the existence of blood in Lobato's car generally and failed to establish the existence of Bailey's blood in particular. Without confirmatory tests, the luminol and phenolphthalin testing was misleading, confusing and improperly set forth before the jury. Any probative value of the presumptive tests was substantially outweighed by its prejudicial effect given the danger of unfair prejudice, confusion of issues, and misleading the jury. NRS 48.035. "'Unfair prejudice" refers to an 'undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one' or 'evidence designed to elicit a response from the jurors that is not justified by the evidence.'" United States v. Ellis, 147 F.3d 1131, 1135 (9th Cir. 1998) (internal quotations omitted) (citing Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 403.04[1][b] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 1997)). The district court abused its discretion in finding the preliminary tests admissible as the prejudicial effect of the evidence substantially outweighed any probative value. The district court abused its discretion in refusing to exclude evidence as to presumptive blood tests, without conclusive confirmatory tests, because the presumptive tests lack probative value and had an inherently prejudicial effect. Lobato's conviction must be reversed as a result of the introduction of this highly prejudicial testimony.

G. The State threw away important evidence and failed to make reports about crucial matters. The district court abused its discretion in denying Lobato's motion to dismiss charges based on the State's bad faith and gross negligence in failing to preserve and collect potentially exculpatory evidence.

The State threw away critical evidence and failed to gather other important evidence. Lobato asked that the State's charges be dismissed based upon this destruction of potentially exculpatory evidence. The district court denied the motion and as a result violated Lobato's state and federal constitutional rights to due process of law and to a fair trial, her right to present a defense, and her right to confront the State's evidence. U.S. Const. amend. V, VI, XIV; Nevada Const. art. I, sec. 1, 3, 6, 8.

The district court abused its discretion in denying Lobato's motion to dismiss the case based on the State's failure to preserve and collect potentially exculpatory evidence. As noted above, there was no physical evidence which implicated Lobato in the commission of Bailey's homicide. Several items of potentially exculpatory evidence, however, were present on or with the body at the crime scene that were either not collected or were thrown away after they were collected.

First, white paper towels, that were partially stuffed into the opening where Bailey's penis once was, were not preserved and were therefore unavailable for fingerprint tests, DNA tests, and other examinations which likely would have revealed information as to the identity of the person who killed Bailey. Shelly Pierce-Stauffer, an investigator with the Clark County Coroner's Office, testified that she saw that paper towels were partially stuffed into the opening where Bailey's penis once was. 8 App. 1487-88, 1490. Once the paper towels were removed she could see that his penis was not there. 8 App. 1488. The towels at issue were visible in the photo marked State's Exhibit 9. 8 App. 1489. She saw the LVMPD crime scene analysts collect the white paper towels and place them in brown paper bags. 8 App. 1489, 1491. She did not know whether they processed the towels or discarded them. 8 App. 1490. Likewise, police officer James Testa, who was the first officer to respond to the scene, testified that he saw a number of white towel-like items over the abdomen area of Bailey's body. 6 App. 1021.. Crime scene analyst Dan Ford also testified that there were white paper towels over the lower abdomen and groin areas of Bailey's body, but he did not believe that they were underneath the plastic that was found over Bailey's body. 7 App. 1282. Ford testified that he did not impound the towels that were found on Bailey's body. 7 App. 1285. Maria Thomas, a LVMPD investigator who was assigned the task of impounding evidence from the morgue, testified that no white paper towels were transported with the body and they were not impounded. 7 App. 1304.

Brent Turvey, a forensic scientist, testified on Lobato's behalf as to the importance of the paper towels that were found against Bailey's groin area, under the plastic wrap. 8 App. 1546. Had this evidence been formally collected and preserved, the paper towels could

have been examined for the presence of bloody or latent fingerprints, transfer evidence such as fibers or hairs, and other physical evidence. 8 App. 1546.

Second, police officers threw away a substantial amount of potential evidence at the scene without documenting in any fashion the evidence that they discarded. Crime scene analyst Renhard acknowledged that items found inside the dumpster near Bailey's body were not processed for fingerprints. 7 App. 1252. Crime scene analyst Dan Ford testified that various items from the scene were processed at the lab, but if they did not have fingerprints they were tossed in the garbage for lack of evidentiary value. 7 App. 1262. No record was kept of items that were collected from the scene, transported back to the lab and then discarded. 7 App. 1277. Items were not preserved for further testing if they tested negative for fingerprints. 7 App. 1277. Other trash found near Bailey's body was not collected at all if the officers decided that the items did not appear to be related to the incident at issue. 7 App. 1283. Maria Thomas testified that she and the detectives decided not to preserve a sample of a silver substance that was found on Bailey's bare upper right buttock because they believed the same substance was on Bailey's shirt, which had already been impounded. 7 App. 1302. Detective Thosen also testified that officers did not collect every piece of evidence at the scene. 8 App. 1390. He opined that it was possible that the officers missed something that had Lobato's DNA on it, although it was also possible that no DNA was present. 8 App. 1390. He further added that he has investigated many crimes and solved them without anything that connected the defendant to the crime, and that many crimes were solved by words that were spoken by the defendants themselves. 8 App. 1390.

