confession, or no confession to Bailey's murder and the post-mortem cutting of his rectum. Psychologist Dr. Allison D. Redlich agreed to review the information in the Petitioner's case.

Dr. Redlich's doctoral degree is from the University of California, Davis, in Developmental Psychology, with a focus on psychology and law. For more than a decade she has conducted research on and written extensively about the social psychology of police interrogation and the causes and consequences of police-induced false confessions. She has researched, written and published numerous peer-reviewed articles on interrogation and confession in scientific journals and in scholarly books, as well as giving invited presentations at national conferences. Dr. Redlich is one of six experts who authored a scientific "white paper" on police interrogations and false confessions for the American Psychology Law Society, a Division of the American Psychological Association. To determine if Petitioner's Statement of July 20, 2001, constitutes a confession to Duran Bailey's murder and mutilation on July 8, 2001, Dr. Redlich reviewed trial testimony, and evidence and information related to the Petitioner's Statement of July 20, 2001. Dr. Redlich's report of February 10, 2010 states in part:

> "From reviewing the materials, it is my expert opinion that Ms. Lobato was not confessing to the murder of Mr. Bailey. Rather, she was "confessing" to an assault in which she was the alleged victim and in which she defended herself by attempting to cut the penis of a man who was allegedly sexually assaulting her. It appears to me that Ms. Lobato believed she was cooperating with a police investigation, not admitting to a murder that occurred on the other side of town some weeks after her alleged assault.
>
> …
>
> Thus, in my opinion, Ms. Lobato's version of events should not be construed as minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her."
>
> (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010.)

It is now known from Dr. Redlich's Report the Petitioner's Statement is not a confession to Bailey's murder. It is also known that Thowsen's testimony was false that the Petitioner "jumbled" details to "minimize" her involvement in Bailey's murder. In fact, she was provided details in her Statement to help the detectives investigate her sexual assault at the Budget Suites Hotel. But because Petitioner's counsel did not retain Dr. Leo, Dr. Redlich, or another psychologist qualified to analyze her Statement, the jury did not know it has nothing whatsoever to do with Bailey's murder.

The Petitioner was prejudiced by the failure of her counsel to introduce expert psychology testimony at trial that her Statement is not a confession to Bailey's murder and the post-mortem cutting of his rectum, because it allowed the jury to rely on Thowsen's unchallenged inexpert "psychology" testimony to convict the Petitioner.

Petitioner's counsel Greenberger wrote a detailed letter three weeks prior to Petitioner's trial that documents her wide ranging concerns about the quality of the representation being provided the Petitioner. That letter of August 16, 2006 reads in its entirety:

> Mr. David Schieck
> Special Public Defender
> 333 South 3rd Street, 2nd Floor
> Las Vegas NV 89155
> RE: Lobato
> Dear David,
>
> Please articulate in writing your professional opinion for refusing to file the writ we prepared in this case and submitted to you for filing, along with an explanation describing what harm it would do to file this document.
>
> Moreover, we must make critical decisions regarding division of labor at trial (who will do opening and closing) and overall trial strategy in this case.
>
> At this point we feel it is necessary to memorialize a number of concerns we have about this case up to this point.
>
> 1) You have articulated on many occasions that you are a last minute person, which has not been conducive to my style of the practice of law. For example, I am concerned about filing witness lists at the last minute, as that was the very basis that witnesses were excluded at the last trial.
>
> 2) When our expert Brent Turvey was in Las Vegas, he attempted to contact you numerous times, before and during his stay, to review the evidence, but was never able to reach you to facilitate this review. He was on business on another case in Las Vegas already, consequently this trip would of cost your office nothing. Hence, we will need to fly him out early to facilitate this review.
>
> 3) We are concerned about the lack of your contributions in terms of ongoing legal advice, research and writing, and overall trial strategy. Is that acquiescence on your part to us taking the lead in this case at trial? We are prepared and wish to take that lead, but cannot do so when you reject our trial strategy and defense.
>
> 4) You previously outlawed Mr. Bodziak as an expert witness in this case on shoe print, tire track and footwear examination, on the grounds that we could obtain the same information through the government witness. We do not agree with this strategy and believe the case will be strengthened by our own independent witness.
>
> 5) You previously ruled out Mr. Schiro as expert, and as a consequence we have not made contact with him in months nor lined him up as an expert witness at the trial. We must make a decision on him forthwith or suffer preclusion of him altogether. I am concerned he may not be available if we need him at this late date and time.

6) As indicated above please articulate in writing your professional opinion for refusing to file the writ we prepared in this case and submitted to you for filing, along with an explanation describing what harm it would do to file this document.

7) We still have no definitive answer from you regarding using Dr. Laufer as an expert witness. We believe his expert testimony as an injury reconstructionist, who can exclude Ms. Lobato from this crime, is pivotal to the overall defense of this case, and do not feel comfortable proceeding without him.

8) You previously have voiced concern about budget constraints at your office regarding the expenses in this case. Our office has put hundreds of hours of work into this case for no legal fee whatsoever. We are very concerned about the utilization of the appropriate experts in Ms. Lobato's defense and do not feel equipped to participate in the defense of this case without them.

9) We are concerned about your attitude of indifference towards this case in general, especially in light of the fact that Ms. Lobato is facing the rest of her life in prison.

10) On the trip to San Francisco, where we had arranged a joint defense counsel meeting with you and Ms. Lobato, you never attended.

11) On the multiple trips to Panaca, and defense investigation in Lake Havasu and Arizona, you have never accompanied the defense team or participated.

12) You have suggested not filing the motion we have drafted moving to exclude any subsequent bad acts the State may seek to introduce against Ms. Lobato. We believe that motion should be lodged with the court to preserve the record.

13) You have repeatedly advised us you would clear time in your schedule to meet with us on trips to Las Vegas, but have had little to no time blocked off to meet with us.

14) We must have an investigator who can help with all of the issue outlined in my comprehensive memo I submitted to you two weeks ago. The trial date is rapidly approaching and we have nowhere to turn for investigation.

15) We must allot time to review all of the defense objectives and legal issues outlined in the above-referenced memo.

We are trying to represent Ms. Lobato to the best of our ability and believe it is the safest course of conduct to memorialize these issues, and point them out immediately, prior to proceeding to trial in this case.

Please respond forthwith.

Shari Greenberger

(See Exhibit 86, Shari Greenberger letter to David Schieck, August 16, 2006.)

The grim picture painted in this letter is the same as that portrayed by Greenberger's previous correspondence with lead counsel Schieck: He had a lackadaisical attitude about representing the Petitioner and the quality of his representation of her. Schieck was sitting on his hands waiting for Petitioner's trial date while *pro bono* counsel Greenberger and Zalkin tried to cobble together Petitioner's defense with duct tape and chicken wire.

As of April 21, 2010 Schieck has failed to turn over to Petitioner the "comprehensive memo" Greenberger refers to that was submitted to Schieck "two weeks" prior to her letter of August 16, 2006. But given the context that the "comprehensive memo" was prior to Greenberger's letter of August 16, it likely provides significant additional evidence of Schieck's "attitude of indifference towards this case in general.", and his failure to exercise due diligence in representing the Petitioner.

Greenberger discussed her concerns about Schieck with defense expert forensic scientist Brent Turvey. Turvey responded:

> After our discussion today regarding the discussion you described with David Schieck, it would be remiss of me not to recommend the following:
>
> 1) That you make a declaration or record of some kind so that his sentiments and underlying philosophy be preserved for appeal, based on IAC, should the case against your client be lost. Having senior counsel explain that resources are being unnecessarily burned, and dissuading you from investigating alibis for the client as well as the physical evidence, suggests that something else is at work. What that is may not be known, but preserving this encounter in a permanent fashion for the court is not only reasonable, but perhaps even obligatory. I say perhaps as I am no lawyer.
>
> 2) That you may want to review the ethics code for the Nevada State Bar to make sure that the code of ethics is not in jeopardy.
>
> Something's definitely not quite right. The last time something like this happened on a case I worked, one of the defense attorneys involved was the hunting buddy of the judge, and was also running for his own judgeship in another county. Politics happen. (See Exhibit 88, Brent Turvey email to Shari Greenberger, October 5, 2005.) (Underlining added to original.)

Turvey brings up a number of interesting conflict of interest issues that can only be resolved by a full evidentiary hearing during which all relevant parties and material witnesses testify, including Judge Valorie Vega, ADAs Kephart and DiGiacomo, and possibly DA Rogers.

So it is known that Schieck not only did not assist Greenberger's efforts as *pro bono* counsel to prepare Petitioner's alibi defense, but he tried to interfere with her efforts. Schieck's indifference and lack of effort as lead counsel in Petitioner's case is also demonstrated by the fact that Greenberger and Zalkin prepared all of the pre-trial motions that were filed and argued in Petitioner's case, and he refused to file some motions.

Schieck's lackadaisical attitude, interference with the investigation of alibi witnesses, and lack of interest in trial preparation in the Petitioner's case resulted in many prejudicial consequences. In addition to Dr. Leo, Bodziak and Schiro not testifying, Dr. Laufer, who lives in the San Francisco Bay area and who testified on a *pro bono* basis, was preventing from testifying about the full extent of his medical expertise because proper notice of the scope of his proposed expert medical testimony was not provided to the prosecution. Petitioner was also prejudiced during trial by Schieck's failure to make as lead counsel to object to prosecution witness testimony, at least 29 false claims made during the prosecution's opening statement, and more than 250 improper closing and rebuttal arguments. (See Exhibit 75, Opening statement false evidence statements; and, Exhibit 76, Prosecution's improper closing and rebuttal arguments that were not objected to.)

In addition, Schieck did not initiate investigation of the seven telephone numbers recovered from Bailey's pants pockets for alibi witnesses, and in doing so he would have discovered that Bailey may have been a police informant and innumerable people in Las Vegas had the motive, means, and opportunity to murder him. Schieck also did not retain forensic entomologists to determine Bailey's time of death; he did not retain a forensic pathologist to analyze the murdered evidence to determine the number of assailants, if Bailey was alive when his rectum was cut, the murder weapon, and other things.

Neither did Schieck retain a dental expert to analyze the evidence of Bailey's teeth found at the crime scene. Dr. Mark Lewis examined the teeth evidence post-conviction and determined they were not knocked out by a baseball bat. Dr. Lewis states in his "Affidavit of Mark Lewis, DDS" dated April 26, 2010:

> 5. In my professional opinion, I do not believe that a baseball bat was used to knock out Bailey's teeth because I would expect that the teeth would have been fragmented by the force needed to forcibly remove them with a baseball bat.
> (See Exhibit 100, Affidavit of Mark Lewis DDS, April 26, 2010.)

At trial a dental expert such as Dr. Lewis would have destroyed the prosecution's speculative argument that the Petitioner's bat was used to knock out Bailey's teeth. However, due to Schieck's failure to retain a dental expert and introduce their exculpatory testimony, the jury convicted the Petitioner by relying on the Prosecution's imagination based "bat" argument that was dead wrong.

Based on what is known, if Greenberger and Zalkin had not worked *pro bono* on Petitioner's case, at the close of the prosecution's case Schieck would have rested the defense without presenting any witnesses, and futilely argued during his closing argument for acquittal on the basis that the prosecution had not presented proof beyond a reasonable doubt of the Petitioner's guilt.

Ron Slay is Nevada state licensed polygraph examiner who has performed over 27,000 examinations. Slay is a member of the American Polygraph Association, the National Polygraph Association, and other professional organizations. He is the owner of Western Security Consultants in Las Vegas, Nevada. Slay has "performed many polygraph examinations for the Clark County District Attorney's Office, the Clark County Public Defenders Office, and the Clark County Special Public Defenders Office." (See Exhibit 9, Affidavit Of Ron Slay.) Slay was retained by Petitioner's previous counsel to perform a polygraph examination of Petitioner, which was conducted on December 3, 2001. As a result of Petitioner's truthfulness in answering the relevant questions during that examination, Slay is "certain Ms. Lobato is innocent of Mr. Bailey's murder." Slay conducted a polygraph examination of Rebecca Lobato on November 27, 2001, and he found "Mrs. Lobato truthfully answered that Ms. Lobato was in Panaca on July 8, 2001, and she further truthfully answered that she had not made a false alibi for Ms. Lobato." (See Exhibit 9, Affidavit Of Ron Slay.) Slay discussed Petitioner's case with Schieck after he became Petitioner's counsel in October 2004. Slay told Schieck that he was "certain Ms. Lobato is innocent of Mr. Bailey's murder." (See Exhibit 9, Affidavit Of Ron Slay.) Although DA's Office recognizes Slay as a neutral examiner whom they have relied on to determine the truthfulness of suspects and witnesses, Schieck made no effort prior to Petitioner's trial in 2006 to arrange a meeting with DA Rogers or one of his subordinates so that he and Slay could argue that Slay's findings concretely support that the Petitioner did not murder Duran Bailey, her stepmother is truthful that she saw the Petitioner in Panaca on July 8 and she did not make a false alibi, and that the charges should be dismissed against the Petitioner.

Schieck's "attitude of indifference towards this case in general" even continued after his representation ended when the United States Supreme Court denied Petitioner's direct appeal writ

of certiorari on October 5, 2009. After informal efforts to obtain Petitioner's case files from Schieck failed, on October 27, 2009 Petitioner sent separate letters to David Schieck and JoNell Thomas (Petitioner's appeal lawyers), requesting that they promptly turn over all case files and documents in accordance with Nevada State law. Petitioner explained that her case files and documents were necessary for preparation of her habeas corpus petition. (See Exhibit 94, Petitioner's letter to David Schieck, October 27, 2009; and, Exhibit 95, Petitioner's letter to JoNell Thomas, October 27, 2009.) JoNell Thomas never responded to that letter. On November 4, 2009 Schieck turned over all the materials that he said Greenberger and Zalkin left when they returned to San Francisco after Petitioner's conviction on October 6, 2006. There were nine boxes of material that included six boxes of documents and three boxes of transcripts. After Petitioner discovered that there were many documents missing from the files that Schieck turned over on November 4, 2009, Petitioner mailed him and Thomas separate letters on December 21, 2009 requesting that all case files and documents be promptly turned over to the Petitioner in accordance with Nevada State law. Petitioner explained that her ability to prepare her habeas corpus petitioner was being hampered by not having her case files and documents. (See Exhibit 96, Petitioner's letter to David Schieck, December 21, 2009; and, Exhibit 97, Petitioner's letter to JoNell Thomas, December 21, 2009.) JoNell Thomas never responded to that letter. On February 4, 2010 Schieck turned over what he represented were copies of his complete case files minus the Scopes for several people. There were eight boxes of material that included five boxes of documents and three boxes of transcripts.

Petitioner has subsequently discovered that there are an unknown number of documents missing from the files turned over by Schieck on February 4, 2010. Among the missing documents are letters written by Schieck to anyone related to the Petitioner's case, any emails by Schieck to anyone related to her case, any memos, any appointment calendars, any telephone logs, or notes of telephone conversations or in person conversations that were written by Schieck related to Petitioner's case. And by holding Petitioner's case files hostage he hindered the Petitioner in the preparation and filing of her habeas corpus petition. As mentioned previously, also missing is Greenberger's comprehensive memo expressing her concerns about the quality of the Petitioner's

representation that was sent to Schieck two weeks before Greenberger's letter to Schieck dated August 16, 2006.

From Greenberger's letters it is known that Schieck refused to authorize proper funding for investigation so an unknown number of witnesses were not located and interviewed due to his obstructionist efforts, and several defense witnesses who needed to be flown to Las Vegas were not subpoenaed for trial.

Neither did Schieck retain a forensic entomologist, a forensic pathologist, a psychologist, a dental expert, a forensic scientist expert in blood pattern analysis, and an impressions expert to thoroughly examine the evidence in Petitioner's case to uncover additional defenses. The magnitude of the prejudice to the Petitioner, and that the testimony of these experts would have resulted in the Petitioner's acquittal, is established by the new evidence the experts in those disciplines have discovered post-conviction in the Petitioner's case. (See Exhibit 1, Report of Dr. Gail S. Anderson, 17 December 2009; Exhibit 2, Forensic Entomology Investigation Report (of Dr. Linda-Lou O'Connor), February 11, 2010; Exhibit 3, Report of Dr. M. Lee Goff, March 12, 2010; Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010; Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010; Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010; and, Exhibit 100, Affidavit of Mark Lewis, DDS, April 26, 2010.)

The state and federal constitutional rights of the Petitioner to effective assistance of counsel, due process of law and a fair trial were gravely prejudiced by Clark County Special Public Defender David Schieck's lackadaisical attitude toward his representation of the Petitioner and his fatally deficient failure to diligently and effectively represent her prior to, during, or after trial.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

INDEX OF EXHIBITS

Habeas Corpus Petition
***Kirstin Blaise Lobato vs. Warden of FMWCC,* District Court, Clark County, Nevada**

Exhibit	Name
1	Report of Dr. Gail S. Anderson, 17 December 2009
2	Forensic Entomology Investigation Report (of Dr. Linda-Lou O'Connor), February 11, 2010
3	Report of Dr. M. Lee Goff, March 12, 2010
4	Affidavit of Glenn M. Larkin, M.D., 5 January 2010
5	Report of Dr. Allison D. Redlich, February 10, 2010
6	Cockroach: The Omnivorous Scavenger
7	Louise Renhard crime scene notes
8	Affidavit of Steven King
9	Affidavit Of Ron Slay
10	Voluntary Statement of Douglas Howell Twining
11	Affidavit of Stephen William Pyszkowski
12	Affidavit of Michele Dawn Austria
13	Affidavit of Heather Michelle McBride
14	Affidavit of Dixie A. Tienken
15	Affidavit of Kimberlee Isom Grindstaff
16	2001 Utah Shakespearean Festival Brochure and Calendar
17	Affidavit of Daniel Lewis (Louis) Lisoni
18	Statement of Christopher Collier and Declaration of Shari White
19	Affidavit of Catherine Ann Reininger
20	Affidavit of Marilyn Parker Anderson
21	Affidavit Of Kendre Pope Thunstrom
22	Affidavit of Jose Abraham Lobato
23	Affidavit of Skye Idris Campbell
24	Affidavit of John Albert Kraft
25	Affidavit of Daniel Smades
26	Affidavit of Martin Yant
27	Digestion times of foods
28	Natasha Richardson, 45, Stage and Film Star, Dies, ***NY Times***, March 19, 2009
29	Las Vegas Sunrise/Sunset, July 8, 2001
30	Las Vegas weather, July 8, 2001
31	Bailey's penis

32	Crime Scene Evidence with diagram of location found
33	Blood at crime scene
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35	LVMPD Vehicle Report, July 20, 2001
36	LVMPD Forensic Lab Report, August 6, 2001
37	Black high-heeled shoes 1
38	Black high-heeled shoes 2
39	Black high-heeled shoes 3
40	Black high-heeled shoes 4
41	Affidavit of James Aleman, June 14, 2002
42	3rd Affidavit of George J. Schiro, Jr., February 15, 2010
43	Affidavit of George J. Schiro Jr., November 24, 2009
44	2nd Affidavit of George J. Schiro Jr., February 4, 2010
45	Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010.
46	Forensic Science Resources (George J. Schiro Jr.) Report, May 31, 2002
47	Footwear Examination Report (William J. Bodziak), March 27, 2002
48	Parkers unit and Mexican's unit (Parker's 2nd floor unit was the one with the satellite dishes on the front porch and Mexican's unit was the 2nd floor unit with plant on the porch.)
49	Mexicans unit 822 looking at Parker's unit 816
50	Bailey superimposed over blood
51	Daniel Martinez, November 16, 2004
52	Mexicans at Grand View Apartments, July 18, 2001
53	Mexican's apartment unit 822
54	Injustice Central, 9-26-2003
55	Bailey's final Nevada State Bank statement
56	Shark attack victim died from massive blood loss, ***The Washington Post***, February 5, 2010
57	Bailey in trash enclosure - diagram
58	Plywood leaning against north wall
59	A.B. 287 (Necrophilia Law) - Assembly
60	A.B. 287 (Necrophilia Law) - Senate
61	Trash Enclosure Wire Mesh
62	Duran Bailey LVMPD Criminal History
63	LVMPD General Counsel Liesl Freedman's letter, December 4, 2009
64	LVMPD Public Records Request, November 2, 2009
65	LVMPD Public Records Request, December 14, 2009

66	Appellant's Opening Brief
67	AIDWYC's letter of endorsement
68	Trash enclosure without lights
69	Voluntary Statement of Diann Parker, July 5, 2001
70	Preliminary hearing testimony – TOD and ante-mortem rectum wound
71	Letter of Hans Sherrer to David Schieck and JoNell Thomas, January 19, 2009
72	Affidavit of Hans Sherrer, March 5, 2010
73	Affidavit of Hans Sherrer, March 8, 2010
74	NRS 629.041
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91	Cardboard non-bloody shoe imprint
92	Bailey as found
93	Bailey's rectum wound
94	Petitioner's letter to David Schieck, October 27, 2009
95	Petitioner's letter to JoNell Thomas, October 27, 2009
96	Petitioner's letter to David Schieck, December 18, 2009
97	Petitioner's letter to JoNell Thomas, December 18, 2009
98	FBI FOIA response that Bailey's records were destroyed on August 1, 1995
99	Criminal Information filed on August 9, 2001
100	Affidavit of Mark Lewis DDS, April 26, 2010
101	Timeline of new time of death evidence And Kirstin Blaise Lobato's alibi

EXHIBIT

1

REPORT OF DR. GAIL S. ANDERSON

17 DECEMBER 2009

In regards to the case of: *The State of Nevada vs. Kirstin Blaise LOBATO*, Eighth Judicial District Court, Clark County, Nevada, No. C177394.