Third, substantial evidence was lost based upon Detective Thowsen's failure to make reports of his investigation and failure to record crucial information. For example, as noted above, Thowsen testified that he asked other people to contact Las Vegas area hospital for a review of records concerning cut penises in May, June and July of 2001. 8 App. 1398. He also testified that he telephoned some hospitals and talked to some urologists, 8 App. 1398-99, but he did not prepare a report on any of this investigation. 8 App. 1399. At the time of trial he did not know the names of the people who gave him this information. 8 App. 1400.

Without such documentation it was impossible for Lobato and her counsel to contact any of these potential witnesses to verify the information that was allegedly given to Thowsen and his secretary. Likewise, Thowsen testified that he talked with the apartment manager of the complex where Diane Parker lived, and asked about some Hispanic individuals who he had reason to believe might have known about Bailey's attack on Parker, and that he ran their names to determine if they had a criminal record, but he did not make a record of this investigation, did not talk with the Hispanic men, and did not look at the men or their footwear. 8 App. 1404. Without a record of this information it was impossible for Lobato's counsel to conduct a proper investigation concerning these alternative suspects and impossible for her counsel to ask that their fingerprints and DNA be tested to see if they were the sources of the unidentified fingerprints and DNA that were found at the scene.

This evidence was material and the failure to collect and preserve this evidence and constituted bad faith, requiring dismissal of the charges, or at the minimum, gross negligence, permitting the inference that the evidence would have been favorable to Lobato. The district court's denial of Lobato's motion to dismiss, and her request for an instruction permitting the inference that the evidence was favorable to her, violated Lobato's state and federal constitutional rights to due process, a fair trial, the right to present a defense, and the right to confront the State's evidence.

"When potentially exculpatory evidence is destroyed, the government violates a defendant's right to due process if the unavailable evidence possessed 'exculpatory value that was apparent before the evidence was destroyed, and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.'" United States v. Rivera-Relle, 333 F.3d 914, 922 (9th Cir. 2003) (quoting United States v. Cooper, 983 F.2d 928, 931 (9th Cir. 1993)). See also ABA Crim. Just. Stand. 11-3.2 (if the State intends to destroy evidence, it must give notice to the defense so that the defense has an opportunity to take appropriate actions, such as testing the evidence).

This Court draws a distinction between the failure to gather evidence and the destruction and loss of evidence after it has been gathered. Gordon v. State, 121 Nev. __,

117 P.3d 214, 217-218 & n. 9-11 (2005). The Court has held that "'[i]n a criminal investigation, police officers generally have no duty to collect all potential evidence.'" Id. (quoting Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001)). "However, "'this rule is not absolute.'" Id. (quoting Daniels v. State, 114 Nev. 261, 268, 956 P.2d 111, 115 (1998) (in turn quoting State v. Ware, 881 P.2d 679, 684 (N.M. 1994))). This Court "has adopted a two-part test to determine when dismissal of charges is warranted due to the State's failure to gather evidence." Id. (citing Daniels, 114 Nev. at 268, 956 P.2d at 115).

> The defense must first show that the evidence was material, i.e., that there is a reasonable probability that the result of the proceedings would have been different if the evidence had been available. Second, if the evidence was material, the court must determine whether the failure to gather it resulted from negligence, gross negligence, or bad faith. In the case of mere negligence, no sanctions are imposed, but the defendant can examine the State's witnesses about the investigative deficiencies; in the case of gross negligence, the defense is entitled to a presumption that the evidence would have been unfavorable to the State; and in the case of bad faith, depending on the case as a whole, dismissal of the charges may be warranted.

Id. (citing Randolph, 117 Nev. at 987, 36 P.3d at 435 (citing Daniels, 114 Nev. at 267, 956 P.2d at 115)).

In contrast, in cases where the State destroys or loses evidence after it has been gathered, the standard of Crockett v. State, 95 Nev. 859, 603 P.2d 1078 (1979), applies:

> Of course, when evidence is lost as a result of inadequate governmental handling, a conviction may be reversed. Howard v. State, 95 Nev. 580, 600 P.2d 214 (1979); Williams v. State, 95 Nev. 527, 598 P.2d 1144 (1979); United States v. Heiden, 508 F.2d 898 (9th Cir. 1974). As stated in our prior decisions, the test for reversal on the basis of lost evidence requires appellant to show either 1) bad faith or connivance on the part of the government, or 2) prejudice from its loss.

Id. at 865, 603 P.2d at 1081. "We cannot permit speculative inferences adverse to [the defendant] to be derived from the absence of evidence which the State should have preserved." Id. at 865, 603 P.3d 1092. The State may not profit from its own fault and may not raise inferences adverse to the defendant from its own loss of evidence. Id. See also Sparks v. State, 104 Nev. 316, 319, 759 P.2d 180, 182 (1988) (conviction reversed because of the State's loss of evidence that was prejudicial to the defendant); Sanborn v. State, 107 Nev. 399, 408, 812 P.2d 1279, 1285-86 (1991) (defendant was entitled to a jury instruction

that a firearm, which was gathered and then mishandled by a police officer, was irrebuttably presumed to have been held and fired by the victim); Cook v. State, 114 Nev. 120, 125-26, 953 P.2d 712 (1998) (reversing conviction based upon the State's failure to preserve evidence after it was gathered).