My name is Dr. Gail S. ANDERSON. I am a full Professor in Forensic Entomology and the Associate Director of the School of Criminology at Simon Fraser University in Burnaby, B.C., Canada. I am also the Co-Director of the Centre for Forensic Research I have a Ph.D. in entomology, as well as a masters in entomology and a First Class Honours Bachelor of Science in zoology. I am a Board Certified Forensic Entomologist (one of approximately 16 in North America, Diplomate of the American Board of Forensic Entomology). I also hold a Burnaby Mountain Endowed Professorship at Simon Fraser University. I am the President of the North American Forensic Entomology Association, Past President of the Canadian Society of Forensic Sciences, a Fellow of the American Academy of Forensic Sciences, and a Fellow of the Canadian Society of Forensic Sciences. In 2001, I received the Derome Award from the Canadian Society of Forensic Sciences, which is listed as the "Most prestigious recognition bestowed by the Canadian Society of Forensic Sciences awarded to those individuals who have made an outstanding contribution to the field of forensic sciences. Only awarded occasionally to worthy candidates". It had not been awarded since 1996. Also in 2001 *Time* magazine listed me as one of the top five global innovators in the Criminal Justice Field this century. I am the author of *Biological Influences on Criminal Behavior* (CRC Press and Simon Fraser University Publications, 2007), and attached to this is a list of some articles, book chapters, and conference papers I have authored (see *curriculum vitae*).

I am a forensic entomologist, and have been working on homicide cases since 1988. I have been qualified many times as an expert witness in forensic entomology, including cases such as *Regina v. Pickton*. I have also been involved in other high profile cases such *R. v. Baltovich* (Robert BALTOVICH was convicted in 1992 of the 1990 murder of his girlfriend in Scarborough, Ontario, Canada. Baltovich was acquitted on April 22, 2008 after a retrial), I was also involved in *R. v. Truscott* (Steven TRUSCOTT was 14 when convicted in 1959 of murdering a 12-year-old female classmate in Clinton, Ontario, Canada. Truscott's conviction was declared a miscarriage of justice, and he was acquitted of the crime on August 28, 2007). See c*urriculum vitae* for list of testimonies.

CASE PRESENTATION

I reviewed color photographs and national weather service data in connection with the time of death in the case of: *The State of Nevada vs. Kirstin Blaise LOBATO*, Eighth Judicial District Court, Clark County, Nevada, No. C177394.

I reviewed the following color photographs of the crime scene and body of Mr. Duran BAILEY at the location where his body was found in Las Vegas, Nevada on the evening of July 8, 2001,

and color photos taken before the autopsy of Mr. BAILEY on July 9, 2001. The photographs I reviewed were as follows:

40390006_outside_trash_enclosure.jpg
40400009_groin.jpg
40400007_Bailey's_face.JPG
40400002_Bailey_as_found.JPG
40400014_Bailey's_body.JPG
40400015_Bailey's_backside.JPG
40460006 – front of Bailey's pants.JPG
40460007 – back of Bailey's pants.JPG
40390017_blood_at_scene.JPG
40430022_Bailey's_body.JPG
40440004_Bailey's_left_palm.JPG
40440006_Bailey's_right_hand.JPG
40440008_Bailey's_left_hand.JPG
40440009_Bailey's_right_palm.JPG
40440012_Bailey's_chest.JPG
40440015_close-up_face.JPG
40440017_Bailey's_backside.JPG
40440018_back_of_head.JPG
40440014_close-up left_side_neck.JPG
Pic chain link over trash enclosure.pdf

I also reviewed weather information from the National Weather Service (NWS) for 7 and 8 July 2001 for Las Vegas, recorded at the McCarran International Airport, which according to Google Earth® is about 3.5 miles from the crime scene. The NWS recording station is 664 meters (2178 feet) above sea level, and according to Google Earth® the crime scene is four meters higher (2191 feet). The weather report indicates that the mean temperature for 8 July 2001 was 84°F (28.9°C), with a maximum of 95°F (35°C) and a minimum of 73°F (22.8°C). Humidity ranged from 23-68%, with a mean of 43%. There was no precipitation. The conditions were mostly cloudy. On that date, sunset occurred at 20:01 h (8.01 pm), civil twilight at 20:31 h (8:31 pm) (when a vehicular driver is legally required to turn on their headlights) and nautical twilight occurred at 21:08 h (9:08 pm), when all lights would be on.

BACKGROUND INFORMATION ABOUT FORENSIC ENTOMOLOGY

Forensic entomology is the study of insects in relationship to law. Medicolegal or medico-criminal entomology is a subset of forensic entomology and is more specifically the study of insects in death investigations with a view, primarily, to estimate the elapsed time since death. Insects colonize remains very shortly after death occurs, and they develop at a predictable rate and colonize in a predictable manner allowing forensic entomologists to interpret these data and provide an estimate of the elapsed time since death (Byrd and Castner 2009).

There are two ways to use insects in estimating elapsed time since death: insect development rates, primarily using blow flies or Calliphoridae (Anderson and Cervenka 2001), and

successional colonization of the body by a variety of species, mostly belonging to the Orders Diptera (true flies) and Coleoptera (beetles) (Anderson 2009).

This case is only concerned with the first method, that of insect attraction to remains and their development.

Blow flies (Calliphoridae) are attracted to remains immediately after death, usually within minutes, assuming that the conditions are appropriate, that is, the death occurred during daylight hours, the weather conditions and the season are appropriate for insect activity and there is nothing preventing insects from accessing the remains (Dillon 1997; Anderson and VanLaerhoven 1996; Dillon and Anderson 1995; Smith 1986; Erzinclioglu 1983; Nuorteva 1977).

Blow flies are attracted to human remains, and any other carrion or meat product, in order to lay their eggs. Eggs are laid within minutes of the remains being located by blow flies, meaning that they are laid within a very short time after death, usually minutes (Dillon 1997; Anderson *et al.* 1996; Dillon *et al.* 1995; Smith 1986; Erzinclioglu 1983; Nuorteva 1977). Blow flies lay their eggs (which are 1-2 mm long and whitish cream/yellow) in clumps. Usually an exposed and bloody body is covered in large eggs masses very shortly after death. These egg masses are very visible to the naked eye and may extend several centimeters or inches in diameter. Blow flies are also attracted to natural orifices in the absence of wounds, where the larvae can feed on the mucosal layer, however, in the presence of wounds, these are usually colonized first. The egg masses frequently obscure wounds or natural orifices.

Insects are attracted to wounds first as the first instar or first stage larvae or maggots which hatch from these eggs in a few hours need to feed on a liquid protein source. Therefore, a bloody wound is extremely attractive to female blow flies and they would be expected to lay large numbers of egg masses on the body.

Insect activity can be limited by a number of parameters. Blow flies are **diurnal** animals, meaning they are **only active during daylight hours**. Several studies have looked at whether blow flies will lay eggs at night and almost all suggest that this does not occur. In mid Michigan, it was found that there was less than a 1% chance of eggs being laid post-sunset (Zurawski *et al.* 2009) and similarly in Nebraska, no eggs were laid and no evidence of fly activity was observed during the dark (Huntington 2008). Researchers in Texas found almost no egg laying at night, except in one trial, where 120 eggs (a very small number, probably from a single female) were laid between 2100 h and 2120 h, but never later (Baldridge *et al.* 2006). This was confirmed in British Columbia recently (Prevolsek 2009) and in Europe (Amendt *et al.* 2008). One author in the US (Greenberg 1990) and others in India (Singh and Bharti 2001) reported a few eggs being laid at night but all other studies have refuted this and their experiments have been criticized methodologically (Prevolsek 2009; Amendt *et al.* 2008). It is, therefore, accepted that blow flies almost never lay eggs at night.

Therefore, if remains are found after dark and show no evidence of insect activity, yet all other conditions are appropriate for insect flight, then it is concluded that the victim died after dark. It has also been noted that insect activity is at its highest during the mid hours of the day. It does not usually begin until several hours after sunrise and trails off as it gets closer to sunset.

Other factors which could limit insect activity include season and temperature. Insects are only usually active in spring, summer or fall in climates that experience a cold winter. In areas where

winter temperatures are warm, insects may be active all year. Insects are cold blooded animals so require external warmth in order to fly. Therefore, if temperature drops belong about 10-12^{o}C (50-53^{o}F) insects cannot fly (Erzinclioglu 1996). In this case, the season and weather conditions were optimal for insect activity. If a body is tightly wrapped (Goff 1992) or inside a house (Anderson In Press), fly colonization can be delayed. However, in this case the remains were only covered by loose paper garbage which would not have provided any impediment to insect colonization.

ASSESSMENT OF THE CASE OF THE STATE OF NEVADA VS. KIRSTIN BLAISE LOBATO

Mr. Duran BAILEY's body was found at approximately 2215 h (1015pm) on 8 July 2001. His remains were found in an outside garbage enclosure under a pile of loose garbage, close to a garbage bin. The scene was outside the Nevada State Bank at 4240 West Flamingo Road, Las Vegas, Nevada, a few blocks from the Las Vegas strip. The trash enclosure was approximately 10 feet x 14 feet with block concrete walls about 6 feet high and it had wide-mesh chain link fencing above it. This would not have provided any impediment to insects.

From the photos I have considered, it is clear that Mr. BAILEY sustained numerous injuries, with many open and gaping wounds, including to the groin where the penis appears to have been amputated. There are also many bloody wounds in the head, face and body, as well as the genitalia. The photos of the scene show a large amount of pooled blood around and under the body. The body was only very loosely covered in what appears to be office waste (paper, cardboard, cups, pop cans *etc*.).

The remains were transported to the Clark County Coroner's morgue after the Coroner conducted her examination of the remains *in situ* at 0350 h 9 July 2001.

I have reviewed the photographs in order to see whether or not insects had located the remains and laid eggs. Although the remains would have been extremely attractive to insects due to the extensive wounds and blood present at the scene, I do not see any evidence of insect activity. In this case, the weather conditions and season were optimal for insect activity, and nothing that can be observed that would have prevented the insects from accessing the body.

In the case of such open wounds I would expect to see large egg masses in the face, head and groin, as well as the wounds in the torso, if the remains had been present and in the condition noted in the photographs during the daylight hours of 8 July 2001. In one photograph, 40440015_close-up_face.JPG, there is one small tiny white object in the left nostril, and a few such specks in the mouth and on the lips. It is *possible* that these are eggs, but they could also be just white specks or an artifact of the photograph. If they are eggs, then it suggests the victim died very close to sunset or complete dark and a single female had begun to lay eggs. I think that it is unlikely that these are eggs, as females lay their eggs in clumps and would very rarely lay them in such a manner. This is the only photograph that I believe shows anything that could possibly be insect evidence.

Also, notes by Las Vegas Metropolitan Police Department Crime Scene Analyst Louise Renhard state: "Beer can partially filled – cockroach infested". This suggests that cockroaches were common in the area, which is to be expected in a garbage area. Cockroach feeding on fresh

remains often cause distinctive marks on the body (Benecke 2001; Haskell *et al.* 1997). No such marks were observed in the photographs I reviewed.

In this case the extensive wounds, accessibility, season and temperature would have made these remains extremely attractive to insects immediately after death if they had been present during the daylight hours. The lack of insect activity and lack of insect eggs show that the remains could not have been present at the scene during the daylight hours of 8 July 2001. The lack of any large insect egg masses indicate that death occurred after sunset, and most probably after nautical twilight, during full dark, that is after 21:08 h (9:08 pm). It could possibly have occurred very close to sunset, but if death had occurred then, I still would have expected to see some insect activity, due to the excessive amounts of blood and presence of large gaping wounds.

CONCLUSIONS

In consideration of the above, it is my opinion as a forensic entomologist, assuming all conditions were as stated, with no unknown confounding factors, that to a reasonable scientific certainty Mr. BAILEY'S death occurred after sunset on 8 July 2001 20:01 h (8.01 pm), and most probably after full dark at 21:08 h (9:08 pm).

I do not believe that it is possible that the remains were present during the entire daylight hours of 8 July 2001.

Dr. Gail S. Anderson
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I reserve the right to make changes to this report as new data are recorded.

REFERENCES

Amendt, J., R. Zehner and F. Reckel (2008). "The Nocturnal Oviposition Behaviour of Blowflies (Diptera: Calliphoridae) in Central Europe and Its Forensic Implications." Forensic Sci. Int. **175**: 61-64.

Anderson, G. S. (2009). Insect Succession on Carrion and Its Relationship to Determining Time since Death. Forensic Entomology: The Utility of Arthropods in Legal Investigations. J. H. Byrd and J. L. Castner. Boca Raton, FL, CRC Press.

Anderson, G. S. (In Press). "Comparison of Decomposition Rates and Faunal Colonization of Carrion in Indoor and Outdoor Environments. ." J. Forensic Sci.

Anderson, G. S. and V. J. Cervenka (2001). Insects Associated with the Body: Their Use and Analyses. Advances in Forensic Taphonomy. Methods, Theory and Archeological Perspectives. W. Haglund and M. Sorg. Boca Raton, FL., CRC Press**:** 174-200.

Anderson, G. S. and S. L. VanLaerhoven (1996). "Initial Studies on Insect Succession on Carrion in Southwestern British Columbia." J. Forensic Sci. **41**(4): 617-625.

Baldridge, R. S., S. G. Wallace and R. Kirkpatrick (2006). "Investigation of Nocturnal Oviposition by Necrophilous Flies in Central Texas." J. Forensic Sci. **51**(1): 125-126.

Benecke, M. (2001). "A Brief History of Forensic Entomology." Forensic Sci. Int. **120**: 2-14.

Byrd, J. H. and J. L. Castner (2009). Forensic Entomology: The Utility of Arthropods in Legal Investigations. Boca Raton, CRC Press.

Dillon, L. C. (1997). Insect Succession on Carrion in Three Biogeoclimatic Zones in British Columbia. Dept. of Biological Sciences. Burnaby. B.C., Simon Fraser University**:** 76.

Dillon, L. C. and G. S. Anderson (1995). Forensic Entomology: The Use of Insects in Death Investigations to Determine Elapsed Time since Death. Ottawa, Ontario, Canadian Police Research Centre.

Erzinclioglu, Y. Z. (1983). "The Application of Entomology to Forensic Medicine." Med. Sci. Law **23**: 57-63.

Erzinclioglu, Z. (1996). Blowflies. Slough, Richmond Publishing Co. Ltd.

Goff, M. L. (1992). "Problems in Estimation of Postmortem Interval Resulting from Wrapping of the Corpse: A Case Study from Hawaii." J. Agric. Entomol. **9**(4): 237-243.

Greenberg, B. (1990). "Nocturnal Oviposition Behavior of Blow Flies (Diptera : Calliphoridae)." J. Med. Entomol. **27**: 807-810.

Haskell, N. H., R. D. Hall, V. J. Cervenka and M. A. Clark (1997). On the Body: Insects' Life Stage Presence and Their Postmortem Artifacts. Forensic Taphonomy. The Postmortem Fate of Human Remains. W. D. Haglund and M. H. Sorg. Boca Raton, CRC**:** 415-448.

Huntington, T. E. (2008). Ecological and Physiological Limitations of Carrion Fly Colonization of Cadavers in Terrestrial Ecosystems. Entomology. Lincoln, Nebraska, University of Nebraska. **PhD:** 62.

Nuorteva, P. (1977). Sarcosaprophagous Insects as Forensic Indicators. Forensic Medicine : A Study in Trauma and Environmental Hazards. C. G. Tedeschi, W. G. Eckert and L. G. Tedeschi. Philadelphia, W.B. Saunders Co. **II:** 1072-1095.

Prevolsek, J. S. (2009). Nocturnal Oviposition of Blow Flies (Diptera: Calliphoridae) in the Lower Mainland of British Columbia, Canada [Ma]. School of Criminology. Burnaby (B.C.), Simon Fraser Univ. **MA**.

Singh, D. and M. Bharti (2001). "Further Observations on the Nocturnal Oviposition Behaviour of Blow Flies (Diptera: Calliphoridae)." Forensic Sci. Int. **120**: 124-126.

Smith, K. G. V. (1986). A Manual of Forensic Entomology. London, Trustees of The British Museum (Nat. Hist.) and Cornell University Press.

Zurawski, K. N., M. E. Benbow, J. R. Miller and R. W. Merritt (2009). "Examination of Nocturnal Blow Fly (Diptera: Calliphoridae) Oviposition on Pig Carcasses in Mid-Michigan." J. Med. Entomol. **46**(3): 671-679.

Province of British Columbia)
) ss.
City of Burnaby)

I swear under penalty of perjury that the statements and opinions above are true and correct to the best of my knowledge and belief.

Signed this 17 th day of December, 2009.

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DR. GAIL S. ANDERSON, PROFESSOR,
ASSOCIATE DIRECTOR, SCHOOL OF CRIMINOLOGY

Curriculum vitae Summary

Board Certified: Diplomate, American Board of Forensic Entomology (one of ~16), on Board of Directors

Education: PhD – Entomology, 1992,
M.P.M – Entomology, 1986,
B.Sc. (First Class Hons) – Zoology, 1983

Awards: 10 since 1995, including Burnaby Mountain Professorship, Derome Award (highest honour offered by Canadian Society of Forensic Sciences)

Research Publications:

• Books	1
• Book Chapters	11
• Refereed Journal Articles	36
• Invited Journal Articles	9
• Technical Reports	11
• Book Reviews	10

Research Presentations:

• Keynote/Plenary Invited Talks	29
• Invited Talks	234
• Invited Workshops	44
• Conference Presentations (31 Invited)	90

Research Student Supervision, Senior Supervisor

• PhD (present)	3
• MA (present)	1
• MA (completed)	10
• MPM (completed)	2
• M.Sc. (completed)	1
• Hons. (completed)	12

Research Student Supervision, Committee Member

• PhD (present)	5
• PhD (completed, 2 overseas)	3
• MA (present)	1
• MA (completed, 1 international)	6
• MPM (completed)	3
• M.Sc. (present, external to SFU	1
• M.Sc. (completed, 2 external to SFU)	3
• Hons. (completed)	4

External Examiner (International, Invited)

• Ph.D.	2
• M.Sc.	3

Director of Society

• President, North American Forensic Entomology Society	2009/2010
• President, Canadian Society of Forensic Science	2008
• President, Entomological Society of B.C.	1995/6 and 2002/3

Qualified in Court as Expert Witness 25

EXHIBIT 2

Forensic Entomology Investigation Report

Deceased: BAILEY, Duran
Age: 44 Sex: Male
Race: African-American

Case No.: ENT-08010
Date: February 11, 2010

In regards to the case of: The State of Nevada vs. Kirstin Blaise Lobato, Eighth Judicial District Court, Clark County, Nevada, No. C-177394.

Requesting Agency: Justice Denied - PO Box 68911 Seattle, WA 98168

Participating Entomologist: Linda-Lou O'Connor, PhD, Department of Entomology
Medical & Veterinary Entomology, University of Kentucky
Location: Institut of Louis Malarde Paea, Tahiti French Polynesia
Contact: lindaloufly@gmail.com Skype: (803) 335-2116

Summary of Conclusions

There is no photographic evidence indicating cockroaches were on or directly around the decedent. Upon close examination of the scene and autopsy photographs, there was no clear indication that cockroaches fed on the decedent.

There was no visual evidence of Dipteran (fly) activity based on the 18 photographs provided, The lack of adults, eggs, and larvae in the families Calliphoridae (the blow flies) and Sarcophagidae (the flesh flies) indicates that colonization of these first arriving species had not yet taken place at the time of discovery. It is possible that a few eggs and/or larvae are undetectable from the images provided; however, the accumulation of adults and egg deposits on remains that originate during diurnal activity are not present. Based on the lack of colonization of blow flies and/or flesh flies, estimated postmortem interval is after sunset, which was at 8:01 pm on July 8, 2001.

Linda-Lou O'Connor
Medical Entomologist

Contact: Hans Sherrer; Editor and Publisher, Justice Denied

Evidence Received by: Dr. Linda-Lou O'Connor, Medical Entomologist

Evidence Submitted:
Received via e-mail on January 25, 2010
Photographic Evidence. All photographs were received in jpeg (JPG) format.

1. 40440018_back of head
2. 40440017_Bailey's backside
3. 4044015_close-up face
4. 40440014_close-up left side neck
5. 40440012_Bailey's chest
6. 40440009_Bailey's right palm
7. 40440008_Bailey's left hand
8. 40440006_Bailey's right hand
9. 40440004_Bailey's left palm
10. 40430022_Bailey's body
11. 40400015_Bailey's backside
12. 40400014_Bailey's body
13. 40400009_Bailey's groin
14. 40400007_Bailey's face
15. 40400005_bailey with garbage
16. 40400002_Bailey as found
17. 40390017_blood at scene
18. 40390006_outside trash enclosure

Additional Information Received. All received in PDF format.