Lobato's federal constitutional rights were violated because the State failed to gather critical evidence at the scene, failed to document evidence that was gathered, failed to protect crucial evidence from being destroyed, and then threw away other important evidence. Such flagrant and repeated acts and omissions constituted bad faith and violated Lobato's rights under Arizona v. Youngblood, 488 U.S. 51 (1988). See also Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1117 (9th Cir. 2001) (a bad faith failure to collect potentially exculpatory evidence violates the Due Process Clause); Miller v. Vasquez, 868 F.2d 1116, 1120 (9th Cir. 1989) (same). Moreover, Lobato's right to due process under the Fourteenth Amendment to the United States Constitution was violated by the arbitrary deprivation of his rights under Nevada law. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980); Hewitt v. Helms, 459 U.S. 460, 466 (1983); Ford v. Wainwright, 477 U.S. 399, 428 (1986). Also, the application of state rules to other similarly situated defendants and not to Lobato violates the Equal Protection Clause of the Fourteenth Amendment. Myers, 897 F.2d at 421.

The State's suppression of materially exculpatory evidence violates both the Fourteenth Amendment and Nevada law. See Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692-93 (1996) (explaining that the affirmative duty to disclose favorable evidence imposed by Nevada law is coextensive with the due process requirements of the 14th Amendment). In granting habeas relief based on the State's Brady violations in Mazzan v. Warden, 116 Nev. 48, 993 P.2d 25 (2000), this Court summarized the elements to a Brady violation as follows: " the evidence at issue is favorable to the accused; the evidence was withheld by the state either intentionally or inadvertently; and prejudice ensued,

i.e., the evidence was material." Id. at 67. Evidence is favorable, and thus subject to Brady, if it is exculpatory or if it "provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation or to impeach the credibility of the State's witnesses." Lay v. State, 116 Nev. 1185, 1194, 14 P.3d 1256, 1262 (2000) (citing Kyles v. Whitney, 514 U.S. 419, 442 n.13 (1995)). Courts recognize that a prosecutor's failure to allow a defendant to "examine a piece of critical evidence whose nature is subject to varying expert opinion" can constitute a due process violation. Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975) (a defendant has a due process right to inspect physical evidence). See also State v. Thomas, 421 S.E.2d 227, 235 (W.Va. 1992) (reversing a conviction based partly on molecular tests that consumed all of the blood evidence because "the State must put the defendant in as nearly identical a position as he would have been in had he been able to perform an independent test"); State v. Schwartz, 447 N.W.2d 422, 427 (Minn. 1989) (fair trial and due process rights are implicated when data relied upon are not available for review and cross-examination); State v. Hall, 105 Nev. 7, 9, 768 P.2d 349 (1989) (holding that the State's spoliation of evidence violates adue process rights if the defendant is prejudiced as a result of the destruction of material evidence or if the evidence was destroyed in bad faith).

Lobato was prejudiced by the loss of this material evidence because she was unable to have her own experts examine the paper towels found directly on Bailey's body and the other evidence found near his body. Had she been allowed to examine this evidence there is a reasonable probability that evidence of the actual perpetrator could have been recovered. Likewise, had Detective Thowsen made a record of his investigation concerning reports by healthcare facilities on cut penises and his investigation of the Hispanic men who were associates of Diane Parker, Lobato could have conducted further investigation for the purpose of verifying Thowsen's allegations. She also could have identified the Hispanic men and asked that they give fingerprint and DNA samples for the purpose of comparing those samples to the unidentified fingerprints and DNA that were found at the crime scene.

Lobato was also prejudiced by the loss of this evidence because the State was allowed to suggest through cross-examination of a defense expert that Lobato's DNA could have

been present at the crime scene but was not discovered because evidence was not collected and preserved. 8 App. 1560. This point was also emphasized during closing arguments:

> Now in opening, defense counsel argued all physical evidence excludes the defendant in this case. And that's very misleading. It doesn't exclude the defendant. It doesn't mean she could not have killed [sic] this crime. No, all it means is there was no evidence found at the scene that she left behind that's physically tied to her. Her DNA is not at the scene.

9 App. 1729.

> So the reverse or the inverse doesn't mean it excludes her because her DNA was not on the chewing gum, because her DNA was not on thecigarette butt, does that mean she didn't do it? No, it doesn't. It just means we didn't find her DNA there.

9 App. 1729.

> Think about the garbage at the scene and the white paper towels. Is her DNA – you know, we didn't test every piece, which probably wasn't possible anywhere with the resources that the police department [has], does it mean that she didn't do it because we didn't find anything? No. Just like if we have found a hundred different people's DNA there, does that mean they're all the killer? No. All if can tell you is that somebody left their biological matter there.

9 App. 1729.

> Look at all that trash. Tons of people's DNA there. Doesn't mean whoever's DNA was there was the killer. Even with the things closest to the body, we don't know how they got there. Don't know that that's the killer either. That's trash. The plastic bag that's found around the victim looks just like the other plastic bags that you see in this picture. It would've been nice to have her DNA there, but we don't need it because we know she was there because she told us she was there.

9 App. 1730.

> Sometimes it gets pretty offensive, ladies and gentlemen, when we're in a situation what we have, what we gotta deal with. We're dealing with the evidence that is presented to us and we're presenting it to you. Do you think for a minute that if we wouldn't have tested any of those items that we'd be in here, be applauded? 'Cause what they'd be saying is just what they argued here, isn't it possible that if you would've tested those items it would've came back that our client didn't tough this item or didn't leave more hair or anything?

9 App. 1740.

> Talk about the physical evidence and a time frame of when things were tested. It comes to a point where you have to just stop testing. Other times you will never stop testing. You've heard of cases even after people have went to prison, they continue doing testing. You've heard of some where they've been exonerated based on the testing and you've not heard of the ones where

they're not exonerated.

And so, you know, to point the finger at the State or the police officers and say you know what, you just didn't quit –you quit testing and you tested right up to the last minuted on that. It's like if we didn't test, I mean they threw the plastic bag in our face on that. And you know what their words were, their words were conclusory, just like their expert that they hired, that the evidence of the perpetrator was beyond that bag, on the bad, in the trash can.

Where do you stop? What if you find the body in the dump? Where do you stop? Don't you give some credence to the people that are out there looking and trying to do what they can?

9 App. 1743. The prosecutors committed misconduct in their arguments by taking advantage of the fact that significant evidence was missing, thereby minimizing the State's burden of proof at trial. Rivera-Relle, 333 F.3d at 922; Crockett, 95 Nev. 859, 603 P.2d 1078 (State may not profit from its own fault and may not raise inferences adverse to the defendant from its own loss of evidence). See also ABA Crim. Just. Stand. 3-5.8 (prosecutor may not mislead the jury as to inferences it may draw from the evidence).

The facts of this case reveal that investigating officers acted with bad faith and gross negligence in failing to preserve potential exculpatory evidence. Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001). The evidence at issue was material as there is a reasonable probability that the result of the trial would have been different if the evidence had been available. The failure to gather and preserve this evidence resulted from gross negligence and/or bad faith. Accordingly Lobato was entitled to a presumption that the evidence would have been unfavorable to the State. In the alternative, dismissal of the charges was warranted.

H. This Court should reconsider its holdings as to issues raised in Lobato's first appeal

In ruling on Lobato's first appeal, this Court addressed several issues which are relevant to her second trial and this appeal:

> Lobato also contends that the district court erred in admitting her statements to police in violation of Miranda, allowing the State to obtain and use privileged material from her medical files, restricting use of her expert on blood and crime-scene analysis based upon her failure to timely designate the expert before trial, excluding her alibi evidence for lack of timely pretrial notice, and allowing prosecutorial misconduct during final argument. We have considered these assignments of error and find them without merit. We note in passing that the failures to timely designate experts and alibi witnesses may

> be cured upon remand. We also reject Lobato's remaining claims of error, including the assertion that NRS 201.450 [defining sexual penetration] was unconstitutionally applied and is void for vagueness."

1 App. 18-19 (footnotes omitted).

Lobato respectfully submits that this Court's decisions on her first direct appeal concerning the admission of her statements to detectives and the constitutionality of NRS 201.450, as applied to the facts of this case, are erroneous and should be reconsidered. See Bejarano v. State, 122 Nev. __, 146 P.3d 265, 271 (2006) (noting that the doctrine of law of the case is not absolute and this Court has the discretion to revisit the wisdom of its legal conclusions if it determines that such action is warranted).

1. Lobato's statements to detectives on July 20, 2001 were not voluntary and should have been suppressed from use as evidence.

Lobato filed a motion to exclude all evidence relating to the July 20, 2001 interrogation at her home by Detectives Thowsen and LaRochelle and Sergeant Lee. 1 App. 91-123. The State opposed the motion and argued that the statements made to police officers were voluntary. 2 App. 462-65. The district court found evidence of the statements to be admissible. 4 App. 926-29. The information derived from that interrogation should not have been admitted at trial because Lobato's statements were not voluntary. Her statements made before a Miranda waiver was obtained were the result of interrogation as they are the product of psychological ploy utilized by the detectives. Second, the alleged Miranda waiver Lobato was not voluntarily given, as the officer's psychological ploy combined with her existing mental state rendered her incapable to give a voluntary waiver.

Detective Thowsen testified that he became aware of Lobato following a telephone call by Lincoln County Probation Officer Laura Johnson. 7 App. 1330. According to Thowsen, Johnson reported that Lobato contacted one of her former teachers and said that she had cut off a person's penis in Las Vegas. 7 App. 1331. Based upon this information, he went with his partner and a crime scene analyst to Pioche and met with Johnson. 7 App. 1332. A sheriff's deputy then took the Las Vegas officers to Lobato's house in Panaca. 7 App. 1332. Detective Thowsen testified that after he provided Lobato with Miranda

warnings that he told her they knew she had been hurt in the past. 7 App. 1333. At that point she lowered her head and began crying. 7 App. 1333. Lobato was 18 years old at the time of her interrogation, her parents were not home when the officers obtained their Miranda waiver and the officers hastily conducted their interview to avoid interaction with the Lobato's parents. Lobato submits that the psychological ploy used by the officers, combined with her already fragile mental state, was enough to invalidate any such waiver of her constitutional rights and that evidence of her statements to the police should have been excluded at trial.

Prior to the first trial, he trial court conducted a voluntariness hearing outside the presence of the jury to determine if the Appellant's pre-Mirandized statements were admissible. 4 App. 821. During the hearing, Det. Thowsen admitted that he intentionally brought up Appellant's 1989 molestation at the age of 6 and that her reaction was that she burst into tears. She then stated the incriminating statement, "I didn't think anyone would miss someone like him."