1. Autopsy Report and Coroner's Crime Scene Report – 07-09-2001
2. Crime Scene Evidence w diagram of location found – p2.
3. Louise Renhard testimony about 15-18 cockroaches in beer can – State v Lobato, C1777394 – 05-13-02 – IV-95, line 12
4. Weather in LV -07-08-2001 (NWS Summary)

Case Summary

- The remains were found between 10 pm and 10:30 pm on July 8, 2001
- Location: Next to a dumpster inside the 10'x14' exterior trash. Las Vegas, Nevada.
- Trash was heaped around the body that was covered with cardboard.
- The Coroner's Investigator conducted her crime scene examination of the body at 3:50 am. Most of the crime scene photos were taken around 3:50 am on July 9, 2001.
- Weather Information: 89° F (39.7° C) and 34% humidity when the body was found. Sunset was at 8:01 pm, and it was fully dark at 9:08 pm

- A Las Vegas MPD crime scene analyst found 15 to 18 cockroaches in a partially filled beer can that was 3' to 4' from the body.

Review of Evidence

All photographs were examined using both Preview© v 4.2 and ImageJ 1.41o. Photographs viewed in Preview could be increase to 115% before they became too grainy, while those in ImageJ could be increased to 100%. A handheld Fisher Scientific magnifying glass (magnification range from 3x to 10x) was used to enhance images.

There were no visual signs of insect activity at the scene based on the six photographs provided as evidence. No adult carrion flies, larvae or eggs are discernible in the images. Specifically and based on an excerpt from court testimony, there were no visual evidence of adult or immature cockroaches at the scene.

A review of the 12 autopsy photographs reveals no evidence of adult or immature insects. It appears there was no insect (particularly flies in the family Calliphoridae) eggs oviposited (egg laying) on the remains. However, due to the small size of Calliphoridae eggs it is possible they were not detectable in the images. The autopsy report does not indicate any presence of insect eggs or larvae, although it is unknown if this would be documented by the reporting agency.

Insect Behavior and Development

Cockroaches, insects in the order Blattaria, are scavengers that exhibit aggregate behavior. They are mainly nocturnal and will disperse when exposed to light. In general, they are omnivorous with opportunistic feeding habits (1). Opportunistic feeding can occur on living as well as deceased persons (2). Skin lesions caused by cockroaches are well-circumscribed, irregular lesions of the epidermis (3). These lesions can have a reddish-brown appearance to a pale appearance depending on the time after death that the feeding occurred (4).

Dipteran (flies) in the family Calliphoridae are usually the first insects to arrive after death. This can occur within minutes or hours after death (5). The presents as well as absence of these species can assist in determining the postmortem interval (PMI) estimate. Flies in the families Calliphoridae and Sarcophagidae (flesh flies also known to be attracted to remains shortly after death) begin their activity after daybreak (late morning) are most active in the afternoon with activity declining sharply at or just before sunset (6-10). Nocturnal oviposition/larviposition (egg/larval laying) is an unlikely event for these flies (6, 11-15).

Analysis

According to courtroom testimony from Louise Renhard, there were 15-18 cockroaches found inside a beer can at the scene. There is no photographic evidence that indicates the cockroaches were on or immediately around the decedent. It is possible they dispersed before the scene was photographed because cockroaches tend to scatter when exposed to light or sudden movement. This would have been observed at the crime scene particularly when the debris covering the decedent was removed. Upon close

examination of the scene and autopsy photographs provided, there was no clear indication that cockroaches fed on the decedent.

Based on the photographic evidence, there was no visual verification of fly activity. The lack of adult flies and eggs indicates that colonization had not yet taken place at the time of discovery. It is possible that a few eggs are undetectable from the images provided; however, the accumulation of adults and egg deposits on remains that originate during diurnal activity are not present. This supports a PMI estimate after sunset, which was at 8:01 pm on July 8, 2001.

Literature Cited

1. Bell,WJ, LM Roth, and CA Nalepa, 2007. Cockroaches: Ecology, Behavior, and Natural History. Baltimore: The Johns Hopkins University Press.
2. Roth LM, Willis ER. 1957. The medical and veterinary importance of cockroaches. Smithsonian Misc Coll. 134(10);1-137
3. Froede RC. 1990. Handbook of forensic pathology. U.S.A.: College of American Pathologists, p. 344
4. Denic, NN, DW Huyer, S Sinal, PE Lantz, CR Smith, MM Silver. 1997. Cockroach: The omnivorous scavenger: Potential misinterpretation of postmortem injuries. Am J Forensic Med Pathol. 18(2): 177-180.
5. Byrd, JH and JL Caster. 2001. Insects of forensic importance. In *Forensic Entomology: The Utility of Arthropods in Legal Investigations.* (Eds. JH Byrd and JL Caster) CRC Press, Boca Raton, FL.
6. Byrd, JH. 1998. Temperature dependent development and computer modeling of insect growth: its application to forensic entomology. Gainesville, FL: University of Florida, 1998.
7. Nuorteva P. 1959. Studies on the significance of flies in transmission of poliomyelitis III. The composition of the blow fly fauna and the activity of the flies in relation to the weather during the epidemic season of poliomyelitis in South Finland. Ann Entomol Fenn. 25:121-36.
8. Baumgartner, DL, B Greenberg. 1984. The genus *Chrysomya* (Diptera: Calliphoridae) in the New World. J Med Entomol. 21(1): 105-13.
9. Baumgartner, DL, B Greenberg. 1985. Distribution and medical ecology of the blow flies (Diptera: Calliphoridae) of Peru. Ann Entomol Soc Am. 78 (565-87).
10. Haskell, NH. 1993. Factors affecting diurnal flight and oviposition periods of blow flies (Diptera: Calliphoridae) in Indiana. Washington, DC. Purdue University.
11. Tessmer JW, Meek CL, Wright VL. 1995. Circadian patterns of oviposition by necrophilous flies (Diptera: Calliphoridae) in southern Louisiana. Southwest Entomol. 20(4):439–45.
12. Stamper T, DeBry RW. 2007. Nocturnal oviposition behavior of carrion flies in rural and urban environments: methodological problems and forensic implications. Can Soc Forensic Sci J. 40(4):173–82.
13. Baldridge RS, Wallace SG, Kirkpatrick R. 2006. Investigation of nocturnal oviposition by necrophilous flies in central Texas. J Forensic Sci. 51(1):125–6.
14. Spencer J. 2002. The nocturnal oviposition behavior of blow flies in the south-west of Britain during the months of August and September. Bourne-mouth: Bournemouth University.
15. Amendt J, Zehner R, Reckel F. 2008. The nocturnal oviposition behavior of blow flies (Diptera: Calliphoridae) in Central Europe and its forensic implications. Forensic Sci Int. 175:61–4.

EXHIBIT 3

Email from Dr. M. Lee Goff, March 12, 2010, regarding his review of documents and photographs in the case of Kristin Blaise Lobato.

From:"Lee Goff" <lgoff@netserver05.chaminade.edu>
To:"Hans Sherrer" <hsherrer@justicedenied.org>
Subject:Re: Kirstin Blaise Lobato case
Date sent: Fri, 12 Mar 2010 09:34:14 -1000

Aloha - I have now reviewed the materials you sent and Dr. Anderson's report. In reviewing these, I find that I am in agreement with her. Given the temperatures, I can not see how the body, in the condition indicated by the images, could have remained uncolonized. This is not to say that it is completely impossible but highly unlikely. When dealing with nature, sometimes things happen. In this case, very unlikely that the body would not have been colonized. I did not see any indications of cockroach activity on the body in the images. Aloha, M. Lee Goff

EXHIBIT 4

STATE OF NEVADA v BLAISE LOBATO

AFFIDAVIT FOR PETITIONER

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STATE OF NEVADA

In the Eighth Judicial District
CLARK COUNTY

State of Nevada	
Vs	
	No. C177394
Kirstin Blaise Lobato,	

AFFIDAVIT

INTRODUCTION

My name is Glenn M. Larkin. I am a physician licensed to practice medicine in the State of North Carolina. I am board certified in Forensic Medicine by the American Board of Forensic Medicine and a Fellow of the American College of Forensic Examiners. Among my publications is "Time of Death, "and "Sharp Force Trauma" in Wecht, C.H., *The Forensic Sciences*, Matthew Bender, New York; (1997).

I have reviewed the autopsy protocol of the body of Duran Bailey made by Dr. Larry Simms (Autopsy Report, 09 July 2001). I have reviewed the crime scene preliminary examination of the body of Duran Bailey by Clark County Coroner's investigator Shelley Pierce-Stauffer (Report of Investigation, 09 July 2001). I have also reviewed some of the scanned reproductions of color photographs and trial testimony, including testimony of Dr. Simms.

It is my opinion to a reasonable medical certainty that there is not enough data to form an estimate of the time of Mr Bailey's death, and by implication with other evidence that Ms Blaise Lobato did not kill Duran Bailey. A full report follows..

> Forensic Pathology, like the rest of medicine is more of an art than a science. While scientific principles can be used to help diagnose and treat disease, and the barrier between known and unknown is shrinking the unknowns, there is still a vast uncharted

wilderness in our understanding of the changes that we call disease, or injuries.

I

THE CRIME SCENE INVESTIGATION

The body of Duran Bailey, a 44-year-old Black homeless man, was discovered by a passerby lying under some trash in a trash enclosure about 10:30 pm Sunday, 08 July 2001. The trash enclosure was on the parking lot of the Nevada State Bank near the intersection of West Flamingo Road and Arville Street in Las Vegas, Clark County Nevada.

The enclosure is an approximately 10 x 14 foot area with concrete block walls on three sides, and a metal gate on the fourth. According to Pierce-Stauffer, this semi-nude mutilated body was supine on the concrete floor, covered with debris when she examined it at 03:50 am Monday, 09 July 2001. Bailey's penis was cut off and placed nearby, his ano-recto-sacral region was cut open, and multiple cuts were on the head, neck and torso, his lower abdomen was "skinned". A partially burned cigarette was found on Bailey's right thigh.

The enclosure' walls were blood spattered (not measured) and considerable blood was on the floor where Bailey's head was lying (unmeasured). Bailey's skin was "cold" to Ms Pierce-Stauffer's touch, and she described "stiff" rigor mortis. She did not detect any lividity.: During the day 08 July 2001 to 0350 am 09 July 2009, the ambient temperature hovered around 90°F and the relative humidity was below 50%. No identifiable odors were detected, and blow flies (Diptera, Saliforidae) were significant by their absence, as was the absence of predatory animal bites.

Noted are two sets of bloody footprints, neither of which match Lobato's shoe size.

Pierce-Stauffer and an unnamed Crime Scene Analyst (CSA) removed the garbage covering the body layer by layer and retained some if it for analysis. After appropriate paper work, and photography, the remains were placed on a fresh white sheet, and into a disaster bag for transportation to the Clark County Coroner/Medical Examiner's Office for autopsy.

II

THE AUTOPSY

Larry Simms, DO, started an autopsy with accession number 01-04231 starting at 12:00 noon 09 July 2001, or approximately 14 hours after discovery, and 8 hours after preliminary examination by Ms Pierce Stauffer. There is no indication when Bailey's body was placed in the cooler until autopsy. Dr Simms dictated a nine-page detailed narrative protocol but left out certain pertinent details that make evaluation difficult. He did not see the body in its pristine state where found, and therefore relied on Ms Pierce-Stauffer's description of what she saw.

THE CAUSE OF DEATH

Dr Simms ascribes the cause of death to "Cranio-cerebral injuries."

The left parietal skull demonstrates a remote bone: flap craniotomy.

> There is no follow up to find out when and for what the operation was performed.

The sub-scalp soft tissue demonstrates scattered hemorrhages in the right and left: lateral areas; the left *temporalis* muscle demonstrates scattered hemorrhages; the right side of the head has more 'hemorrhages than the left.

The occipital sub-scalp demonstrates a broad area of dense hemorrhage and hematoma formation.

> Photograph № 40440018 enlarged, exhibits two (2) lacerations over the occipital vertical plate, which is over the diffuse hemorrhage as seen in photograph № 40460008. These two lacerations, angled differently on the skin exhibit no hemorrhage within the wound borders, represent two separate transfers of energy. This could be caused by the moving head striking the concrete curb in the enclosure, or a blow with a club. In the absence of minute concrete particles in the wound, the latter is more probable

The membranous compartments of the cranial cavity demonstrate broad areas of subdural hemorrhage over the cerebral hemisphere with extension onto the base of `the brain;-the: estimated total bilateral subdural hemorrhage volume is 80- 100 milliliters.

> As described, this bleeding is more likely due to blow(s) to the head; the extension into the "brain base" >sic< is potentially fatal if Dr Simms means the secondary hemorrhage into the nuclei in the ponto-medullary area. These sometimes called Duret hemorrhages are a secondary phenomena, and take some time to develop.

The brain demonstrates generalized patchy subarachnoid hemorrhage.

The left side of the skull demonstrates a linear skull fracture extending posteriorly from the temporal bone, through the parietal bone and into the occipital bone; a few small fractures radiate from the dominant curvilinear fracture.

> Dr Simms does not state if the fracture is displaced or not, or if there is identifiable epi-dural hemorrhage associated with it. The fracture line, as seen in photograph № 40460009 and 40460010. He does not identify or photograph the remnants of the bone flap craniotomy. The point of maximal impact appears to be where a fracture line branches off from the main (primary) fracture line.

Although the brain was removed and retained for fixation, a report of the internal structures is not included in this protocol. Yet Dr Simms lists the proximate cause of death as "cranio-

cerebral injuries''. He does not describe or even mention any cortical contusion, contusion hemorrhage or contusion necrosis, nor does he describe any cerebellar-tonsillar or other herniation, expected with severe head injury.

> The combined intra-cranial hemorrhages — i.e. sub-dural, sub-arachnoid and "brain stem" hemorrhages are potentially fatal over a period of time, but with no mention of cerebellar tonsillar herniation through the foramen magnum, or other herniations, there does appear to be a mass effect to cause death. Diffuse Axon Injury (DAI) cannot be ruled out however.

THE CAROTID ARTERY INJURY

The severed (common) carotid artery is given minimal mention. This artery is bilateral, hugging the trachea and larynx until it divides into two branches. It is in a tunnel of connective tissue next to the internal jugular vein and the vagus nerve.

> Bleeding from it is brisk and plenty, and would result in death in short order on its own if not treated. If the blood is retained in the neck, in one of the fascial compartments, Bailey could have suffocated to death. In the event, there was considerable (unmeasured) blood loss at the scene--- estimated from the photographs at between 1-2 quarts. Judging from the blood loss patterns, Bailey was supine when his neck was stabbed.

INJURIES IN GENERAL

The description of any injury follows Mallory's dicta —, SIZE, SHAPE, COLOR, and CONSISTANCY. Every injury that is visible has at least two measurable dimensions, height, width, and occasionally depth. Dr Simms fails to supply all parameters. It is acceptable to describe several wounds together, using a maximal and minimal measurement of a particular group of wounds. Incised wounds and lacerations tend to spread if oriented perpendicular to Langer's lines, so a knife wound should be measured after being closed with Scotch tape. These measurements were not taken. With many incised wounds and lacerations. Measurements can be collective, with a maximum and minimum size described. Dr Simms was not remiss by lumping several wounds together, and in the absence of evidence to the contrary, his measurements are accepted as valid. Note however that because of the elasticity of the skin, two people measuring the same wound will not necessarily agree on measurements. Measuring the clothing worn gives a better estimate of the weapon's size and other characteristics.

1. **The abdominal wounds** appear to be superficial, except for one, said to be post-mortem by Dr Simms, which does penetrate the liver's left side.

> NB: The liver is ***NOT*** on the left side of the abdomen, unless Mr Bailey has a ***situs inversus***, not mentioned in the autopsy protocol. The left sub-phrenic space is occupied by the **spleen.** The liver's

left lobe does cross the mid-line for a variable amount, but the liver's bulk is on the right side of the body.

2. **The penectomy** (amputation of the penis) is casually described; No mention of any pathology in the glans, foreskin or shaft is mentioned Nor was the characteristic of the amputation line described.

> The amount of skin --- covered by dense hair--- attached to the cut end of the penis—"surgical margin"-- is much smaller than the defect seen on the distal abdominal wall. This suggests two separate acts of mutilation. Removal of the penis at its base could be accomplished with one hand holding the weapon, the second hand stretching the skin—the second mutilation, similar to skinning an animal--- required one hand to stretch the skin, and the other hand to cut through the sub cutis on the stretch. The perpetrator either had some medical knowledge, or experience skinning an animal. Blaise Laboto was squeamish at the sight of blood
>
> Given the poor lighting, it suggests that a third hand was involved to supply light, or that the perpetrator(s) has a head lamp. The skin fragment was not found.

3. **Note:** The loss of scrotal skin suggests that it occurred after the penis was removed;

A second superficial incised wound is identified on the surface covering the left testicle. Although the testicle is described as being hemorrhagic, no reaction is seen on or in the skin wound.

The scrotum demonstrates a stab wound measuring 1.75 inches in dimension; dissection of the scrotal sac and testicles demonstrates broad areas of hemorrhage associated with testicular parenchymal hemorrhage.

The penis is amputated at the base; dissection of the margins of-the-wound-does not demonstrate hemorrhage.

4. The **ano-rectal** mutilation is not well described nor photographed; the incision depth is not mentioned, nor if any sphincters were cut. Dr Simms does note a lack of bleeding in the wound borders. The one photograph in the protocol is not revealing:

The anus and perineum demonstrate a complex, generally longitudinal, incised wound measuring 5.75 inches in dimension; dissection of the wound shows no evidence of hemorrhage. Several silver-coated pliable paper-like fragments are recovered from the depths of the wound; the wound extends from the apex of the intergluteal fold to the base of the scrotum.

Based on the autopsy descriptions, there is no apparent documented cause of death.

TIME OF DEATH

Crucial to the state's case is a close approximation of Mr Bailey's death; there is little data to evaluate. There is no quick fix, no elaborate formula to plug into a computer to get an estimate with certainty, so that any opinion carries with it a high level of uncertainty. Add to this uncertainty is the fact that Bailey could have lingered a while after the attack, in shock before he died.

The four captains of the Men of Death are ALGOR (the chill of death), LIVOR (the stain of death) RIGOR (the stiffening of death) and DECOMPOSITIO (the decay of death) are not helpful in this case.

The limiting factor of all change is temperature; the surrounding environment controls the rate with which RIGOR, ALGOR and to a lesser extent LIV0R develop in a dead body. Touching the forehead and a covered part of the body with the back of the hand, in experienced hands can determine if the skin is hot, cool or cold. The temperature change, *ceterus parabus*, is related to the body temperature at death, and the ambient temperature. However in extremely cold weather, the skin can cool rapidly. In temperate temperature, it takes about 18 hours for the body to equilibrate with the environment.

1. The only measurements taken at the scene were by Ms Pierce-Stauffer at approximately 03:50 am the morning of 09 July 2001; At that time, she reports a body that was cold, was stiff and did not detect livor because of the pigmentation in a Black person. "Cold" is a relative term, and is subjective, as is the degree of rigor, and the ability to detect livor in a person of color.

2. At 12:00 noon, Dr Simms states that there was no rigor (rigor lysis) ; he did detect some livor, both anterior and posterior. He also detected some skin slippage on the body, and what he calls, without defining further "decomposition changes''.

The changes that occur after the death of an individual follow a stereotypic sequence, the major determining variable being the environmental temperature. Accompanying this are National Weather Service provided

records with hourly temperature values for the day in question. Assuming that the recorded temperature is close enough to the temperature at the crime scene, the afternoon of Sunday 08 July 2001 to midnight dropped from 95°F to 85°F, and from midnight 09 July to 03:50 am, 85°F to 81°F. This means that Bailey's body temperature never dropped below 81°F as a theoretical minimum. The skin temperature never dropped below 81°. The inner core temperature never approached 81°F, which is scarcely "cold". The practical significance is that all the captains of death moved at an accelerated pace, and although Bailey's body may have been "cool" to Ms Pierce-Stauffer's touch, the body was not "cold".

> The "cold skin described by Ms Pierce-Stauffer can occur when for one reason or another, blood is shunted from the skin to the viscera, as in blood loss, and shock, caused by any number of reasons. An example of this in the living is a person who leaves the warm comfort of home and enters a snow storm; within minutes, his hands, if ungloved his earlobes if not covered, and his nose feel cold. The skin temperature can be misleading in a dead body, and has to be evaluated cautiously. "Cold" is a subjective term in this case, and since the body temperature never approached the lowest ambient temperature, the statement that the skin was "cold" at discovery is refutable.

Rigor is a fickle sign, and cannot be used alone to determine the estimated time of death. A person actively involved in exercise—as in a fight for life--- will enter RIGOR quicker than a person not exercising. See table of rigor mortis according to twenty experts.

"Decomposition changes" is a vague term and does not yield any information. In a torrid environment, and a body exhibiting open wounds – either post-mortem, peri-mortem, or ante-mortem, decomposition can be accelerated, if the dead person was involved in extreme exercise just prior to death, or has a systemic infection. Dr Simms did detect, and photographs confirm isolated areas of skin slippage.