Before statements made during a custodial police interrogation are admissible, defendant must make a knowing, intelligent and voluntary waiver of her Fifth Amendment rights. Miranda v. Arizona, 384 U.S. 436 (1966). "[I]f a suspect is subject to abusive police practices and actually or overtly compelled to speak, it is reasonable to infer both an unwillingness to speak and a perceptible assertion of the privilege." New York v. Quarles, 467 U.S. 649, 672 (1984) [Justice O'Conner, concurring in part and dissenting in part.] Police interrogation of a suspect threatens the exercise of the Fifth Amendment privilege because of the danger that officers might overtly or passively compel confessions. New York v. Quarles, 567 U.S. at 654. Therefore, before questioning, Miranda warnings must be given. Miranda v. Arizona, 384 U.S. 436 (1966).

The defense argued that her will was overborne when the detective intentionally used this emotionally traumatic recollection to begin the interview, however, the trial court determined that the statement was voluntary in response to a statement, not a question and that Lobato's will was not overborne. However, while it is true that Miranda only protects

those subject to interrogation, there need not be an actual question posed for a response to be considered a result of interrogation; "psychological ploys" designed to elicit incriminating responses may also constitute interrogation. Holyfield v. Nevada, 101 Nev. 793, 799; 711 P.2d 834 (1985) ("Interrogation" under Miranda need not amount to actual questioning and may instead be the "functional equivalent" of such questioning). Interrogation includes "any words or actions on the part of police, other than those normally attendant to arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect. Id. Therefore, the detective's "psychological ploy" inciting the Lobato's emotional response regarding her molestation at the age of 6 was an interrogation and her provoked pre-Miranda response "I didn't think anyone would miss someone like him," should have been suppressed.

Likewise, the district court erred in allowing evidence of statements made after Lobato was provided with her Miranda warnings because the psychological coercion employed by the detective rendered her statements involuntary.

Lobato's will was overborne when the detective used the emotionally traumatic recollection of her molestation at age 6 to begin the interview. Accordingly her Mirandized statement was not given freely. Exhibit 125A is an audio tape which reflects Lobato's tone of voice, demeanor and psychological state. This exhibit supports a finding that Lobato's statement was not voluntarily made. Even if Miranda warnings are given, evidence deemed to have been coerced is a violation of the Due Process Clause of Fifth and Fourteenth Amendments and must be excluded. Colorado v Connelly, 479 U.S. 157, 163 (1986). To determine whether a statement was voluntary, a court must consider whether, in the totality of the circumstances, officials obtained the evidence by overbearing the will of the accused. Allan v. State, 118 Nev. 19, 38 P.3d 175 (2002), overruled on other grounds in Rosky v. State, 121 Nev. __, 111 P.3d 690, 694 (2005); Passama v. State, 103 Nev. 212, 214;735 P.2d 321, 323 (1987). A trial court's voluntariness determination presents a mixed question of law and fact, subject to this Court's de novo review. Rosky, 111 P.3d at 694 (citing

Thompson v. Keohane, 516 U.S. 99 (1995) and Miller v. Fenton, 474 U.S. 104 (1985).[19] "In order to satisfy due process requirements, a confession must be 'made freely and voluntarily, without compulsion or inducement.' When a defendant waives Miranda rights and makes a statement, the State bears the burden of proving voluntariness, based on the totality of the circumstances, by a preponderance of the evidence." Dewey v. State, 123 Nev. __, __, __ P.3d __ (2007) (citing Passama, 103 Nev. at 213, 735 P.2d at 322; Quiriconi v. State, 96 Nev. 766, 772, 616 P.2d 1111, 1114 (1980); Blackburn v. Alabama, 361 U.S. 199, 206 (1960)).

Detective Thowsen admitted that before he administered the Miranda warnings, he told Lobato that he knew about her molestation at the age of 6 and that her reaction was that she burst into tears. In Allan, this Court noted that the Appellant displayed "unusual outbursts during the interrogation as he was crying." Allan, 118 Nev. at 12; 38 P.3d at 179. Lobato was sexually assaulted by her mother's boyfriend when she was 6 years old and this attack had a big impact on her life. 8 App. 1394, 9 App. 1633, 1672. She was also raped by an ex-boyfriend when she was 13 and by her best friend's father when she was 17. 9 App. 1672; 7 App. 1201. Lobato's will was overborne when the detective used the emotionally traumatic recollection of her molestation at age 6 to begin the interview such that her Mirandized statement was not given freely and this error was not harmless. Furthermore, there were two detectives, a sergeant, a crime scene analyst, and a local sheriff present at Lobato's house when Thowsen began his interrogation of Lobato. Other relevant facts bearing on the voluntariness of her statement include the fact that she was only 18 years old, she had no prior involvement in the criminal justice system, she had previously used methamphetamine,

---

[19]Rosky presents further justification for this Court's consideration of this issue, despite its holding on the first direct appeal. At the time that Lobato's first appeal was decided, in September, this Court reviewed a district court's determination that a confession was voluntary under the highly deferential "substantial evidence" standard. Rosky, 111 P.3d at 694 & n.4 (citing Allan). This Court now recognizes that the deferential standard was not consistent with pronouncements by the United States Supreme Court and holds that voluntariness issues should be reviewed de novo. Id. This Court should address this issue now under the de novo standard.

she had recently been prescribed anti-depressants, and her parents were not present.

Based on the foregoing, the totality of the circumstances in the instant case indicate that Lobato's statement to the detectives was not voluntary for the Fifth and Fourteenth Amendment rights embodied in Miranda v. Arizona. See also Mincey v. Arizona, 437 U.S. 385, 401-402 (1978). The admission of this coerced statement was not harmless error. Arizona v. Fulminante, 499 U.S. 279, 296, 306-12 (1991). Accordingly, Lobato's judgment must be reversed.

2. NRS 201.450 is unconstitutionally overbroad and vague was applied here.

In her prior direct appeal Lobato contended that her conviction for sexual penetration of a dead human body in violation of NRS 201.450 by "inserting a knife into and/or cutting the anal opening of the said Duran Bailey," was unconstitutional because the injuries inflicted here were not consistent with sexual gratification, but rather reflected an act of rage. As noted above, this Court found this argument to be without merit. Lobato respectfully submits that this Court should reconsider this holding because Nevada's necrophilia statute, NRS 201.450 is unconstitutionally over broad as applied in this case.

Sexual penetration is defined within the statute, in subsection 2, as:

> "[C]unnilingus, fellatio or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including, without limitation, sexual intercourse in what would be its ordinary meaning if practiced upon the living."

NRS 201.450(2).

This definition suggests that "...any intrusion, however slight, of any part of a person's body..." constitutes sexual penetration. Therefore, the statute criminalizes penetration that is not for sexual gratification and unnecessarily sweeps broadly into activity which has not been ordinarily viewed as being sexual in nature. This language is so overly inclusive and sweeping, that it is ambiguously vague and over broad in violation of Article 1, Section 8 of the Nevada Constitution and the First and Fourteenth Amendment of the U.S. Constitution.

The definition of sexual penetration in NRS 201.450, is borrowed from NRS 200.364(2), the sexual assault statute. The definition contained in Nevada's necrophilia

statute differs in one very significant way from the definition in the sexual assault statute: the words "without limitation" are inserted in the definition of the necrophilia statute. In an over breadth challenge, this distinction is significant. The words "without limitation" renders the definition meaningless. The result is that the definition of sexual penetration is without restriction. It is boundless. As a result, the language of the statute is overly broad and, therefore, unconstitutional as applied to Lobato.

The statute is also void for vagueness. This Court has stated that the due process clause of the Fourteenth Amendment requires that criminal statute be declared void when it is so vague that it "fails to provide persons of ordinary intelligence with fair notice of what conduct is prohibited and also fails to provide law enforcement officials with adequate guidelines to prevent discriminatory enforcement." State v. Richard, 108 Nev. 626, 836 P.2d 622 (1992). The first part of the test for vagueness is whether the terms of the statute are "so vague that people of common intelligence must necessarily guess as to their meaning." Sereika v. State, 114 Nev. 142, 955 P.2d 175 (1998). The second part of the test is whether the law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and substantive basis. Williams v. State, 110 Nev. 1182, 885 P.2d 536 (1994).

In this case, the statute challenged, NRS 201.450, produces uncertainty is not very specific and suggests alternative interpretations. Therefore, ordinary persons cannot anticipate whether their actions violate the statute. The fact that "...any intrusion, however slight, of any part of a person's body..." constitutes sexual penetration alone is so indistinct and indefinite that the forbidden conduct proscribed remains so ambiguous that it is as if it had never been defined at all. Furthermore, there exists no limitation as to what can be adjudged to be sexual intercourse with the insertion by the legislature of the words "without limitation." The fact that sexual intercourse is further defined as "what would be its ordinary meaning," also leaves the matter unresolved.

Sometimes, a statute's title sheds some light on the meaning of the ambiguous statute. State v. Miller, 87 P. 723 (Kan. 1906). Literally interpreted, the wording of the title of this

statute is explicitly sexual. The title of the statute in question is Sexual Penetration of a Dead Human Body. Therefore, implicit in the title is the fact that the injury is of a sexual nature, that is, it is committed for sexual gratification. Finally, the statute in this case, NRS 201.450, is ambiguous in view of the heavy penalty imposed for its violation.

Lobato's theory that the injury to Bailey was not committed for sexual gratification was not rebutted by the evidence adduced at the Trial. Therefore, as applied to Lobato, the statute is void-for-vagueness.

Among the rules of statutory construction is that of ejusdem generis (of the same kind). LaFavre & Scott, Substantive Criminal Law, § 2.2, pp. 118-119 (1986). This rule applies when a statute, such as this one, lists some specific items followed by a general catch-all phrase, usually introduced by the phrase "or other..." According to the rule of ejusdem generis, the general catch-all phrase is construed to be limited to things of the same kind as those specific items listed. Id.

For example, a federal criminal statute made it a felony for one to transport in interstate commerce an "automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails" which he knows to be stolen. In a case which explored this issue, the defendant flew an airplane he knew to be stolen from one state to another and was charged under this statute. The issue was whether the airplane was included in the catch-all phrase, "any other self-propelled vehicle not designed for running on rails" Literally, it would seem to be. However, the Supreme Court held that it was not covered by the phrase. The theme of the catch-all phrase was that all the specific items listed (automobile, automobile truck, automobile wagon, motorcycle) were vehicles that run on land, so that, "self-propelled vehicles was limited to land vehicles and the airplane was excluded from the statute." McBoyle v. U.S., 283 U.S. 25 (1931). Similarly, a statute forbidding the destruction of property by "use of bombs, dynamite, nitroglycerine or other kinds of explosives" was held not to cover igniting a firecracker in a telephone coin return slot because the listed items were distinguishable from the fireworks by being designed to produce an explosion of extreme effect. State v. Lancaster, 506 S.W.2d

403 (Mo. 1974). In State v. Hooper, 386 N.E.2d 1348 (Ohio 1979), a statute providing that no person "shall insert any instrument, apparatus or other object into the vaginal or anal cavity of another" by force or threat, did not include finger because only inanimate objects were named in the catch-all phrase.