CONCLUSION AND OPINION

Based upon the material I received, the determination of an estimated time of Durand Bailey's death, is tenuous at best, because of a lack of data with which to work. Should new evidence be made available, this opinion could be subject to change to reflect the new data

It is my opinion to a reasonable medical and scientific certainty that

1. Bailey was killed in the evening, a few hours at most before he was discovered, more likely than not within two hours before discovery, perhaps at dusk. The lack of blow fly infestation suggest an even shorter time between Bailey died and was discovered. This opinion has to be tentative because of a paucity of data. Bailey was not doused in gasoline to prevent blow-fly attack
2. There is a good probability that more than one person was involved in this attack and murder,. At least one perpetrator was skilled either with medical knowledge or animal husbandry to effect the mutilation of Bailey's groin area.
3. Bailey put up a spirited defense against his attackers, judging from the defense wounds on his fingers;'
4. Because no brain sections were made, the timing of the head wounds with respect to the other wounds cannot be determined;
5. A single edged knife, either a non serrated kitchen knife, a butcher knife or hunting knife was used to inflict the knife wounds; there are no choil or tang impressions on the skin.
6. Bailey survived either conscious or not, a short time after being attacked
7. Because of the disparity of size, and Labato's squeamishness to blood, it is unlikely that she could have defended herself against a street wise Bailey.
8. There is absolutely no evidence to suggest that Bailey was doused in gasoline during or after the attack.

Respectfully, 5 January 2010

G M Larkin MD

3700 Shamrock Dr
Charlotte NC 28215

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY/ SS

I swear under penalty of perjury that the statements and opinions above are true and correct to the best of my knowledge and belief.

Signed this ___5th____ day of January 2010

G M Larkin MD

Glenn M. Larkin, M.D.

3700 Shamrock Dr.

Charlotte, NC 28215

704-940-8818

STATE v LOBATO VICTIM BAILEY- SUMMARY OF LESIONS
nos = Not Otherwise Specified

HEAD & NECK

DR EXHIBIT No.	WHERE	WHAT	size(inches), color	COMMENT
1	back of scalp	contusion	2.5 x ?, blue-violet	nos
2	neck, left, postero-lateral	incised,curvilinar	4.5 x ?	superficial
3a	face, left	abrasions, contusions	area 5x 4	superficial
3b	face, left	curvilinear, "scratches"	scattered area 2 x 3	superficial
3c	face, left	abrasions, contusions	curvilinear-area 2 x3	superficial
4a	face, right	abrasions, contusions	area 4 x 6	superficial
4b	face, right	"scratches"	scattered area 2 x 3	superficial
5	nose	"bloody nose" epitaxis	nos	nos
6	forehead anterolateral right	stab	1.2 x?	deep to galea
7	chin, left	stab	1.2 x ?	superficial
8	neck, anterior	stab	0.6 x ?	superficial ?
9	nose, bridge of	abrasion,	0.25 x ?	superficial
unnumbered	neck, right anterior	stab wound	?	penetrates common carotid artery-fatal
10	forehead, right lateral	abrasions (2)	1.1 x ?, 0.5 x ?	supeficial
11	ABOVE RIGHT EYE"	incised wound	1.2 x ?	nos
12	"in relation to left eye"	incised wound)s) multiple	max 1.6 , transverse	nos
13	lips	contusions, abrasions	multiple, nos	nos
14	"maxillary arch", teeth	fractures, avulsions	multiple nos	nos
15	chin	incised wound	0.75, multiple extensions	superficial
16	scalp, left parietal	osteoplastic bone flap craniotomy nos	nos	scar
			CHEST & ABDOMEN	
1	mid and lower abdomen	"pressure marks"- parchment changes		nos
2	chest, upper left	incised wound	2.8 x ? Curvilinear	superficial
3	shoulder, left	abrasions	curvilinear	superficial
4	costal margin "upper abdomen"	stabs (4)-	0.6 x 0.9 maxum, curvilinea	no hemorrhage on wound borders; 4x3 hemorrhage in subcutis
4a	liver, left lobe	stab,	? X?	superficial
5	back, left upper	abrasions	scattered	superficial
			PELVIS	
1	anus & perineum	incised wound(s) irregular	5.75 x ?	superficial; no hemorrhage; extends down inter gluteal fold to scrotum; anus not visible
2	scrotum, right testicle	stab,	1.75 x ?	one blumt end; hemorhage in testicle
3	penis	amputated	no measurements	no hemorrhage associated

Rigor mortis is the "stiffening" of muscle tissue after death. It is a temporary development, and is one of the most fickle signs of death, easily misleading those whose rely on it exclusively. Furthermore no two experts agree on the timetable on its appearance and departure (Table 25B-2)

AUTHORITY LOCALE	PARAMETERS OF RIGOR MORTIS (HRs FIRST DETECTED	REACHES PEAK	LAST DETECTED(LYSIS)
Adelson (OHIO)	2-4	6-12	24-48
Anderson(TEXAS)	4-10	Not specified	36-48
Camps Gradwohl (LONDON)	6	9	26-48
Coe	2-3	6-8	12-26
DiMaio & Dimaio NY	2-4	6-12	24-144
Eckert(KANSAS)	2	12	36-48
Fatteh(NORTH CAROLINA	6	12	36
Fisher(MARYLAND)	Not specified	4-12	36
Gerberth(NEWYORK)	2-4	8-12	36-60
Gonzales...Helpern(NY)	2-6	Not specified	12-48
Gresham-ENGLAND	2-5	12	48
Hughs-PITTSBURGH	2-5	8-18	32-42
Ludwig-MINNESOTA	5-10	6-8	18-42
Moorehead-NORTH CAROLINA	5-10	Not specified	36-28
O'Hara & O'Hara	0.25-15	12-18	36
Parikh (Bombay)	2-3	15	38
Rentoul & Smith	Not specified	10-12	36-48
Sandritter-ONSABRUCK	5-7	12-18	24-36
Simpson, KeithLONDON	3-5	8-12	32-36
Snyder, LemoyneMICHIGAN	3-5	8-12	32-36
Watson	2-3	6-12	144
Wecht & Larkin-PITTSBURGH	0.5-6	6 -16	24-96

These values represent the earliest time rigor was first detected (column 1) and when latest detected (column 3). It does not reflect the nukber of cases in each expert's opinion. The high values may represent one case of many

From Larkin G, Time of Death, in The Forensic Sciences, editied by Wecht, C.W, Batthew Bender, New York, 1982

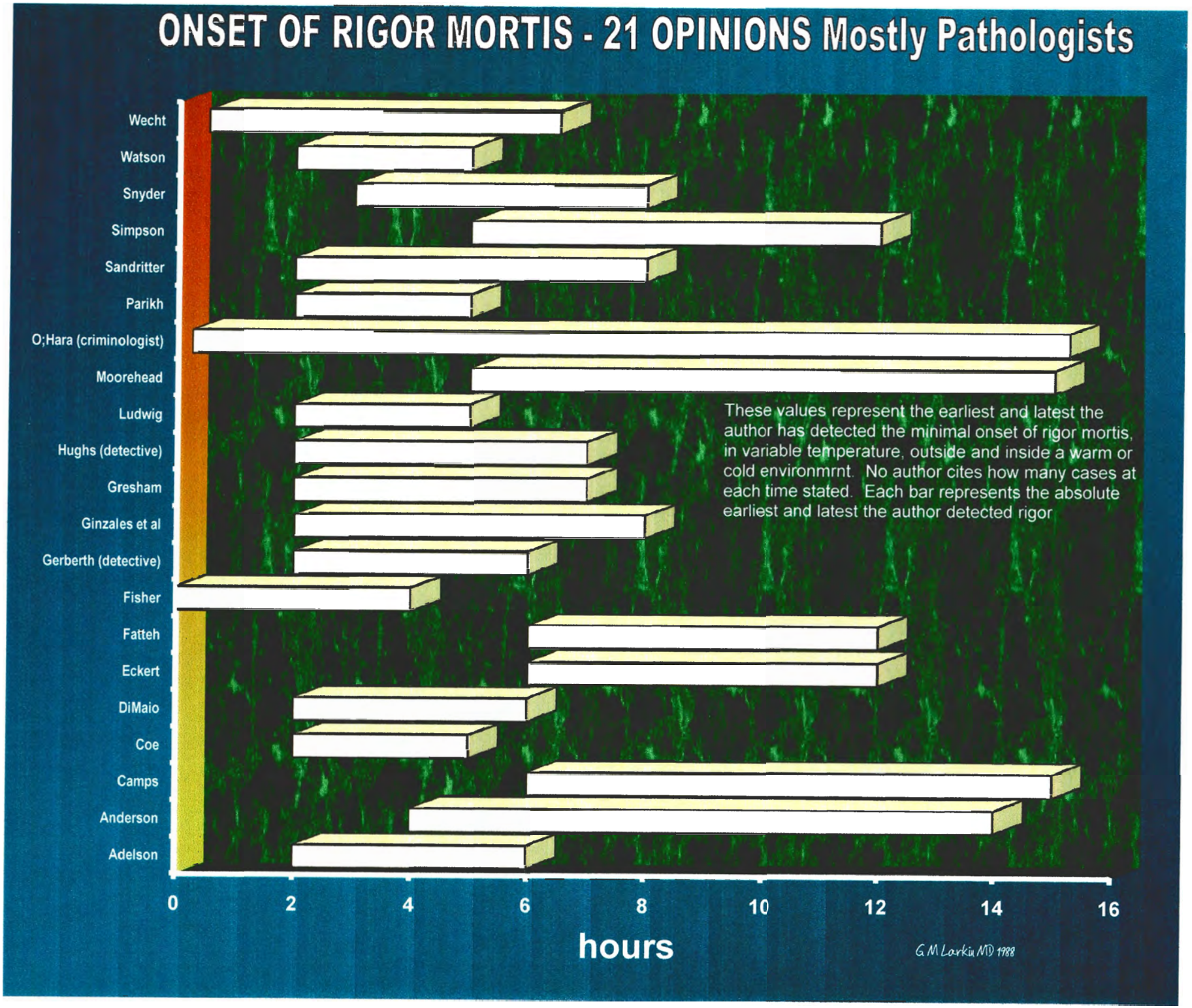
ONSET OF RIGOR MORTIS - 21 OPINIONS Mostly Pathologists
Wecht
Watson
Snyder
Simpson
Sandritter
Parikh
O;Hara (criminologist)
Moorehead
Ludwig
Hughs (detective)
Gresham
Ginzales et al
Gerberth (detective)
Fisher
Fatteh
Eckert
DiMaio
Coe
Camps
Anderson
Adelson
These values represent the earliest and latest the author has detected the minimal onset of rigor mortis, in variable temperature, outside and inside a warm or cold environmrnt. No author cites how many cases at each time stated. Each bar represents the absolute earliest and latest the author detected rigor
0
2
4
6
8
10
12
14
16
hours
G M Larkin MD 1988

EXHIBIT 5

UNIVERSITY AT ALBANY
State University of New York

School of Criminal Justice

February 10, 2010

Hans Sherrer
Editor and Publisher, Justice Denied
P.O. Box 68911
Seattle, WA 98168

Dear Mr. Sherrer:

At your request, I reviewed several materials from the Kirstin Blaise Lobato case. More specifically, these materials included:

1. The transcript of Ms. Lobato's Statement of July 20, 2001.
2. The audio of Ms. Lobato's Statement of July 20, 2001.
3. "Facts of Duran Bailey's Murder on July 8, 2001".
4. "Circumstances of Kirstin Blaise Lobato's Statement of July 20, 2001"
5. Portion of the transcript of Las Vegas Metro PD Detective Thomas Thowsen's testimony
6. Affidavits from Kimberlee Isom Grindstaff and Stephen William Pyszkowski
7. Portions of your book of this case (Tables 1 and 2, Physical Landmark)

I am an Assistant Professor in the School of Criminal Justice at the University at Albany, State University of New York. The School is currently ranked the Number 2 program in the nation for Criminal Justice according to U.S. News and World Reports. Prior to my current employment, I was employed at Policy Research Associates and the Department of Psychiatry and Behavioral Sciences at Stanford University School of Medicine. I received my doctoral degree from University of California, Davis in Developmental Psychology, with a focus on psychology and law. I am a recognized expert in the area of police interviewing and interrogation practices, false confessions and miscarriages of justice. For more than a decade, I have conducted research on and written extensively about the social psychology of police interrogation and the causes and consequences of police-induced false confessions. In this time, I have researched, written and published numerous peer-reviewed articles on interrogation and confession in scientific journals and in scholarly books, as well as giving invited presentations at national conferences. I am one of six experts who authored a scientific "white paper" on police interrogations and false confessions for the American Psychology Law Society, a Division of the American Psychological Association.

Recently, an alarmingly high incidence of wrongful convictions has been documented in the U.S., in large part due to "Innocence Projects," many of which utilize analyses of DNA from crime scenes to exonerate innocent persons. The best-known Innocence Project, administered through the Benjamin Cardozo School of Law in New York, to date has helped to free 250 people who have been wrongfully convicted. Approximately 25% of these cases involved false confessions or false admissions. Because of these realized and proven miscarriages of justice, the amount of research conducted on false confessions in the past 10 years has burgeoned and findings are generally accepted among scientists. Several comprehensive reviews and edited volumes have been published, including (but not limited to) Gudjonsson (2003); Kassin (2005); Kassin & Gudjonsson (2004); Lassiter (2004); Lassiter & Meissner (in press); Leo (2008). The literature cites over 300 identified false confession cases; however, most experts agree that this number represents only the tip of the iceberg.

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From reviewing the materials, it is my expert opinion that Ms. Lobato was not confessing to the murder of Mr. Bailey. Rather, she was "confessing" to an assault in which she was the alleged victim and in which she defended herself by attempting to cut the penis of a man who was allegedly sexually assaulting her. It appears to me that Ms. Lobato believed she was cooperating with a police investigation, not admitting to a murder that occurred on the other side of town some weeks after her alleged assault.

Although I do not consider Ms. Lobato's case a typical false confession case because she did not confess to the crime in which she was charged and convicted of, her case does share many hallmarks of proven false confession cases. Most notable are the inconsistencies between Ms. Lobato's version of events and the objective facts of Mr. Bailey's death. These inconsistencies have been documented by yourself and others, so I will not go into detail, but they include the date of the crimes, the location and time of the crimes, the supposed murder weapon, the shoe print left at Mr. Bailey's crime scene (and lack of a match with Ms. Lobato's shoes), and numerous others.

In addition, in proven false confession cases, there is often no other evidence linking the suspect to the crime except the false confession statement. Similarly, in some of these cases, there is an absence of evidence that is consistent with the commission of the crime and/or the confession statements. To my knowledge, there is no physical evidence linking Ms. Lobato to Mr. Bailey's murder, as well as a lack of corroborating evidence given the manner of the murder.

Another commonality found in proven false confession cases is that the confession statements are not generative in they do not lead to new evidence and/or tell the police details that are not already known. To my understanding, Ms. Lobato's statements did not provide any new evidence or information concerning the Bailey murder.

Finally, I comment on Detective's Thowsen's claim that suspects often minimize their involvement with crimes. It is likely that some guilty suspects do minimize their involvement, in large part because police interrogators are trained to induce suspects to minimize. Specifically, the Reid Interrogation method (i.e., the most commonly used and well known method, see Inbau, Reid, Buckely, & Jayne, 2001) trains interrogators to utilize minimizing themes and scenarios (Step 2); that is, scenarios that make it easier for the suspect to admit to wrongdoing. However, I stress that almost all, if not all, proven false confessions also contain minimization. For example, in the well-established proven false confession case of the five teens involved in the Central Park Jogger crime, the teens minimized their involvement by claiming actions such as holding the victim's legs but not committing the rape itself. Thus, in my opinion, Ms. Lobato's version of events should not be construed as minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her.

Please let me know if I can be of further assistance.

Sincerely,

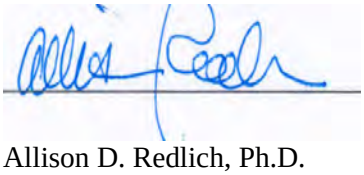

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EXHIBIT 6

The American Journal of Forensic Medicine and Pathology:
June 1997 - Volume 18 - Issue 2 - pp 177-180
Articles

Cockroach: The Omnivorous Scavenger: Potential Misinterpretation of Postmortem Injuries

Denic, Nebojsa M.D., Ph.D.; Huyer, Dirk W. M.D.; Sinal, Sara H. M.D.; Lantz, Patrick E. M.D.; Smith, Charles R. M.D.; Silver, Meredith M. M.B., B.S.

Abstract

Interpretation of postmortem injuries, including their differentiation from those produced antemortem, may be difficult even for experienced forensic pathologists. A variety of animals or insects residing in the death environment may alter the appearance of the deceased. *Dictyoptera blattaria* (the cockroach) is common in the residential setting. Three cases of sudden and unexpected infant death are presented in which postmortem injuries inflicted by cockroaches initially raised concern of nonaccidental injury. The true nature of the lesions was not recognized by the people at the death scene and, in one case, observation of neck injuries raised suspicion of possible strangulation. In another, the lesions were thought to be burns of different ages. Cockroaches are omnivorous scavengers that devour keratin. They will bite human flesh in both the living and dead with resultant injury. Recognition of cockroach bites will help in the evaluation of injuries discovered during child death investigations.

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[Articles]

Cockroach: The Omnivorous Scavenger: Potential Misinterpretation of Postmortem Injuries

Denic, Nebojsa M.D., Ph.D.; Huyer, Dirk W. M.D.; Sinal, Sara H. M.D.; Lantz, Patrick E. M.D.; Smith, Charles R. M.D.; Silver, Meredith M. M.B., B.S.

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Address correspondence and reprint requests to Dr. Dirk Huyer, Suspected Child Abuse and Neglect Program, Hospital for Sick Children, 555 University Avenue, Toronto, Ontario M5G 1X8, Canada.

Abstract

Interpretation of postmortem injuries, including their differentiation from those produced antemortem, may be difficult even for experienced forensic pathologists. A variety of animals or insects residing in the death environment may alter the appearance of the deceased. *Dictyoptera blattaria* (the cockroach) is common in the residential setting. Three cases of sudden and unexpected infant death are presented in which postmortem injuries inflicted by cockroaches initially raised concern of nonaccidental injury. The true nature of the lesions was not recognized by the people at the death scene and, in one case, observation of neck injuries raised suspicion of possible strangulation. In another, the lesions were thought to be burns of different ages. Cockroaches are omnivorous scavengers that devour keratin. They will bite human flesh in both the living and dead with resultant injury. Recognition of cockroach bites will help in the evaluation of injuries discovered during child death investigations.

Child abuse is a common problem in today's society. Increased awareness and discussion of the problem has led to its greater recognition. The observation of unexplained injuries may raise the suspicion of child abuse. These injuries may or may not have a recognizable pattern. Skin lesions in either living or deceased children may be misinterpreted and felt to represent nonaccidental injury (1,2). Because of moral and legal obligations, suspicions of child abuse must be reported by the professionals involved to the investigatory authories. Involvement of these agencies may, however, cause serious consequences to the child and family.

In childhood deaths, misinterpretation of postmortem injuries may lead to initial concern of child abuse, especially if the injury appears to represent a recognized pattern. Questions about the contribution of the injuries to the manner of the child's death will arise.

Injuries that occur after death can usually be linked to the death environment. Unless the body is discovered quickly after death, it may be subject to attack by insects or animals. Marks or wounds may be left that mimic premortem injuries. Therefore, consideration of postmortem injuries in the evaluation of child death is important. An autopsy, including microscopic examination coupled with a detailed death scene evaluation, will help determine the true nature of the observed injuries.

Case 1

JA, a 12-month-old boy was one of seven children who lived with their single mother in a small townhouse. Normally he slept on the lower level of a bunkbed and two brothers aged 8 and 9 slept together on the upper level. During the night of his death, his brothers brought JA into the top bunk with them. One of the brothers awoke during the night and saw JA sleeping with his head positioned between the mattress and the wooden bed railing. The brother also recalled JA suddenly falling off the bed sometime later; he did not arise to check JA at the time. About 6 AM, JA was found lying face up on the carpeted bedroom floor without vital signs. He was covered with cockroaches. He was clothed in diapers and T-shirt. Cardiopulmonary resuscitation was started by an aunt, and paramedics continued resuscitation after arrival. The paramedics reported the presence of burns on the face, groin, and hands.

Some of these lesions reportedly appeared recent, whereas others looked older. Death was pronounced on arrival at the local hospital. Concern of nonaccidental injury in the form of different-aged burns remained following emergency room physician and coroner review of the body. The father stated that JA was free of injuries the day prior to his death when he visited the home to celebrate a son's birthday. Police attended the scene and found the townhouse to be heavily infested with cockroaches.

Autopsy examination, 6 h later, revealed multiple superficial skin lesions on the face, hands, feet, and along the external edge of the diaper. The facial lesions were irregularly shaped, reddish-brown in color and confluent demarcated by a serrated edge (Fig. 1). The hands bore multiple oval lesions measuring up to 5 mm in diameter; some were reddish-brown, similar in appearance to the face marks; others were excavated with a brown margin and pale center (Fig. 2). On microscopic examination (Fig. 3), both the reddish-brown and the pale skin lesions were similar. The excavated areas observed grossly showed reduced thickness of dermal collagen covered by coagulated epidermis. Blood vessels in the dermis contained lysed red blood cells. No inflammatory reaction was present. Internal examination showed signs consistent with asphyxia (i.e., petechiae on thymus and lung surfaces)

without evidence of other injury. Death was attributed to accidental positional asphyxia.

FIG. 1. Confluent superficial facial lesions on a 12-month-old infant (case 1) who died, apparently, from positional asphyxia. Investigators were initially suspicious that these lesions were representative of burns.