In the necrophilia statute at issue, the catch-all phrase is:

> "...or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including, without limitation, sexual intercourse in what would be its ordinary meaning if practiced upon the living."

The common theme of the specified items, cunnilingus, fellatio, etc., is that they are all acts committed for the purpose of inducing sexual gratification. A person who strikes and injures a dead person's sexual organ in a continuing uncontrolled fit of anger or maddening rage that began when the person was alive, cannot be said to have committed an act on a dead body for sexual gratification. The key here is that there exists no evidence that the person who attacked Bailey before he died was motivated by sexual gratification. Thus, the continuing conduct does not mutate into a sexual crime just because the sexual organs were injured.

This is especially true when, as here, the individual injured sustained several other wounds, not just injury to sexual organs. An individual striking a dead body who also strikes a sexual organ does not necessarily cause a sexual penetration without more. Nor is this the case of an attempted rape completed after the death of the victim.

The definition of sexual penetration in the statute in question, NRS 201.450, was borrowed from NRS 200.364(2), commonly referred to as "the sexual assault statute." This Court has held that the definition of sexual penetration contained in the sexual assault statute is not unconstitutionally vague. Fields v. Nevada, 93 Nev. 640, 572 P.2d 213 (1977). However,"statutes challenged for vagueness are evaluated on an as-applied basis where, as here, First Amendment interests are not implicated." Lyons v. Nevada, 105 Nev. 317, 775 P.2d 219 (1989). Therefore, review of the statute for vagueness is not foreclosed in this case.

Furthermore, and perhaps most importantly, the definition contained in Nevada's necrophilia statute differs in one very significant way from the definition in the sexual assault

statute: the words "without limitation" are inserted in the definition of the necrophilia statute; they are not included in the sexual assault statute. As argued, supra, in the above-stated over breadth challenge, this distinction is very significant. The words "without limitation" necessary render the statute vague and indefinite

Most of the rules of statutory interpretation which are utilized in construing ambiguous criminal statutes are rules which apply as well to civil statutes, but there is one rule which is specifically applicable to criminal cases: criminal statutes must be strictly construed in favor on the defendant. LaFavre & Scott, supra. Felony statutes should be construed more strictly that misdemeanor statutes, those with severe punishments more than those with lighter penalties; those involving morally bad conduct more than those involving conduct not so bad; those involving conduct with drastic public consequences more than those whose consequences to the public are less terrible. Id., at page 110.

This Court has echoed this concern stating that, "(G)enerally speaking, we narrowly construe ambiguous provisions of penal statutes." Mangarella v. State, 117 Nev. 130, 134, 17 P.3d 989, 992 (2001). "Moreover, the rules of statutory interpretation that apply to penal statutes require that provisions which negatively impact a defendant must be strictly construed, while provisions which positively impact a defendant are to be given a more liberal construction." Id. "Statutes providing criminal sanctions must reflect a higher standard of certainty than civil statutes." Lyons v. State, 105 Nev. 317, 775 P.2d 219 (1989) citing Winters v. N.Y., 333 U.S. 507, 515 (1948).

In the alternative, if this Court finds that the necrophilia statute is not unconstitutionally over broad or vague, it is respectfully requested that this Court narrowly construe the statute as applied to Lobato and find that the conduct charged is excluded from the purview of the statute.

I. The sentence imposed by the district court violates Lobato's double jeopardy rights under the state constitution

Following the first trial, Lobato was sentenced to two consecutive 20 to 50 year sentences for first-degree murder with use of a deadly weapon and a ***concurrent term*** 5 to

15 year sentence for sexual penetration of a dead body. 1 App. 11. On appeal, this Court reversed the judgment after finding that the trial court erred in precluding Lobato from introducing extrinsic evidence to impeach the testimony a witness for the State. 1 App. 6; Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004). Following the second trial, Lobato was convicted of voluntary manslaughter with use of a deadly weapon and sexual penetration of a dead body. During the sentencing hearing her trial counsel noted that concurrent time had been imposed following the first trial and asked the district court to impose concurrent time for the two offenses. 9 App. 1759-60. See also 4 App. 781-82 (sentencing memorandum). The district court noted that the sentence imposed for Count One was "significantly" greater in the original judgment than the sentence that count be imposed pursuant to the jury's finding of voluntary manslaughter in the second trial. 9 App. 1760. The court then ordered that Lobato be sentenced to two consecutive terms of 48 months to 120 months for voluntary manslaughter with use of a deadly weapon and a ***consecutive term*** of 60 months to 180 months for use of a deadly weapon. 9 App. 1762. Lobato respectfully submits that pursuant to this Court's recent decision in Wilson v. State, 123 Nev. __, __ P.3d __ (11/21/2007), the district court violated Lobato's state constitutional right against double jeopardy by restructuring the sentences to require that she serve her sentences consecutively, rather than concurrently, as originally ordered by the court.