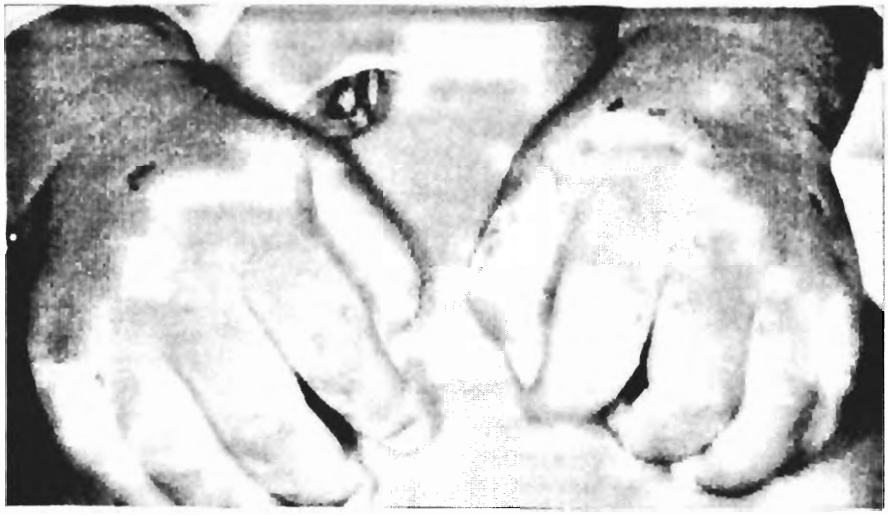

FIG. 2. Nonconfluent excavated skin lesions on the hands of the same infant seen in Fig. 1. These lesions were felt to be representative of old healed burns, raising further suspicion of nonaccidental injury.

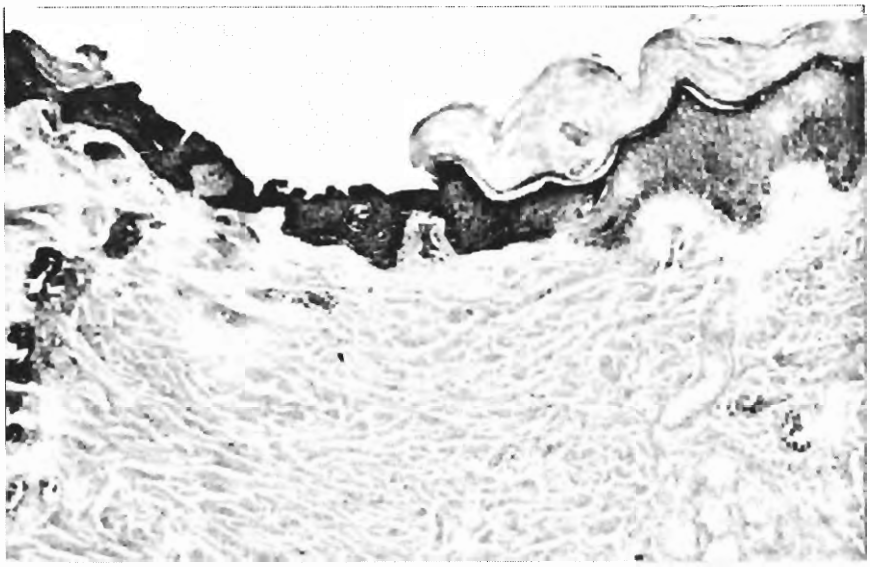

FIG. 3. Skin section at scanning magnification. To the right, epidermis and dermis, including skin appendages, are normal and show an abrupt transition centrally to hypereosinophilic coagulated structures in the area of postmortem injury.

Case 2

A 4-month-old previously well black infant (EA) was found not breathing and stiff in her crib by her mother. EA was last seen alive at 2 AM and found dead at 7 AM. Emergency Medical Services and police were called as well as Child Protective Services (CPS), because neighbors suggested that the child may have been left unattended. Death was pronounced at the scene and no resuscitation efforts were attempted. Several small wounds, similar in appearance to those in case 1, were noted on the child's left arm, the left side of her face, and the neck. Because of the concerns expressed by the neighbor and the observation of unexplained skin markings, an investigation was performed by the police and CPS. No evidence of child abuse or neglect was revealed, although the death scene evaluation revealed extreme filth and heavy infestation with cockroaches.

An autopsy was performed several hours later, with findings consistent with sudden infant death syndrome. Gross and microscopic examination of the skin lesions revealed postmortem injuries felt to be cockroach bites.

Case 3

A 3.5-month-old healthy white female (KP) was found in her crib unresponsive 6 h after she was put down to sleep. Her mother called Emergency Medical Services and resuscitation was attempted on the way to the emergency room.

Despite resuscitation, no vital signs could be obtained. General physical examination revealed skin lesions consisting of superficial erosions over the posterior neck and legs. Because the neck lesions were initially suspicious for traumatic neck injury (i.e., strangulation), the Department of Social Services was asked to become involved with the case investigation. Their investigation found no evidence of child abuse; however, it was noted that the house was heavily infested with cockroaches.

Autopsy examination revealed numerous skin lesions that ranged in size from 0.3-1.8 cm involving both thighs and the base of the neck (Fig. 4). Microscopic examination of the skin lesions showed excoriation of epidermis without an inflammatory response, and were felt to be consistent with postmortem injuries likely the result of cockroach bites. The other autopsy findings were consistent with sudden infant death syndrome.

FIG. 4. Lesions observed on the posterior neck of a 3.5-month-old infant (case 3) who died with autopsy findings consistent with sudden infant death syndrome. Initial concern arose of a neck injury due to strangulation.

DISCUSSION

Postmortem injuries may occur in a variety of ways (e.g., facial and other injuries secondary to cardiopulmonary resuscitation) (3,4). Injuries inflicted by animal and insect invaders should be considered when a body is found in an environment where these organisms live. Effects of their actions may appear as skin ulcers, burns, or abrasions, raising suspicion of inflicted wounds.

These are easily confused with antemortem injuries if the invaders are not observed at the time of body discovery (5). The degree of damage depends on many factors, such as the number of invaders, the presence of more than one invader species, the number of each species, the time of exposure to the invaders, the degree of skin exposure, the temperature of the environment, and the state of decomposition (6). Insects may produce injury in a variety of ways: by sucking, by biting, or by releasing liquid substances (e.g., formic acid by ants) that harm the skin. Postmortem insect bites may become desiccated giving the appearance of brush burns (5,7). Confusion may also exist because of the site of the postmortem injury (e.g., superficial abrasions to the neck region may simulate nail abrasions produced in the course of manual strangulation) (5,8). Animal bites may produce significant blood loss with resulting suspicious injury if inflicted in a dependent area of the corpse.

One of the prominent home pests is the cockroach (*Dictyoptera blattaria*). Cockroaches are among the most ancient and least specialized of all insects (9,10). There are nearly 4,000 species of cockroaches with only about 50 of these domesticated. In one study of a Florida low-income apartment complex a median population of 13,000

cockroaches were measured per apartment (9).

Cockroaches are omnivorous and have unspecialized chewing mouth parts that enable them to consume a wide range of materials (9,10). Common foods that cockroaches ingest include starchy substances, sugary substances, meat, and cheese; they often scavenge crumbs, food scraps, decaying foods, and hair, amongst other material. Cockroaches have strong mandibles (Fig. 5) and they may on occasion eat a substantial amount of flesh (7). Bites may occur on living people, especially while they sleep, and on children more frequently than adults (10,11). Cockroaches are known to bite various areas of the body, including hands, toes (including the nails), eyelashes, and areas of skin with thin epidermis (e.g., the face and ears) (10-12). Gal'kov described a child's corpse, which remained undiscovered overnight, with resultant loss of the facial skin secondary to injury by cockroaches (13). With a predilection for ingesting keratin, cockroaches cause small, well-circumscribed, but irregular lesions of the epidermis (14).

FIG. 5. Scanning electron micrograph shows the oral apparatus of a German cockroach (*Blattella germanica*) collected from the home of case 1. The strong mandibular apparatus is demonstrated.

The skin is destroyed deep into the dermis with epidermal defect secondary to the mechanical effects of the bite. Scarring will result if bites are inflicted during life (11). The lesions appear dry, yellow, or orange and may lie in a row, often along the edge of clothing.

All of the skin lesions in the three cases we observed appeared characteristic of cockroach bites, both grossly and microscopically (14). Two different skin lesions were observed: case 1 had a large reddish-brown confluent lesion and all cases had numerous small pale excavated lesions. Multiple cockroaches feeding on the face likely produced the larger confluent skin injury observed in case 1. The color difference resulted from the time after

death that the injuries occurred, with the facial lesion likely occurring soon after death when blood was still in the vessels and the pale hand lesions occurring later. Prior to the identification of the postmortem nature of the injuries, further concern of nonaccidental injury followed the suspicion of different-aged burn injuries.

Injuries discovered during the investigation of child death must be carefully assessed and all injuries found must be explained adequately. Injuries that are artifactual and not contributory to the cause and manner of death should not be misinterpreted, which could lead to unnecessary involvement of investigatory personnel, nor should inflicted injuries be misinterpreted, allowing a perpetrator to escape from culpability. In the three cases we present, concerns of nonaccidental injury resulted from the initial postmortem observations. With carefully performed autopsies by experienced forensic pathologists, including microscopic evaluation coupled with detailed death scene investigation, these concerns were excluded. Hence, at a time of loss for the parents, further need for investigation was unnecessary.

REFERENCES

1. Bays J. Conditions mistaken for child abuse. In Reece RM, ed. *Child abuse: medical diagnosis and management*. Philadelphia: Lea and Febiger, 1994:358-85. [Context Link]

2. Kirshner RH, Stein RJ. The mistaken diagnosis of child abuse: a form of medical abuse? *Am J Dis Child* 1985;139:783-876. **UWA Library Holdings** | [Context Link]

3. Kaplan JA, Fossum RM. Patterns of facial resuscitation injury in infancy. *Am J Forensic Med Pathol* 1994;15:187-91. **Ovid Full Text** | **UWA Library Holdings** | **Request Permissions** | [Context Link]

4. Leadbeatter S, Knight B. Resuscitation artifact. *Med Sci Law* 1988;28:200-4. **UWA Library Holdings** | [Context Link]

5. Spitz WU, Fisher RS. Medicolegal investigation of death. 1st ed. Springfield: Charles C. Thomas, 1972:23-31. [Context Link]

6. Megnin P. La faune des cadavres: application de L' entomologie a la medicine legale. In: *Encyclopedie scientifique des aides-memoire*. Paris: Masson, 1894:214. [Context Link]

7. Keh B. Scope and applications of forensic entomology. *Annual Review of Entomology* 1985;30:137-54. **UWA Library Holdings** | [Context Link]

8. Littlejohn H. *Forensic medicine*. London: Churchill, 1925:285. [Context Link]

9. Brenner RJ, Koehler PG, Patterson RS. Health implications of cockroach infestations. *Infections in Medicine* 1987;4:349-60. UWA Library Holdings | [Context Link]

10. Mallis A. *Handbook of pest control*. 5th ed. New York: MacNair-Dorland, 1969:1158. [Context Link]

11. Roth LM, Willis ER. The medical and veterinary importance of cockroaches. Smithsonian Misc Coll 1957;134(10);1-137. [Context Link]

12. Marlatt CL. Cockroaches. U.S. Department of Agriculture, *Division of Entomology Circular* 1902;51:15. [Context Link]

13. Gal'kov VP. An experiment with hydrocyanic acid for the control of insect parasites in dwelling (in Russian). *Zashchita Rastenii, Defense des Plantes* 1926;3:98-100. [Context Link]

14. Froede RC. Handbook of forensic pathology. U.S.A.: College of American Pathologists, 1990:344. [Context Link]

Key Words: Cockroach; Child abuse; Postmortem injury

IMAGE GALLERY

Select All Export Selected to PowerPoint

Fig. 1

Fig. 2

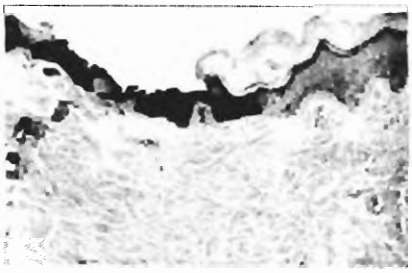

Fig. 3

Fig. 4

Fig. 5

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EXHIBIT 7

LOUISE RENHARD

GALLERY MAGAZINE – FINGER PRINTS ?
BEER CAN PARTIALLY FILLED – COCKROACH INFESTED
LIQUID DISCARDED – DNA ?

FOOTWEAR IMPRESSIONS IN BLOOD ALONG NORTH SIDE
– WHAT DID YOU DO 1x1 CAMERA ?
DEVELOPED ?

SANDALS SIDE BY SIDE – BLOOD DROPS

* CARDBOARD BOX W/ APPARENT BLOOD & FOOTWEAR IMPRESS.
COVERED BODY WHAT HAPPENED TO IT
WAD CHEWING GUM
FORD – LATENT PRINTS
POSITIVE RESULTS ON: A BOX FROM TRASH AT V' FEET
– A SURGE SUPRESSOR BOX
– BEER CAN

= D VEHICLE 7/22/08

VOMIT ON THE LEFT FRONT FLOOR

LUMINOL POSITIVE: LEFT SLIP COVER, LEFT FRONT SEAT, LEFT DOOR PANEL

PHENOLPHTHALEIN – SHOES IN TRUNK, BASEBALL BAT, TOOL, KEYS → ALL NEGATIVE
WHEN & WHERE SECOND TEST ?

TIRE IMPRESSIONS

EXHIBIT 8

AFFIDAVIT OF STEVEN KING

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

I, STEVEN KING, being duly sworn, hereby depose and say under penalty of perjury that the following statements are true and correct to the best of my knowledge and belief:

1. I was Diann Parker's domestic partner for about five years until her death in January 2005 from natural causes.

2. In the months of June and July 2001 Diann and I lived at the Grand View Apartments in Las Vegas, Nevada.

3. Up until about mid-June Diann socialized and smoked crack cocaine with a black man I knew as "St Louis," who lived on the streets.

4. "St Louis" was not a large man, but he was street smart, tough, and I still think of him as a mean S.O.B.

5. Diann could speak Spanish, and during that time she socialized regularly with the seven to nine Hispanic males who lived in a building at the Grand View Apartments near our building.

6. To my knowledge the Hispanics could not speak English very well and they were in the country illegally.

7. On the morning of July 1, 2001 Diann came home and told me that while she was at the Hispanic's apartment "St Louis" barged in and hit her and yelled at her for hanging out with Hispanics. Diann told me the Hispanic men were very upset with "St Louis" and they told him that he should not have hit her. Diann told me that the Hispanics were very unhappy with "St Louis" and they told him to leave her alone.

I THINK HE DIDN'T BARGE IN, HE WAS ALREADY THERE WHEN DIANN ARRIVED

8. During that period of time I was working nights, and when I got home on the morning of July 2, 2001 I saw that Diann had been beaten up. She told me that the night before "St Louis" beat and raped her, and threatened to kill her.

9. Diann had reason to believe that "St Louis" could kill her, because we believed he had been in prison for murder in Missouri.

10. Diann did not call the police at that time, even though I encouraged her to do so.

11. Several days later when I got home from work Diann told me that she called the police and reported the rape when "St Louis" came to our apartment and beat on the door and window. She also told me the police took a report and she was examined at the University Medical Center in Las Vegas.

12. Around that same time I believe "St Louis" also attacked a girlfriend of one of Diann's Hispanic male friends at the Grand View Apartments.

13. Early on the morning of July 9, 2001 I went to a bar after work and saw on the TV news that a black man had been murdered at the Nevada State Bank that is within walking distance of the Grand View Apartments where we lived.

14. I had the gut feeling the murdered man was "St Louis," even though I knew he did not "live" at the Nevada State Bank.

15. When I got home around sunrise I told Diann that a black man had been murdered nearby, and that I had the gut feeling it was "St Louis." She said that she wanted to see if it was "St Louis," so she got dressed and left to walk to the murder scene.

16. Around mid-morning several Las Vegas police officers came to our apartment and asked Diann and me a few questions. We showed them our shoes, and they left after a few minutes.

17. A few weeks after the murder at the Nevada State Bank, Diann's male Hispanic friends vanished. Those were the Hispanics who lived in the apartment "St Louis" barged into on July 1, 2001.

18. Several weeks after the murder the Las Vegas police returned to our apartment and asked Diann some questions. I was present, but they did not ask me any questions.

19. We learned that "St Louis" was the man murdered at the Nevada State Bank, and Diann testified in 2002 at the trial of the young woman charged with murdering "St Louis."

20. After testifying, Diann told me she had never seen the young woman before, and it was not possible that she could have murdered "St Louis."

21. Diann and I learned from the news that the young woman was convicted of murdering "St Louis."

22. Before Diann died in Louisville, Kentucky we discussed the murder of "St Louis" on a number of occasions. I absolutely believe Diann's male Hispanic friends killed "St Louis" in retaliation for mistreating and raping Diann, and mistreating other women they knew.

23. Because "St Louis" was murdered at the Nevada State Bank where he did not "live," my belief is he was lured there by some kind of bait and ambushed by Diann's male Hispanic friends.

24. I know that Kirstin Blaise Lobato is the young woman convicted of murdering "St Louis," and that his real name is Duran Bailey.

25. Based on what Diann told me, what I personally know about "St Louis," the anger the Hispanics had toward "St Louis," and the injuries inflicted on "St Louis," I am absolutely certain that Kirstin Blaise Lobato did not murder "St Louis."

26. I believe that Kirstin Blaise Lobato is innocent and her conviction is a miscarriage of justice.

27. I am executing this AFFIDAVIT voluntarily and of my own free will. No force has been used upon me, and no threats or promises made to me by anyone.

Steven King
STEVEN KING

SUBSCRIBED AND SWORN to before me this 17TH day of February, 2010.

Notary Public

CRYSTAL CASTRO
NOTARY PUBLIC
STATE OF COLORADO
My Commission Expires 03/05/2011

Crystal Castro
Printed name

Notary Public for Denver Colorado

My Commission expires: 03/05/2011

EXHIBIT 9

AFFIDAVIT OF RON SLAY

STATE OF NEVADA)
) **ss.**
COUNTY OF CLARK)

I, RONALD D. SLAY, being duly sworn, hereby depose and say under penalty of perjury that the following statements are true and correct to the best of my knowledge and belief:

1. I am a Nevada state licensed polygraph examiner with 35 years experience, and I have conducted over 27,000 polygraph examinations. My license number is 207.
2. I am a member of the American Polygraph Association, the California Association of Polygraph Examiners, the National Polygraph Association, and the American Society of Testing and Materials for Polygraph Standards as applies to standardization of polygraphs.
3. I am the owner of Western Security Consultants in Las Vegas, Nevada.
4. I have performed many polygraph examinations for the Clark County District Attorney's Office, the Clark County Public Defenders Office, and the Clark County Special Public Defenders Office.
5. In the fall of 2001 I was retained by Clark County Special Public Defender Phillip Kohn to conduct a polygraph examination of his client Kirstin Blaise Lobato.
6. In preparation for the polygraph examination I was informed by Mr. Kohn that Ms. Lobato was charged with the murder of Duran Bailey in Las Vegas on July 8, 2001.
7. On December 3, 2001, Ms. Lobato came to my office for her polygraph examination.
8. During her polygraph examination Ms. Lobato was extremely inconsistent.
9. Ms. Lobato had difficulty following instructions, especially regarding questions she thought were unrelated to Mr. Bailey's murder but were essential to the polygraph examination.
10. After conducting the examination I asked Ms. Lobato's attorney, Mr. Kohn, if I/we could meet with Clark County District Attorney Stuart Bell so I could explain to DA Bell why I was certain of Ms. Lobato's truthfulness regarding Mr. Bailey.
11. I was confident if I thoroughly explained how Ms. Lobato's polygraph examination provided convincing evidence to me of her truthfulness regarding Mr. Bailey's murder, that DA Bell would seriously consider dismissing the criminal charges against Ms. Lobato.
12. Mr. Kohn declined to arrange a meeting with Mr. Bell unless I prepared a report that Ms. Lobato had passed her entire polygraph examination.
13. After Clark County Special Public Defender David Schieck became Ms. Lobato's lawyer in October 2004, I discussed Ms. Lobato's case with him. I told Mr. Schieck I am certain Ms. Lobato is innocent of Mr. Bailey's murder.
14. Since December 2001 I have told numerous people that Ms. Lobato is innocent of Mr. Bailey's murder, and I have gone so far as to contact the Rocky Mountain Innocence Project and other organizations in an effort to encourage them to represent her so that she can be exonerated of her convicted crimes. I have referred her to the Federal Public Defender.

15. On November 27, 2001, I conducted a polygraph examination of Rebecca Lobato, Ms. Lobato's stepmother. Mrs. Lobato truthfully answered that Ms. Lobato was in Panaca on July 8, 2001, and she further truthfully answered that she had not made a false alibi for Ms. Lobato.

16. I am as certain today that Ms. Lobato is innocent of any involvement in Mr. Bailey's murder, as I was on December 3, 2001, after conducting Ms. Lobato's polygraph examination.

17. I am executing this AFFIDAVIT voluntarily and of my own free will. No force has been used upon me, and no threats or promises made to me by anyone.

RONALD D. SLAY

SUBSCRIBED AND SWORN before me this 12th day of February, 2010.

Notary Public

DANIEL SCULLY

[typed/printed name]

STATE OF NEVADA
COUNTY OF CLARK

DANIEL SCULLY
Notary Public State of Nevada
No. 02-72928-1
My appt. exp. Oct. 26, 2010

EXHIBIT 10

IN THE SUPREME COURT OF THE STATE OF NEVADA

***

KIRSTIN BLAISE LOBATO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 58913

APPELLANT'S APPENDIX

VOLUME 7

APPEAL FROM NOTICE OF ENTRY OF DECISION AND ORDER

IN THE EIGHTH JUDICIAL DISTRICT COURT

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ATTORNEYS FOR RESPONDENT

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(rr) Ground forty-four.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to introduce Petitioner's black high-heeled open-toed platform shoes into evidence that the prosecution did not contest she was wearing when they argued she murdered Duran Bailey, and the Petitioner was highly prejudiced because if that exculpatory evidence had been available to the jury, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution argued that Petitioner stabbed Duran Bailey's scrotum, hit his mouth with a bat, punched his face with her fists, and used her knife to cut his carotid artery and stab his face and abdomen multiple times. Medical Examiner Lary Simms testified Bailey bled profusely from his wounds. Photos introduced at trial showed a large amount of blood on Bailey, cardboard, concrete and many items at the crime scene. (See Exhibit 33, Blood at crime scene; and Exhibit 92, Bailey as found.) The prosecution also argued that after Bailey's death Petitioner repeatedly stabbed his abdomen, amputated his penis, and slashed his rectum. The prosecution also argued Bailey's murder was the same event Petitioner describes in her Statement of July 20, 2001, that was audio recorded by homicide Detectives Thomas Thowsen and James LaRochelle. Petitioner described being "bum rushed" in the parking lot of a Budget Suites Hotel on Boulder Highway in east Las Vegas as she was getting in her car to go out around, or after midnight. The man attempted to rape her, but Petitioner described fighting him off by trying one time to cut his exposed penis. Petitioner described in her Statement wearing a skirt and black high-heeled shoes, and she told the detectives interrogating her that she had the shoes she was wearing that night. She identified them as black open-toed platform shoes that have 4" to 5" heels, and those shoes were seized as evidence at the time she was arrested on July 20, 2001. (See Exhibit 35, LVMPD Vehicle Report, July 20, 2001.) Petitioner's black high-heeled shoes were tested on August 6, 2001, by the Las Vegas Metropolitan Police Department's Forensic Laboratory. The following is the finding of the tests:

CONCLUSIONS:

1. A human bloodstain was detected in the big toe area (stain A) of the right high

> heel sandal (TAW5 item 01). Duran Bailey is excluded as the source of this blood. Kirstin Lobato cannot be excluded as the source of this blood."
> …
> Petitioner's shoes were returned to the evidence vault in a "Sealed paper bag" (package #4032-01). (See Exhibit 36, LVMPD Forensic Lab Report, August 6, 2001. Underlining added to original.)

In addition to not having any of Bailey's blood on Petitioner's black high-heeled shoes, they do not have any damage or scuff marks from a prolonged, violent and bloody struggle with a man, or damage from climbing into the dumpster to throw out the trash that was piled around and on top of Bailey. Attached as Exhibits are four LVMPD photos of Petitioner's black high-heeled open-toed platform shoes that were seized as evidence. (See Exhibit 37, Black high-heeled shoe 1; Exhibit 38, Black high-heeled shoe 2; Exhibit 39, Black high-heeled shoe 3; and Exhibit 40, Black high-heeled shoe 4.) On October 3, 2001, Petitioner's black high-heeled shoes were excluded by the Las Vegas Metropolitan Police Department Crime Lab as being the source of the shoeprints imprinted in blood on the cardboard covering Bailey's torso, or the shoeprints imprinted in blood on concrete at the crime scene. (See testimony of LVMPD footwear examiner Joel Geller, Trans. XI-114 (9-25-2006)) The prosecution did not contest at trial that Petitioner was wearing her black high-heeled shoes during the assault she described in her Statement, which the prosecution argued was actually Bailey's murder. There was no testimony at trial that the Petitioner wore the shoes after she was assaulted or that they had been cleaned after the assault, and the prosecution did not even suggest during their argument that they had been worn or cleaned after the assault. So the Petitioner's two high-heeled shoes are perfectly preserved physical witnesses to the assault described in her Statement.

Given the immense amount of blood on Bailey and all over the crime scene, and the fact that no shoeprints imprinted in blood matching Petitioner's shoe size were found at the crime scene on the concrete floor leading out of the trash enclosure or on a piece of cardboard covering Bailey's torso, it is not reasonable that Petitioner could have committed Bailey's murder wearing her high heel shoes that the prosecution does not contest she was wearing. (See Exhibit 33, Blood at crime scene; and, Exhibit 58, Plywood leaning against north wall.) Given the intensity of the

attack on Bailey and the lack of damage to her high-heeled shoes, that Petitioner could have murdered Bailey while wearing them is even less reasonable, particularly since the shoes are very far removed from highly maneuverable athletic footwear.

Petitioner's shoes are the one item of clothing she had when arrested that she positively identified in her Statement as wearing at the time she was sexually assaulted at the Budget Suites Hotel. Since the day of her arrest, the prosecution has not contested that she was wearing her high-heeled platform shoes during the assault described in her Statement. There is no evidence on Petitioner's black high-heeled shoes that she was present at the bloody and violent scene of Bailey's murder which would be expected if she had in fact been there. Petitioner's shoes are not only a witness that she did not murder Bailey, but introduction of her black high heel shoes into evidence would have allowed the jury to hold and closely examine the lack of blood or damage to the shoes, and to make an informed judgment about the probability, or the utter impossibility that Petitioner could have beaten Bailey and inflicted all the bloody wounds on him, "dragged" his body several feet after his death, and climbed into the dumpster and thrown out the trash that was piled around and on top of him without getting a single drop of his blood on her high-heeled open-toed shoes or even scuffing them. And also without leaving a single shoeprint imprinted in blood. A LVMPD crime scene photo of Bailey as found shows what the prosecution alleged the Petitioner accomplished in her high-heeled platform shoes. All the garbage was piled in the corner after Bailey was immobilized or dead from his injuries. (See Exhibit 92, Bailey as found.)

The near pristine condition of Petitioner's shoes don't just speak, but scream volumes that the Petitioner was the victim of the very short altercation described in her Statement of July 20, 2001 – and that she had nothing to do with the prolonged, bloody, physical and violent event that was Bailey's murder and mutilation that occurred weeks after the incident the Petitioner described in her Statement.

Consequently, the single most important item of exculpatory physical evidence Petitioner's counsel should have introduced into evidence was her black open-toed platform shoes with a 4" to 5" heel.

The absence of Bailey's blood on Petitioner's high-heeled shoes is consistent with the fact that during the Petitioner's 26-minute Statement of July 26, 2001, she does not a single time mention the words blood or bloody, or that either she or her attacker bled. The single most noticeable feature of Bailey's murder was the great amount of blood on him and the surrounding area. That there was not a single drop of his blood on her shoes supports that her Statement is exactly what it appears to be, a description of unsuccessful rape attempt in the parking lot of a Budget Suites Hotel in east Las Vegas "over a month" before her Statement on July 20, 2001.

The evidentiary importance of Petitioner's black high-heeled shoes is supported by the post-conviction expert analysis of forensic scientist George Schiro. Schiro has over 25 years of experience as a forensic scientist and crime scene investigator. Schiro has worked over 2900 cases and has been court qualified as an expert in latent fingerprint development, serology, crime scene investigation, forensic science, trajectory reconstruction, shoeprint identification, crime scene reconstruction, bloodstain pattern analysis, DNA analysis, fracture match analysis, and hair comparison. He has also consulted on cases in 23 states, for the United States Army, and in the United Kingdom. Schiro has testified as an expert for both the prosecution and defense over 145 times in eight states, federal court, and two Louisiana city courts. Schiro is a fellow of the American Academy of Forensic Sciences, a member of the Association for Crime Scene Reconstruction, a full member of the International Association of Bloodstain Pattern Analysts, and a member of the Louisiana Association of Scientific Crime Investigators.

Schiro is familiar with Petitioner's case, having testified on May 16, 2002 as a defense witness at Petitioner's first trial. After Petitioner's direct appeal was exhausted in October 2009, Schiro agreed to assist the Petitioner by providing his expertise as a forensic scientist ***pro bono***. On February 6, 2010 Schiro was provided four full-color photographs of Petitioner's black high-heeled platform shoes that were taken into evidence by the LVMPD on July 20, 2001. (See Exhibits KK, LL, MM, and NN, four LVMPD photos of Petitioner's black high-heeled open-toed platform shoes.) After analyzing the photographs Schiro executed the "3rd Affidavit of George J. Schiro, Jr.," dated February 15, 2010, in which he states in part:

19. It is my opinion that had Ms. Lobato been wearing these shoes during the murder, mutilation, and concealment of Duran Bailey, then it is highly likely that she would have left at the scene bloody shoeprints corresponding to the sole patterns of the black high heeled shoes.
20. No bloody shoeprints corresponding to the sole patterns of the black high heeled shoes were identified or documented at the scene of Mr. Bailey's murder.
21. It is also my opinion that had Ms. Lobato been wearing these shoes during the murder, mutilation, and concealment of Duran Bailey, then Mr. Bailey's blood would have been present on the black high heeled shoes.
22. None of Mr. Bailey's blood was found on the black high heeled shoes.
23. There is no physical evidence associating Kirstin Lobato with Duran Bailey or the crime scene. Ms. Lobato is also excluded as the source of key physical evidence found at the crime scene. (See Exhibit 42, 3rd Affidavit of George J. Schiro, Jr., February 15, 2010.)

Schiro's analysis is that if Petitioner had been wearing her black high heeled platform shoes at the scene of Bailey's murder, "it is highly likely that she would have left at the scene bloody shoeprints," and, "It is also my opinion that Bailey's blood would have been present on the black high heeled shoes." The Petitioner's shoeprints were not at Bailey's crime scene, and none of his blood was on her shoes. Consequently, her black high heeled shoes are invaluable exculpatory evidence. Yet Petitioner's counsel neither sought to introduce the shoes into evidence, nor have an expert such as Schiro analyze the shoes in relation to the crime scene and the crime scene evidence, and testify as a defense expert. The Petitioner was gravely prejudiced by her counsel's failure to introduce her black high heeled shoes into evidence, because if the jurors had been able to see and examine them, combined with argument by counsel, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ss) Ground forty-five.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object to a butterfly knife demonstration by LVMPD Detective Thomas Thowsen, for failing to object to Detective Thowsen's expert testimony about butterfly knives without meeting the pretrial requirements of NRS 174.234(2) and qualification by the court, and for suggesting and insisting that the prosecution introduce into evidence a butterfly knife that was not the Petitioner's knife and that the Petitioner had never seen or

touched, and that did not have any connection whatsoever to the Petitioner or to the crime she was charged with, and in fact the knife had been provided by LVMPD Detective Thomas Thowsen, and if Petitioner's counsel had objected and prevented the knife from being introduced into evidence and prevented the jury from being exposed to Detective Thowsen's butterfly knife testimony and demonstration, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution argued to the jury that Petitioner used her pocket butterfly knife to inflict all of Bailey's stabbing and cutting wounds. There was no evidence linking Petitioner's butterfly knife to the crime and it was not introduced into evidence. Consequently, the jurors had to imagine what Petitioner's butterfly knife looked like, and imagine if they thought it could have caused Bailey's wounds.

LVMPD homicide Detective Thomas Thowsen obtained a butterfly knife that was not the Petitioner's knife, that the Petitioner had never seen or touched, that the Petitioner did not identify as being similar to her butterfly knife, and that had no connection whatsoever to the Petitioner or to the crime she was charged with. When the prosecution attempted to have Detective Thowsen demonstrate the use of the butterfly knife he provided, Petitioner's counsel insisted that knife be introduced into evidence before it could be used for a demonstration by Detective Thowsen. Clark County Assistant District Attorney William Kephart seemed to be taken aback by the insistence of Petitioner's counsel to introduce the knife into evidence, because as Kephart plainly stated, "it's not evidence." (8 App. 1386; Trans. XIII-65 (9-27-06)) Acceding to the demand of Petitioner's counsel, the prosecution introduced the butterfly knife into evidence as State's Exhibit 262.

In addition to insisting on introduction of Thowsen's butterfly knife, Petitioner's counsel did not object to Thowsen providing expert testimony about butterfly knives and their use without the prosecution having provided in accordance with NRS 174.234(2) 21 days notice prior to trial: Thowsen's C.V. detailing his expertise as a knife expert; any reports he prepared for the case about butterfly knives; and a brief statement regarding the subject matter and the substance of his expected testimony about butterfly knives. Furthermore, Petitioner's counsel did not object to the

Court allowing Thowsen's expert knife testimony without the Court conducting an inquiry into Thowsen's expert knowledge and skill with butterfly knives. The failure of Petitioner's counsel to object to Thowsen's expert testimony and enforce NRS 174.234(2) was unquestionably prejudicial to Petitioner because Thowsen acknowledged in his testimony that he was a novice with a butterfly knife, and thus he could not have qualified to testify as an expert about butterfly knives even if the prosecution had made an effort to comply with NRS 174.234(2). (See, 8 App. 1386; Trans. XIII-65 (9-27-06))

By insisting on introduction of Detective Thowsen's butterfly knife into evidence and allowing Detective Thowsen's testimony and butterfly knife demonstration, Petitioner's counsel enabled the jurors to touch and feel and play with a real butterfly knife that the prosecution had effectively presented as a surrogate for what they argued was the knife used to inflict Duran Bailey's stabbing and cutting wounds, amputate his penis, and cut his rectum. To at least some of the jurors, the knife Petitioner's counsel insisted on introducing into evidence could have been considered the equivalent of the murder weapon. Consequently, Petitioner's counsel aided the prosecution in deceiving the jury that Bailey was killed with a butterfly knife when there is no evidence that is true, and that speculation is directly contradicted by the new post-conviction determination of forensic pathologist Dr. Glenn Larkin that, "A single edged knife, either a non serrated kitchen knife, a butcher knife or hunting knife was used to inflict the knife wounds; there are no choil or tang impressions on the skin." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 8.) If Detective Thowsen's butterfly knife had not been introduced into evidence at the insistence of Petitioner's counsel, and if Detective Thowsen's testimony about butterfly knives had been barred by the objection of Petitioner's counsel, the jury would have had no evidence at trial to connect the Petitioner's butterfly knife to Bailey's murder, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(tt) Ground forty-six.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to argue the Petitioner's alibi witness testimony was trustworthy and admissible in the interests of justice under state and federal exceptions to the hearsay rule and that Detective Thomas Thowsen opened the door to its admittance when he cast doubt on the Petitioner's credibility and truthfulness by his opinion testimony that she "minimized" and "jumbled" details in her July 20, 2001, Statement by describing that "over a month ago" she fought off a sexual assault at the Budget Suites Hotel by attempting once to cut her attacker's penis, and Thowsen *de facto* called her a liar and guilty when he testified it "didn't happen there", and the alibi testimony rebuts Thowsen's opinion testimony as not being credible, or in the alternative, the alibi testimony was admissible in the interests of justice under state and federal exceptions to the hearsay rule because the foundation of the prosecution's case and argument to the jury was the assumption the Petitioner was not credible and not truthful in her Statement about when, where, and what type of attack occurred, and the Petitioner's alibi testimony establishes the Petitioner was credible and truthful in her Statement, and if the jury had heard Petitioner's alibi testimony, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Las Vegas Metropolitan Police homicide Detectives Thomas Thowsen and James LaRochelle audio recorded the Petitioner's Statement on July 20, 2001. The Petitioner described being sexually assaulted "over a month ago" around or after midnight in the parking lot of a Budget Suites Hotel on Boulder Highway in east Las Vegas, and she escaped from her assailant after attempting once to cut his exposed penis. That means the assault described in the Petitioner's Statement occurred prior to June 20, 2001, which was weeks before Duran Bailey's murder.

There are at least 40 specific details in the Petitioner's Statement that don't match the details of Bailey's murder. (See Exhibit 85, Forty differences between Petitioner's Statement and Bailey's murder.) Likewise, her Statement doesn't identify a single landmark at or around the scene of Bailey's murder. (See Exhibit 84, Landmarks around the Budget Suites Hotel and the Nevada State Bank.) The information in Exhibits 84 and 85 was only partially introduced at trial. Thowsen explained away all the details in Petitioner's Statement that did not match Bailey's murder, including when, where and what occurred during her assault, and her description of her assailant who she said was alive when she

escaped, by testifying the Petitioner "jumbled" the attacks many details to "minimize" her involvement, and thus she was not truthful in her Statement. (8 App. 1387-1388; Trans. XIII–69-71 (9-27-06)), and Thowsen also testified that he didn't look for any witnesses at the Budget Suites Hotel where Petitioner describes the assault took place, because "there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo." (8 App., 1410; Trans. XIII-159 (9-27-2006)) Thowsen's opinion testimony de facto branded the Petitioner as a liar and guilty.

Thowsen's testimony was the foundation of the prosecution's case and argument that the Petitioner was not truthful or credible in her Statement's description of the incident, and that it was actually about Duran Bailey's murder and post-mortem cutting of his rectum at the Nevada State Bank's trash enclosure in west Las Vegas.

When Petitioner's counsel sought to have prosecution witness Stephen Pyszkowski testify on cross-examination about his knowledge that Petitioner repelled a sexual assault by trying to cut her attacker's penis more than month before Bailey's murder, the prosecution's hearsay objection was sustained. (6 App. 1089; Trans. VI-27 (9-18-06)) When Petitioner's counsel sought to have defense witness Heather McBride testify that prior to July 4, 2001, Petitioner told her about fighting off a sexual assault in Las Vegas by cutting her attacker's penis, the prosecution's hearsay objection was sustained. (8 App. 1525-26, 1528-29; Trans. XVI-60, 62, 64, 73 (10-2-06))

Petitioner's counsel did not argue that Thowsen's testimony opened the door to admission of the alibi witness testimony in the interests of justice under both state and federal hearsay exceptions based on one or more of the following:

> 1. The alibi witnesses would have been testifying about Petitioner's **credibility** in describing a rape attempt in her statement that happened prior to July 8, 2001.
> 2. To **rebut** Thowsen's opinion testimony the Petitioner was not credible and had not been truthful in her statement by describing that the rape attempt happened prior to July 8, 2001.
> 3. To **rebut** Thowsen's opinion testimony as not credible, by establishing the Petitioner was in fact credible and truthful in her statement by describing that the rape attempt happened prior to July 8, 2001.

Neither did Petitioner's counsel argue that the alibi witness testimony was admissible in the interests of justice under both state and federal hearsay exceptions because the foundation of the prosecution's case is the assumption the Petitioner was not credible and not truthful in her

Statement about when and where the assault occurred and what happened during it, and that it is a *de facto* confession to Bailey's murder and mutilation. The Petitioner's alibi testimony rebuts the prosecution's claim and establishes the Petitioner is credible and truthful in her Statement describing that the assault occurred prior to July 8, 2001, and other details, and that there is no rational basis on which to believe her Statement is a confession to Bailey's murder.

The alibi witness testimony the prosecution objected to and that the jury was barred from hearing was trustworthy and credible testimony corroborating the Petitioner's account in her Statement of fighting off a sexual assault prior to July 8, 2001. Consequently, the Petitioner's testimony would have done nothing to ensure the accuracy or trustworthiness of the alibi witness testimony because it was consistent with the Petitioner's audio taped Statement that was entered into evidence by the prosecution and played in open court for the jury to hear.

The Petitioner was prejudiced by her counsel's failure to argue that Thowsen's testimony opened the door to admissibility of the alibi witness testimony on multiple grounds, or in the alternative that the prosecution basing its case on the assumption the Petitioner was not truthful and not credible in her Statement created the special circumstance that in the interests of justice her alibi witness testimony was admissible to establish that the Petitioner was truthful and credible in her Statement. The magnitude of that prejudice is demonstrated by the fact the Petitioner knows of at least nine alibi witnesses who have personal knowledge the Petitioner told them prior to July 8, 2001, that she fought off a sexual assault in east Las Vegas by trying one time to cut her attacker's penis. Those nine witnesses are Steve Pyszkowski (Exhibit 11, Affidavit of Stephen William Pyszkowski.); Heather McBride (Exhibit 13, Affidavit of Heather Michelle McBride.); Cathy Reininger (Exhibit 19, Affidavit of Catherine Ann Reininger.); Michele Austria (Exhibit 12, Affidavit of Michele Dawn Austria.); Dixie Tienken (Exhibit 14, Affidavit of Dixie Tienken.); Daniel Lisoni (Exhibit 17, Affidavit of Daniel Lewis (Louis) Lisoni.); Kimberlee Grindstaff (Exhibit 15, Affidavit of Kimberlee Isom Grindstaff.); Chris Collier (Exhibit 18, Statement of Chris Collier and Declaration of Shari White.); and Doug Twining (See Exhibit 10, Voluntary Statement of Douglas Howell Twining.).