In Wilson, this Court concluded that a district court violated Nevada's double jeopardy protections by increasing the defendant's sentence after his conviction had been partially vacated on appeal. Id. at __. Specifically, in 2003, the defendant was convicted of four counts of using a minor in production of pornography and four counts of possession of a visual presentation depicting sexual conduct of a person under 16 years of age. He was sentenced to four terms of 24 to 72 months on the possession charges to run concurrently with 4four consecutive terms of 10 to life on the production charges. On direct appeal this Court reversed three of the four production convictions because all four arouse of a single criminal act. It then remanded the case for resentencing. In 2006, the district court modified the sentences on the defendant's remaining convictions by increasing the minimum for each

possession conviction from 24 months to the statutory maximum of 28 months and by ordering the sentences to run consecutively, instead of concurrently, as specified in the original sentencing hearing. This Court found that the district court's action constituted a double jeopardy violation under Article 1, Section 8(1) of the Nevada Constitution and Dolby v. State, 106 Nev. 63, 65, 787 P.2d 388, 389 (1990). It rejected the State's contention that Dolby should be overruled and took "this opportunity to renew [its] commitment to strong double jeopardy protections." Wilson, __ P.3d at __. This Court also rejected that State's proposed alternative rule which would have provided that when a defendant successfully challenges part of a multi-count conviction on direct appeal, the district court may effectuate its original sentencing intent by increasing the sentences associated with the remaining counts without violating double jeopardy, provided that, considered in the aggregate, the duration of the new sentences does not exceed the original punishment. In ruling against the State, the Court rejected the rationale employed by federal courts and focused upon Nevada double jeopardy jurisprudence. Of critical importance to this appeal is this Court's conclusion in Wilson: "Even though the resentencing did not lead to a harsher result than Wilson's original sentence, the district court individually increased the minimum terms on each of the remaining possession counts and restructured the relationship between the possession counts and the lone production count. We conclude that Dolby forbids this sentencing procedure."

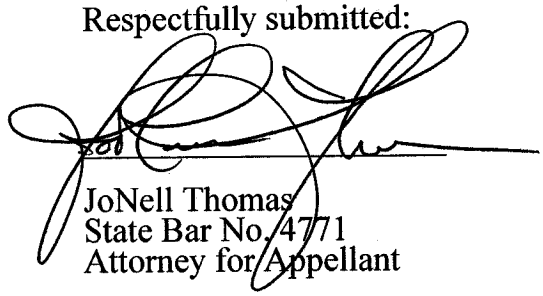
Here the district court did that which was expressly found improper in Wilson. The district court restructured the relationship between Count I and Count II by ordering that the sentences be served consecutively rather than concurrently. Accordingly, in the event that this Court does not vacate the convictions entirely based upon the fact that the State did not present sufficient evidence to support the convictions, or does not reverse the convictions and remand for a new trial based upon the issues set forth above, the case must nonetheless be remanded to the district court with instructions to enter a new judgment of conviction which reflects concurrent sentences for the two offenses.

VII. CONCLUSION

Lobato has been imprisoned based upon conviction for substantial offenses even though the State fell far short of its burden of proving beyond a reasonable doubt that she committed these offenses. Her convictions must be immediately vacated based upon this injustice. In the alternative, she must be granted a new trial based upon the numerous errors and constitutional violations that resulted in her conviction. Finally, her sentence must be modified to provide for concurrent time between her two convictions.

DATED this 29th day of November, 2007.

Respectfully submitted:

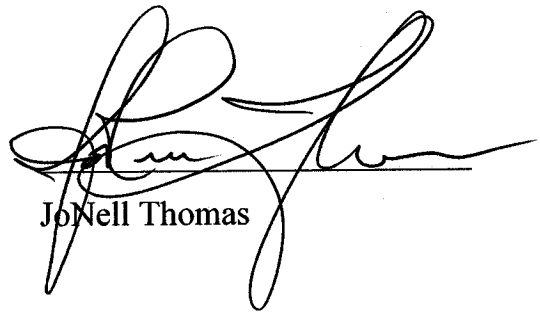


JoNell Thomas
State Bar No. 4771
Attorney for Appellant

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, N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 29th day of November, 2007.



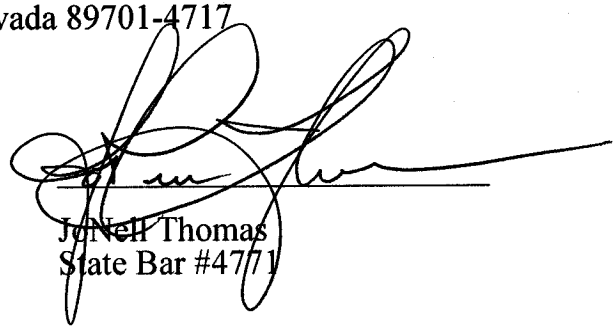
JoNell Thomas

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, 2007 I caused to be mailed a true and correct copy of the foregoing Appellant's Opening Brief

David Roger
Clark County District Attorney
200 South Third Street
Fifth Floor
Las Vegas, NV 89155

Catherine Cortez-Masto
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717



JoNell Thomas
State Bar #4771