None of these alibi witnesses are related to the Petitioner, they have not kept in contact with Petitioner, and several now live in such diverse places as Hawaii and New Mexico. Some of the alibi

witnesses lived in Panaca and some in Las Vegas in June and July 2001, and some of them don't know each other. The only common denominator between the alibi witnesses is that prior to July 8, 2001, the Petitioner told each of them she fought off a sexual assault in Las Vegas by trying to cut her assailant's penis. It stretches credulity to not believe that such a large number of witnesses who are non-relatives and who have been out of contact with the Petitioner for many years are not being truthful, in providing evidence consistent with what the testimony of Pyszkowski and McBride would have been at trial if Petitioner's counsel had successfully countered the prosecution's objections to their testimony. And all these alibi witnesses provide new alibi evidence that is consistent with the Petitioner's Statement of July 20, 2001, and what the alibi testimony of Pyszkowski and McBride would have been at trial. The purpose of the hearsay rule is to filter out unreliable testimony. There is no basis to believe the new alibi witness testimony is unreliable.

The prosecution wanted their cake and to eat it too by presenting Detective Thowsen's opinion testimony that the Petitioner was not credible and not truthful in her July 20, 2001, Statement due to "minimizing" and "jumbling" when she described fighting off a sexual assault at the Budget Suites Hotel "over a month ago," and that it "didn't happen there," and then objecting to the Petitioner presenting alibi witnesses to rebut the credibility of Thowsen's claim, and to further establish that she was credible and truthful in her Statement. The prosecution also wanted their cake and to eat it to by basing their case on the assumption the Petitioner's Statement is a ***de facto*** confession to Bailey's murder and mutilation, and then objecting to the Petitioner presenting alibi witnesses to rebut the prosecution's claim and establish that she was credible and truthful in her Statement that the assault she describes in it occurred weeks prior to Bailey's murder.

The Petitioner's counsel allowed the prosecution to have their cake and eat it too by failing to argue for the admissibility of Petitioner's alibi testimony on the proper grounds. The Petitioner was grievously prejudiced because if the jury had heard the alibi witness testimony they would have had a factual basis to believe Thowsen's testimony was not credible, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(uu) Ground forty-seven.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution, Nevada Statutes, and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object to Detective Thomas Thowsen's expert psychology testimony regarding the Petitioner's psyche, on the ground the prosecution acted in bad faith by failing to conform with NRS 174.234(2), that requires the prosecution to provide 21 days advance notice of Thowsen's expert testimony, a C.V. detailing Thowsen's psychology degree and his advanced educational background qualifying him to analyze and offer expert psychology testimony about the Petitioner, as well as providing specific information about Thowsen proposed testimony as an expert psychology witness, and Petitioner was gravely prejudiced by her counsel's failure to object to Thowsen's expert psychology testimony that would have triggered the Court to perform its gatekeeper function to exclude non-expert testimony, and if Petitioner's counsel had objected and Thowsen's "expert" testimony had been barred, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The Petitioner's Statement of July 20, 2001, was audio recorded by LVMPD Detectives Thomas Thowsen and James LaRochelle. She describes being "bum rushed" by a black man in the parking lot of a Budget Suites Hotel on Boulder Highway in east Las Vegas as she was getting in her car that around, or after midnight. The man attempted to rape her, but she fought him off by trying one time to cut his exposed penis. She also told the detectives that the attack happened "over a month ago," which would have been prior to June 20, 2001 – more than two weeks before Bailey's murder.

There is not a single specific detail in the Petitioner's Statement of when, where, and the type of attack that occurred that matches the specific details of Duran Bailey's murder and the post-mortem cutting of his rectum, and neither does her description of her attacker as "huge" match Bailey who was 5'10" and weighed less than 140 pounds (133 pounds at autopsy). The Petitioner is 5'6", so Bailey was not a giant compared to her. There are at least 40 specific details in the Petitioner's Statement that don't match the details of Bailey's murder. (See Exhibit 85, Forty differences between Petitioner's Statement and Bailey's murder.) Likewise, the Petitioner's Statement doesn't identify a single landmark at or around the scene of Bailey's murder. (See Exhibit 84, Landmarks around the Budget Suites Hotel and the Nevada State Bank.)

At trial the prosecution did not present any physical, forensic, eyewitness, documentary, surveillance or confession evidence the Petitioner was anywhere in Clark County, Nevada at any time on July 8, 2001 – the day of Bailey's murder. Consequently, the prosecution needed some way to tie the Petitioner to Bailey's murder. It did that by Detective Thowsen's expert psychological opinion testimony that the Petitioner *de facto* confessed/admitted to Bailey's murder in her Statement precisely because it doesn't have details matching Bailey's murder and the crime scene.

Nevada state law requires that the opposing party must be notified about all prospective expert testimony. Petitioner's counsel was not provided notice that Detective Thowsen would provide expert testimony about anything. However, on direct testimony Thowsen explained away the lack of specific details in the Petitioner's Statement that matched Bailey's murder or the crime scene by testifying that was to be expected because based on a few on-the-job experiences, methamphetamine users such as the Petitioner "jumble" details to "minimize" their involvement in a crime. (8 App. 1387-1388; Trans. XIII 69-71 (09-27-06)) The essence of Thowsen's testimony is the Petitioner, who was an 18-year-old high school graduate with no criminal record, consciously used sophisticated techniques of misdirection to try and fool Thowsen and his partner James LaRochelle. Although Thowsen opinion testimony was about the Petitioner's psychological motivations or reasons underlying why her Statement doesn't match Bailey's death or crime scene, Petitioner's counsel did not object and move the court to strike Thowsen's testimony as improper expert psychology opinion testimony.

The prosecution acted in bad faith because they had more than two years to prepare for Petitioner's retrial, yet they did not provide the defense with the required statutory notice of Thowsen's prospective expert psychology testimony about the Petitioner. Furthermore, Thowsen could not have qualified as an expert psychology witness if the prosecution had attempted to do so, because there was no evidence presented at trial Thowsen possessed the advanced psychology academic degrees and years of specialized formal training necessary to even begin to attempt an expert analysis of the Petitioner's psyche to explain her reasons and motivations for anything she did or said about anything – much less to expertly analyze her psychology to explain what was or was not in her Statement and why.

Thowsen's opinion testimony did not posses any reliability or credibility as expert psychology evidence that would assist the jury to understand the inner working of the Petitioner's psyche or why

she did or didn't say anything to anyone about anything. Thowsen's testimony is precisely the sort of non-expert mumbo-jumbo psycho-babble testimony masquerading as expert testimony that NRS 174.234(2) is intended to prevent a jury from being contaminated and misled by hearing. Being a police officer no more makes a person a formally trained expert in psychology qualified to analyze and provide expert testimony about the inner workings of a person's mind and motivations than being a pilot makes a person a formally trained expert in aeronautical engineering. Knowing how to fly an airplane doesn't make one an expert in the how and why of the technicalities of an airplane's intricate operations. Thowsen's psycho-babble testimony about what he called the Petitioner's "jumbling" and "minimizing" was appropriate for casual conversation after a few beers with buddies in a bar, but it had no place in a court of law where the truth is considered important. NRS 174.234 (2) is not a self-executing statute – vigilance by the Petitioner's counsel was required for its enforcement. Yet, Petitioner's counsel made no objection and a motion to strike Thowsen's "expert" psychological testimony on the basis the prosecution acted in bad faith by failing to comply with the statutory requirements to provide 21 days notice of Thowsen's "expert" psychology testimony; a summary of his proposed expert testimony; his C.V. documenting his formal psychology education, advanced degrees, specialized training, and articles and papers he has written related to psychologically analyzing criminal suspects; and any reports related to the Petitioner he has written as a psychology expert.

Petitioner was extremely prejudiced by her counsel's failure to object and to move to have Thowsen's improper psychology opinion testimony stricken, because it served as the basis for the prosecution to claim her Statement constitutes a confession to Bailey's murder. During ADA William Kephart's direct examination of Thowsen he even referred to the Petitioner's Statement as a confession – "the defendant; who gave you her confession" (8 App. 1385, XIII-59-60 (09-27-06) During the prosecution's closing and rebuttal arguments Thowsen's improper psychology "expert" opinion testimony was relied on to describe the Petitioner's Statement as an admission of her guilt to murdering Bailey and cutting his rectum after he was dead.

Although Petitioner's counsel did not retain a psychology expert to analyze the Petitioner's Statement and provide expert testimony about it, new post-conviction expert psychology evidence

proves the magnitude of the prejudice to the Petitioner by her counsel's failure to object to Thowsen's improper psychology "expert" opinion testimony.

After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a qualified psychologist willing to review the Petitioner's Statement and associated materials on a *pro bono* basis to determine if the Petitioner's Statement could be considered a confession, a false confession, or no confession to Bailey's murder and the post-mortem cutting of his rectum. Psychologist Dr. Allison D. Redlich agreed to review the information in the Petitioner's case.

Dr. Allison D. Redlich is an Assistant Professor in the School of Criminal Justice at the University at Albany, State University of New York. Dr. Redlich's doctoral degree is from the University of California, Davis, in Developmental Psychology, with a focus on psychology and law. For more than a decade she has conducted research on and written extensively about the social psychology of police interrogation and the causes and consequences of police-induced false confessions. She has researched, written and published numerous peer-reviewed articles on interrogation and confession in scientific journals and in scholarly books, as well as giving invited presentations at national conferences. Dr. Redlich is one of six experts who authored a scientific "white paper" on police interrogations and false confessions for the American Psychology Law Society, a Division of the American Psychological Association. To determine if Petitioner's Statement of July 20, 2001, constitutes a confession to Duran Bailey's murder and mutilation on July 8, 2001, Dr. Redlich reviewed trial testimony, and evidence and information related to the Petitioner's Statement of July 20, 2001. Dr. Redlich's report of February 10, 2010, states in part:

> "From reviewing the materials, it is my expert opinion that Ms. Lobato was not confessing to the murder of Mr. Bailey. Rather, she was "confessing" to an assault in which she was the alleged victim and in which she defended herself by attempting to cut the penis of a man who was allegedly sexually assaulting her. It appears to me that Ms. Lobato believed she was cooperating with a police investigation, not admitting to a murder that occurred on the other side of town some weeks after her alleged assault.
>
> Although I do not consider Ms. Lobato's case a typical false confession case because she did not confess to the crime in which she was charged and convicted of, her case does share many hallmarks of proven false confession cases. Most notable are the inconsistencies between Ms. Lobato's version of events and the objective facts of Mr. Bailey's death. These inconsistencies have been documented by yourself and others, so

> I will not go into detail, but they include the date of the crimes, the location and time of the crimes, the supposed murder weapon, the shoe print left at Mr. Bailey's crime scene (and lack of a match with Ms. Lobato's shoes), and numerous others.
>
> In addition, in proven false confession cases, there is often no other evidence linking the suspect to the crime except the false confession statement. Similarly, in some of these cases, there is an absence of evidence that is consistent with the commission of the crime and/or the confession statements. To my knowledge, there is no physical evidence linking Ms. Lobato to Mr. Bailey's murder, as well as a lack of corroborating evidence given the manner of the murder.
>
> Another commonality found in proven false confession cases is that the confession statements are not generative in they do not lead to new evidence and/or tell the police details that are not already known. To my understanding, Ms. Lobato's statements did not provide any new evidence or information concerning the Bailey murder.
>
> Finally, I comment on Detective's Thowsen's claim that suspects often minimize their involvement with crimes. It is likely that some guilty suspects do minimize their involvement, in large part because police interrogators are trained to induce suspects to minimize. Specifically, the Reid Interrogation method (i.e., the most commonly used and well known method, see Inbau, Reid, Buckely, & Jayne, 2001) trains interrogators to utilize minimizing themes and scenarios (Step 2); that is, scenarios that make it easier for the suspect to admit to wrongdoing. However, I stress that almost all, if not all, proven false confessions also contain minimization. For example, in the well-established proven false confession case of the five teens involved in the Central Park Jogger crime, the teens minimized their involvement by claiming actions such as holding the victim's legs but not committing the rape itself. Thus, in my opinion, Ms. Lobato's version of events should not be construed as minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her."
>
> (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010.)

The Petitioner was extremely prejudiced by the failure of her counsel to object to Thowsen's improper "expert" psychology opinion testimony, because during the Petitioner's trial no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced that she was anywhere in Clark County on the day of Bailey's murder. So when the jury began its deliberations the only testimony linking her to Bailey's murder was Thowsen's improper psychology "expert" opinion testimony that her Statement didn't have details about Bailey's murder because she "jumbled" all the details to "minimize" her involvement. If Thowsen's testimony had been objected to and stricken as evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(vv) Ground forty-eight.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object and make a motion for a mistrial based on irreparable contamination of the jury by Detective Thomas Thowsen's testimony in response to a juror's question about whether he investigated around the Budget Suites Hotel on Boulder Highway for a witness to the sexual assault Petitioner describes in her Statement of July 20, 2001 – "there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo." – which was not just an opinion of Detective Thowsen's unequivocally stated as a fact, but his statement was that of an experienced homicide detective directly and unquestionably branding the Petitioner as a liar and "guilty" of Bailey's murder, and Thowsen's declaration was so prejudicial that no curative instruction could undo or correct its prejudice to the Petitioner's state and federal constitutional rights to and unbiased and impartial jury, due process of law and a fair trial, yet Petitioner's counsel made no objection and motion for a mistrial, and the Petitioner was further prejudiced by her counsel because by not objecting the issue was not preserved for appeal to the Nevada Supreme Court.

Facts:

LVMPD Detective Thomas Thowsen was the lead homicide investigator in Petitioner's case. After Petitioner's counsel concluded cross-examining Thowsen, one of the jurors submitted a question and the following exchange took place:

> Question by a juror.
> THE COURT: Court's Number 59. Did you search the area near the Budget Suites for possible witnesses and did you ever locate where Blaise was living?
> THE WITNESS: I contacted the Budget Suites and because Blaise did not use her name to register there and she could not give us a name other than I believe it was Michelle as a first name, we had no information. It's a huge place. They had no information on somebody described like Blaise. They had no reports of incidents in their area. **So there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo.** (8. App. 1410; Trans. XIII-159 (9-27-2006) Emphasis added to original.)

Petitioner's counsel did not object and make a motion for a mistrial based on irreparable contamination of the jury by Detective Thowsen's testimony that was tantamount to a direct and unequivocal statement of fact that the Petitioner is a liar and guilty of Bailey's murder. There was nothing for the jury to interpret about Thowsen's statement: "**So there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo**."

Detective Thowsen's testimony was nothing less than his declarative statement that Thowsen and others ("we") "know" Petitioner is guilty of murdering Bailey, because "we know" the incident described in her Statement did not happen at the Budget Suites Hotel, but in the trash enclosure at the Nevada State Bank on West Flamingo where Duran Bailey was murdered. Det. Thowsen's statement of fact that Petitioner is guilty of murdering Bailey was supported by his improper testimony that Petitioner "jumbled" details of the crime in her Statement to "minimize" her involvement. (Trans. XIII–69-71 (9-27-06)) (See (uu) Ground forty-seven, for a detailed explanation of the prejudice to Petitioner by Thowsen's "jumbled" and "minimization" testimony.)

No evidence was provided during Petitioner's trial to support Det. Thowsen's testimony that Petitioner's Statement was a *de facto* confession except for Det. Thowsen's own self-serving testimony that "We know it happened on West Flamingo.", and that Petitioner "jumbled" details to "minimize" her involvement. Detective Thowsen's opinion expressed as a statement of fact – "So there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo." – was a response by an experienced homicide detective directly and unequivocally branding the Petitioner as a liar and "guilty" of Bailey's murder because he believed her Statement as about Bailey's murder.

As an authority figure entrusted to help keep the public safe from "bad people," Thowsen's branding of the Petitioner as a liar for the claims she made in her Statement about being assaulted at the Budget Suites Hotel, and that she was guilty was fatally prejudicial and had a profound effect on the jury's decision.

And there was a cascade effect from Detective Thowsen's testimony. If the jurors believed Thowsen then they also had to believe the Petitioner lied about where she was assaulted, when she was assaulted, and what happened. So the direct consequence of Thowsen's testimony was to fatally prejudice the Petitioner by branding everything she said in her Statement as a possible lie. For all practical purposes, the Petitioner's trial was over after Thowsen's testimony because nothing presented in her defense could be expected to overcome the fatal prejudice of Thowsen's testimony, i.e., she "jumbled" and "minimized" the details. That at least some of the jurors made up their mind about the Petitioner's guilt after Thowsen's testimony is likely why a juror was heard

to state before the Petitioner presented her defense that she had determined the Petitioner was guilty. (See Exhibit 24, Affidavit of John Kraft.)

In addition to doing nothing in response to Det. Thowsen's testimony branding Petitioner as a liar and that she was guilty because her Statement was a *de facto* confession to Bailey's murder, Petitioner's counsel did not counter Detective Thowsen's testimony by presenting testimony by a psychology expert. The magnitude of harm caused by counsel's failure to make any effort to counter Det. Thowsen's testimony branding Petitioner as a liar in her Statement and that she is guilty of Bailey's murder, is proven by Dr. Allison D. Redlich's post-conviction analysis of Petitioner's Statement.

After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a qualified psychologist willing to review the Petitioner's Statement and associated materials on a *pro bono* basis to determine if the Petitioner's Statement could be considered a confession, a false confession, or no confession to Bailey's murder and the post-mortem cutting of his rectum. Psychologist Dr. Allison D. Redlich agreed to review the information in the Petitioner's case.

Dr. Allison D. Redlich is an Assistant Professor in the School of Criminal Justice at the University at Albany, State University of New York. Dr. Redlich's doctoral degree is from the University of California, Davis, in Developmental Psychology, with a focus on psychology and law. For more than a decade she has conducted research on and written extensively about the social psychology of police interrogation and the causes and consequences of police-induced false confessions. She has researched, written and published numerous peer-reviewed articles on interrogation and confession in scientific journals and in scholarly books, as well as giving invited presentations at national conferences. Dr. Redlich is one of six experts who authored a scientific "white paper" on police interrogations and false confessions for the American Psychology Law Society, a Division of the American Psychological Association. To determine if Petitioner's Statement of July 20, 2001, constitutes a confession to Duran Bailey's murder and mutilation on July 8, 2001, Dr. Redlich reviewed trial testimony, and evidence and information related to the Petitioner's Statement of July 20, 2001, including the audio and transcript of the Statement. Dr. Redlich's report of February 10, 2010, states in part:

From reviewing the materials, it is my expert opinion that Ms. Lobato was not confessing to the murder of Mr. Bailey. Rather, she was "confessing" to an assault in which she was the alleged victim and in which she defended herself by attempting to cut the penis of a man who was allegedly sexually assaulting her. It appears to me that Ms. Lobato believed she was cooperating with a police investigation, not admitting to a murder that occurred on the other side of town some weeks after her alleged assault.

Although I do not consider Ms. Lobato's case a typical false confession case because she did not confess to the crime in which she was charged and convicted of, her case does share many hallmarks of proven false confession cases. Most notable are the inconsistencies between Ms. Lobato's version of events and the objective facts of Mr. Bailey's death. These inconsistencies have been documented by yourself and others, so I will not go into detail, but they include the date of the crimes, the location and time of the crimes, the supposed murder weapon, the shoe print left at Mr. Bailey's crime scene (and lack of a match with Ms. Lobato's shoes), and numerous others.

In addition, in proven false confession cases, there is often no other evidence linking the suspect to the crime except the false confession statement. Similarly, in some of these cases, there is an absence of evidence that is consistent with the commission of the crime and/or the confession statements. To my knowledge, there is no physical evidence linking Ms. Lobato to Mr. Bailey's murder, as well as a lack of corroborating evidence given the manner of the murder.

Another commonality found in proven false confession cases is that the confession statements are not generative in they do not lead to new evidence and/or tell the police details that are not already known. To my understanding, Ms. Lobato's statements did not provide any new evidence or information concerning the Bailey murder.

Finally, I comment on Detective's Thowsen's claim that suspects often minimize their involvement with crimes. It is likely that some guilty suspects do minimize their involvement, in large part because police interrogators are trained to induce suspects to minimize. Specifically, the Reid Interrogation method (i.e., the most commonly used and well known method, see Inbau, Reid, Buckely, & Jayne, 2001) trains interrogators to utilize minimizing themes and scenarios (Step 2); that is, scenarios that make it easier for the suspect to admit to wrongdoing. However, I stress that almost all, if not all, proven false confessions also contain minimization. For example, in the well-established proven false confession case of the five teens involved in the Central Park Jogger crime, the teens minimized their involvement by claiming actions such as holding the victim's legs but not committing the rape itself. Thus, in my opinion, Ms. Lobato's version of events should not be construed as minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her.

(See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010.)

Dr. Redlich provides new evidence and provides the expert assessment that was not presented at trial for the jury to rely on in evaluating how and why the Petitioner was credible and

truthful in her Statement, why it is not a confession to the murder of Duran Bailey, and why Thowsen's testimony was the baseless "shoot-from-the-hip" opinion of a person uneducated and with no formal training in psychologically analyzing a suspect's Statement.

Dr. Redlich explains that Petitioner's Statement is concerned with an unrelated event in which Petitioner was the victim, and she defended herself "by attempting to cut the penis of a man who was allegedly sexually assaulting her." (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010, 2.) Just as important as identifying that Petitioner's Statement is not a confession to Bailey's murder, is Dr. Redlich's conclusion that Detective Thowsen's testimony was inaccurate that Petitioner "jumbled" and minimized" about Bailey's murder in her Statement. Completely contrary to Det. Thowsen's testimony that Petitioner was deceptive, Dr. Redlich specifically observes "that Ms. Lobato believed she was cooperating with a police investigation." And, "Ms. Lobato's version of events should not be construed as minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her." (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010, 2.)

If Petitioner's counsel had retained Dr. Redlich or another qualified psychology expert (such as Dr. Richard Leo) who had testified the Petitioner did not "minimize" or "jumble" details of Bailey's murder in her Statement and it is not a confession to Bailey's murder, the jury could have been expected to identify that Detective Thowsen's testimony about the Petitioner's Statement completely lacked credibility. Consequently the jury would have rejected the prosecutor's arguments and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

The Petitioner was gravely prejudiced by her counsel's failure to object and move for a mistrial after Thowsen's ***de facto*** declaration the Petitioner was a liar in her Statement and guilty of Bailey's murder, because "We know it happened on West Flamingo.", and no curative instruction could overcome the jury's fatal infection with the prejudice of Thowsen's declaration to the Petitioner's right to an impartial and unbiased jury, due process, and a fair trial. The Prejudice to the Petitioner by Thowsen's declaration was compounded by her counsel's failure to introduce expert psychology testimony that Petitioner's Statement is not a confession to Bailey's murder. If

the motion for mistrial had not been granted, the Petitioner was further prejudiced because by her counsel not objecting the issue was not preserved for appeal to the Nevada Supreme Court.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ww) Ground forty-nine.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object and make a motion for a mistrial and dismissal of the charges with prejudice when Clark County Assistant District Attorney William Kephart's committed egregious prosecutorial misconduct during his direct examination of Detective Thomas Thowsen by stating the Petitioner gave him "her confession," when there was no testimony the Petitioner "confessed" to Bailey's murder, and Kephart's statement fatally contaminated the jury so that no curative instruction could undo the prejudicial effect of Kephart's deliberate false statement to the jury that prejudiced the Petitioner's right to an impartial and unbiased jury, due process and a fair trial, and the failure of Petitioner's counsel to object and make a motion for a mistrial and dismissal of the charges with prejudice, prejudicially denied the Petitioner's state and federal rights to effective assistance of counsel, and the Petitioner was further prejudiced by her counsel because by not objecting the issue was not preserved for appeal to the Nevada Supreme Court.

Facts:

The Petitioner was charged with murdering Duran Bailey on July 8, 2001, and cutting his rectum after his death (aka sexual penetration of a dead body). No evidence was introduced at trial the Petitioner confessed to murdering Bailey or cutting his rectum after his death in her Statement or during any conversation with homicide Detectives Thomas Thowsen and James LaRochelle or any other person. No physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence was introduced at trial the Petitioner was anywhere in Clark County at any time on July 8, 2001, the day of Duran Bailey's murder. With no evidence the Petitioner was within 170 miles of Las Vegas on July 8, the prosecution had to somehow make the jury believe the Petitioner had confessed to murdering Duran Bailey.

During the direct examination of LVMPD homicide Detective Thomas Thowsen, Clark County Assistant District Attorney William Kephart the following exchange took place:

> Q. Okay. And in respect to that, you had indicated that you had done other investigations with regards to speaking to Dixie and Michelle and Laura; other

> individuals in this case; the defendant; who gave you **her confession**, and you -- did you do anything to determine whether or not there was any other report of an injury involving a knife wound to a man's penis?
> A. Yes, I did. (8 App. 1385); Trans. XIII–59-60 (9-27-06))

Petitioner's counsel did not object and make a motion for a mistrial based on Kephart's egregious prosecutorial misconduct, even though Kephart clearly and unequivocally stated the Petitioner gave Thowsen "her confession" – which only could have been in her Statement or during unrecorded conversations with Detectives Thomas Thowsen and James LaRochelle when she was arrested on July 20, 2001. Yet, there is no confession to Bailey's murder in Petitioner's Statement and there is no record that either Thowsen or LaRochelle claimed the Petitioner confessed to his murder. The Petitioner's Arrest Report doesn't claim the Petitioner confessed in her Statement or during any conversation with the Detectives, nor does the LVMPD Officer's Report of August 22, 2001, claim the Petitioner confessed.

So there is evidence in any document introduced at trail or referenced during the trial by any witness that the Petitioner confessed to Bailey's murder. Kephart fabricated his statement "the defendant, who gave you her confession" out of thin air, because it has no basis in reality or the evidence introduced at trial. Even though Kephart fabricated his statement, as the public's representative the jury would be expected to take it at face value.

Although Petitioner's counsel did not object, a motion for a mistrial was the only reasonable correction to Kephart's statement, because no curative instruction could have undone the damage to Petitioner's due process right, her right to a fair trial, and her right to an impartial and unbiased jury, because they could have reasonably assumed Kephart's statement as true and the Petitioner did confess, and that her counsel's objection was a legal stratagem to keep that information from the jury.

On the other hand, since Petitioner's counsel did not object to Kephart's gross prosecutorial misconduct of declaring the Petitioner gave "her confession" to Thowsen, the jurors could be expected to have believed the Petitioner did "confess," when no evidence was presented during Petitioner's almost four week trial that she did so. Kephart's unchallenged and false declaration the Petitioner gave "her confession" to Thowsen for accused crimes can be expected to have had a significant and

prejudicial impact on the jury's deliberations and finding that the Petitioner was guilty.

The Petitioner was extremely prejudiced by her counsel's failure to object and make a motion for a mistrial when Kephart falsely stated the Petitioner gave Thowsen "her confession." And because Kephart deliberately and falsely stated the Petitioner gave "her confession" to Thowsen to prejudice the Petitioner's state and federal constitutional rights to an impartial and unbiased jury, due process and a fair trial, the Petitioner was further prejudiced by her counsel's failure to object and make a motion for dismissal of the charges with prejudice based on Kephart and the prosecution's extreme prosecutorial misconduct that was intended to interfere with the fair administration of justice. The bell of Kephart's fabricated statement and its effect on the jurors could not be unrung by a curative instruction, so Kephart's statement about the Petitioner's non-existent confession was fatally prejudicial to the Petitioner's rights. Consequently the only cure was a mistrial, and the appropriate sanction for Kephart's egregious prosecutorial misconduct was dismissal of the charges with prejudice. If the motion for mistrial had not been granted, the Petitioner was further prejudiced because by her counsel not objecting the issue was not preserved for appeal to the Nevada Supreme Court.

Petitioner incorporates by reference the facts in the supporting documents. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(xx) Ground fifty.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to use available evidence to expose during cross-examination of Detective Thomas Thowsen that his testimony was not credible that he contacted hospital personnel and urologists in Las Vegas regarding a slashed or severed penis in May, June and July 2001; that he had his secretary search for reports filed by medical providers pursuant to NRS 629.041 related to a groin area or penis injury in May, June and July 2001 in Las Vegas; and that he went to the Budget Suites Hotel on Boulder Highway to investigate the Petitioner's Statement on July 20, 2001, that "over a month ago" she fought off a rape attempt by cutting once at her assailant's penis, and if the jury had known Thowsen's testimony wasn't credible, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution's key law enforcement witness during Petitioner's trial was LVMPD Detective Thomas Thowsen. Det. Thowsen was the lead homicide detective in Petitioner's case, and his partner was Detective James LaRochelle. The Las Vegas Metropolitan Police Department Officer's Report dated August 22, 2001, meticulously details what Thowsen and LaRochelle did during their investigation of Duran Bailey's murder. The Officer's Report includes the name and address of every individual and organization the detectives contacted, and it also records the date and time of when those contacts were made. Nowhere in the Officer's Report is it mentioned:

- That Detective Thowsen or his secretary searched for reports filed with the LVMPD under NRS 629.041 for groin area or penis wounds in May, June and July 2001.
- That Detective Thowsen contacted hospitals concerning treatment of an injured or severed penis in May, June and July 2001.
- That Detective Thowsen contacted urologists concerning repair of a severed penis in May, June and July 2001.
- That Detective Thowsen went to the Budget Suites Hotel on Boulder Highway in east Las Vegas to investigate the Petitioner's Statement that she was assaulted there "over a month" prior to July 20, 2001 (which was weeks before Bailey's murder).

Thowsen testified to the following on May 10, 2002, during Petitioner's trial:

> THE COURT: The record shall reflect that when he said in here somewhere he referred to a black binder that's to his right, which contains numerous documents, is about five inches thick.
> Q (By Mr. Kohn) I believe that's his **homicide book**, is that correct detective?
> A (By Mr. Thowsen) That's correct.
> Q **And that has everything you did in the case; everything that was done in the case; is that correct?**
> A **Yes**. (3 App. 734-735; Trans. III-99-100 (5-10-02)) (Emphasis added to original.)

Petitioner's counsel did not question Thowsen about the completeness of his "homicide book" at Petitioner's second trial.

In her Statement on July 20, 2001, audio recorded by Detectives Thowsen and LaRochelle, Petitioner described being sexually assaulted "over a month ago" in the parking lot of the Budget

Suites Hotel near Sam's Town (Casino) on Boulder Highway in east Las Vegas around or after midnight, and that she escaped from her assailant after attempting once to cut his exposed penis.

During Petitioner's trial Thowsen testified on direct examination that to try and verify Petitioner's account he searched for reports filed with the LVMPD by Las Vegas medical care providers in May, June and July 2001 for knife wounds to the groin area or penis, and that he found no reports. The reports are required by NRS 629.041 to be filed for the treatment of non-accidental gunshot and knife wounds. On cross-examination Detective Thowsen changed his testimony. He testified that he delegated the search to his secretary, and that she found no reports. When asked on cross-examination if he recorded anything regarding the search for the NRS 629.041 reports, Thowsen responded, "It's not in a specific document, no." (8 App. 1399; Trans. XIII-114 (9-27-2006))

Petitioner's counsel did not follow up by questioning Thowsen that his testimony he had no record of the investigation for reports filed under NRS 629.041 was contrary to his prior testimony that "everything that was done in the case" was in his 5" thick black "homicide book." Neither did Petitioner's counsel question Thowsen about why the Officer's Report does not include any mention of a search by any person for any reports filed under NRS 629.041.

Thowsen also testified on cross-examination that to investigate if a man's penis had been cut or severed in May, June and July 2001, "I personally telephoned hospitals." (Trans. XIII-113 (09-27-06)), and, "Well, I also spoke with urologists in the Valley." (8 App. 1399; Trans. XIII-114 (9-27-2006)) Thowsen testified that all his inquires were negative for a slashed or severed penis. Petitioner's counsel asked Thowsen during cross-examination:

> Q. Okay. And did you prepare a report on the results of this investigation?
> A. I did not. (Trans. XIII-114 (09-27-06))

Petitioner's counsel did not follow up by questioning Thowsen that his testimony he did not make a report of his contacts with hospital personnel and urologists was contrary to his prior testimony that "everything that was done in the case" was in his 5" thick black "homicide book." Neither did Petitioner's counsel question Thowsen about why the Officer's Report does not include any mention of him contacting hospital personnel and urologists.

Thowsen also testified on cross-examination that to try and verify Petitioner's account he went to the Budget Suites Hotel at 4855 Boulder Highway "within a few days" of her arrest. During Thowsen's cross-examination the following exchange took place:

> Q (By Mr. Schieck) Did you go out to the Budget Suites on the Boulder Highway?
> A (By Mr. Thowsen) Yes, I did. (8 App. 1392; Trans. XIII-88 (09-27-06))
> And,
> Q (By Mr. Schieck) And you didn't look for a crime scene. You talked to the manager and that was it?
> A (By Mr. Thowsen) That's correct. (8 App. 1411, Trans. XIII-165 (09-27-06))
>
> And,
>
> Q Did you prepare a report on that?
> A No, I did not. (App. 8, 1412, Trans. XIII-166 (09-27-06))

Petitioner's counsel did not follow up by questioning Thowsen that his testimony he had no record of his investigation at the Budget Suites Hotel was contrary to his prior testimony that "everything that was done in the case" was in his 5" thick black "homicide book." Neither did Petitioner's counsel question Thowsen about why the Officer's Report does not include any mention of him investigating at the Budget Suites Hotel.

There is no record anywhere that Thowsen conducted any of the four "investigations" that he testified he conducted to verify the assault described in the Petitioner's Statement. Yet, the Petitioner's counsel did not question Thowsen about why there is nothing about any of those investigations in the Officer's Report, or in his black "homicide book" that he agreed in his previous testimony has "everything that was done in the case."

The prosecution's case depended on undermining the Petitioner's description in her Statement that "over a month ago" at the Budget Suites Hotel she fought off a sexual assault by trying once to cut her assailant's penis. The prosecution relied on the negative results of Thowsen's four alleged investigations to undermine the Petitioner's credibility and the truthfulness of her Statement's description of when and where she was attacked, and what happened. Consequently, the Petitioner was gravely prejudiced by her counsel's failure to even attempt to cross-examine Thowsen to expose that there was no rational basis for the jurors to believe he conducted any of the four alleged investigations – because if he had done so he would have kept a record of them in his

black "homicide book" and they would have been documented in the Officers Report, particularly because the negative results of the four investigations support the allegation the Petitioner committed her accused crimes. If Petitioner's counsel had cross-examined Thowsen about the four alleged investigations it would have provided a factual basis for the jury to have determined his testimony about the investigations was not credible and untruthful, and with no basis to doubt the Petitioner's account in her Statement of being assaulted, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(yy) Ground fifty-one.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object on confrontation grounds to the hearsay testimony of LVMPD Detective Thomas Thowsen about what he said his secretary told him she had learned from searching for reports by Las Vegas medical care providers filed under NRS 629.041 for May, June and July 2001, and his hearsay testimony about what he said Las Vegas hospital personal and urologists told him regarding the treatment of an injured or severed penis during May, June and July 2001, and if Petitioner's counsel had objected on confrontation grounds Thowsen's hearsay testimony would have been stricken under *Crawford v. Washington*, 541 US 36 (2004) *et al*, and if the jury had not been allowed to consider Thowsen's hearsay testimony undermining the Petitioner's credibility and truthfulness in her Statement of July 20, 2001, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to confront witnesses against her, due process of law and a fair trial.

Facts:

The pillar of the prosecution's case was their contention the Petitioner was not credible and not truthful in her Statement of July 20, 2001, in which she described "over a month ago" being sexually assaulted at the Budget Suites Hotel on Boulder Highway in east Las Vegas, and that she defended herself by trying once to cut her "huge" attacker's penis with her pocket butterfly knife. The prosecution had to undermine Petitioner's credibility and truthfulness because if the incident occurred when, where and how the Petitioner described it, then her Statement and comments to many people about the attack had nothing to do with Duran Bailey's murder and the post-mortem cutting of

his rectum. With no physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence that at any time on July 8, 2001, the Petitioner was in Clark County, or Las Vegas, or at the Nevada State Bank, or inside the bank's trash enclosure where Bailey was murdered, the prosecution had to rely on somehow characterizing her Statement as a confession of guilt.

Consequently, a prosecution tactic to establish the Petitioner was not credible and not truthful in her Statement's description of when, where and how she was attacked, was to present Detective Thowsen's direct testimony that he personally conducted a search of NRS 629.041 reports by Las Vegas medical care providers filed in May, June and July 2001 for treatment of a non-accidental "slashed or severed penis." (Trans. XIII-62 (09-27-06)) (See Exhibit 74, NRS 629.041) Thowsen testified, "I found no slashed or severed penis." (Trans. XIII-62 (09-27-06)) On cross-examination Thowsen changed his testimony. He did not conduct a search of NRS 629.041 reports, but his secretary did, and she told him the results of her efforts. (Trans. XIII-112-4 (09-27-06)) The continuation during cross-examination of Thowsen's direct testimony about the NRS 629.041 reports led to him testify, "I personally telephoned hospitals." (Trans. XIII-113 (09-27-06)), and "I also spoke with urologists in the Valley." (Trans. XIII-114 (09-27-06)) Thowsen testified that all his inquires were negative for a slashed or severed penis. Petitioner's counsel asked Thowsen during cross-examination:

> Q. Okay. And did you prepare a report on the results of this investigation?
> A. I did not. (Trans. XIII-114 (09-27-06))

So Thowsen provided direct hearsay and double hearsay testimony as to what his unnamed secretary told him about her search for reports, and hearsay and double hearsay testimony on cross-examination about what unnamed persons from unidentified hospitals and unnamed urologists from unnamed clinics told him about the contents of reports or that they did not treat a slashed or severed penis in May, June or July 2001. Furthermore, Thowsen testified he did not memorialize in writing anything that was reported to him by those many unnamed people, making the direct testimony of his secretary, the hospital personnel and urologists, and the opportunity of Petitioner's counsel to cross-examine them, even more important.

Thowsen's testimony was not only hearsay and double hearsay, but it created the situation that all the medical care providers who prepared the NRS 629.041 reports he said his secretary told

him she searched for, and the hospital personnel and urologists that Thowsen's said he talked with were *de facto* witnesses testifying in absentia against the Petitioner via Thowsen without her having any opportunity to cross-examine them and elicit testimony consistent with her Statement, and that undermined the truthfulness of Thowsen's testimony. Thowsen testified he gathered the information from his secretary, the hospital personnel and the urologists as part of his investigation and the prosecution's preparation for the Petitioner's trial, which renders the reporting of that information to him testimonial in nature. And that information formed a key part of Thowsen's trial testimony and the prosecution's argument to the jury for the Petitioner's conviction. However, Petitioner's counsel did not object to Thowsen's hearsay testimony on the basis it violated the Petitioner's state and federal constitutional right to confront the witnesses against her.

Petitioner was extremely prejudiced by counsel's failure to object to any of Thowsen's multiple acts of hearsay and double hearsay testimony on confrontation grounds, because the prosecution relied on Thowsen's hearsay testimony to argue to the jury that there is no record of a slashed or severed penises in Las Vegas in May, June and July 2001. Consequently, the prosecution was able to attack Petitioner's credibility and truthfulness by characterizing her Statement as a *de facto* confession to Duran Bailey's murder and the cutting of his rectum, and that her Statement does not describe her defending herself against a sexual assault at the Budget Suites Hotel on Boulder Highway that occurred weeks prior to Bailey's murder. If Thowsen's hearsay testimony had been stricken and the jury admonished to disregard it, the jury would have had no evidence upon which to determine the Petitioner was not truthful in her Statement, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(zz) Ground fifty-two.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object and make a motion for a mistrial because ADA William Kephart committed egregious fraud on the court by deliberately misrepresenting to Judge Valorie Vega that Detective Thomas Thowsen was not going to provide hearsay testimony about NRS 629.041 reports filed in May, June and July 2001, and after Thowsen's direct testimony was exposed as hearsay during cross-examination, Kephart committed additional egregious fraud on the court by misrepresenting to Judge Vega that Thowsen had not provided hearsay testimony, and as a result of Kephart's egregious prosecutorial misconduct Thowsen also provided hearsay testimony about what he was allegedly told by hospital personnel and urologists, and ADA Sandra DiGiacomo aided and abetted Kephart's frauds on the court, and furthermore Kephart suborned perjury from Thowsen on direct examination about his non-exist search for NRS 629.041 reports, and because of Kephart and DiGiacomo's egregious prosecutorial misconduct of deliberately trying to sabotage the fair administration of justice and deprive the Petitioner of her state and federal constitutional rights to due process of law and a fair trial, the curative action was dismissal of the charges against the Petitioner with prejudice, but the Petitioner's counsel made no motion for dismissal, and the Petitioner was further prejudiced because by not objecting to Kephart's frauds on the court, DiGiacomo's aiding and abetting, and Kephart's subornation of perjury, those issues were not preserved for appeal to the Nevada Supreme Court.

Facts:

In the Petitioner's Statement on July 20, 2001, audio recorded by lead homicide Detective Thomas Thowsen and his partner Detective James LaRochelle, she described being sexually assaulted "over a month ago" in the parking lot of the Budget Suites Hotel on Boulder Highway in east Las Vegas around or after midnight, and that she escaped from her assailant after trying once to cut his exposed penis.

The prosecution's case depended on discrediting the Petitioner's description of when, where and what type of attack occurred, because they had to convince the jury that what she was talking about in her Statement was Bailey's murder and the post-mortem cutting of his rectum at the Nevada State Bank's trash enclosure 12 days before her interrogation. Key to that strategy was having Detective Thowsen testify that he could find no evidence that another man in Las Vegas experienced a cut or severed penis in May, June and July 2001.

During Thowsen's direct examination Clark County Assistant District Attorney William Kephart asked Thowsen several questions about NRS 629.041, which requires medical care

providers to file a report with local law enforcement authorities about their treatment of what they believe are non-accidental gunshot and knife wounds. Petitioner's counsel requested a bench conference to clarify where Kephart was going with Thowsen's testimony. Kephart represented to Judge Vega that Thowsen was going to provide testimony based on his personal knowledge of reviewing the NRS 629.041 reports. Judge Vega ruled that Kephart could question Thowsen about his search for the NRS 629.041 reports. (8 App. 1414-15; XIII-176-180 (9-27-06))

Thowsen testified on direct examination that to try and verify Petitioner's account in her Statement he searched for reports filed with the LVMPD under NRS 629.041 in May, June and July 2001 for knife wounds to the groin area or the penis, and that he found no reports. On cross-examination Thowsen changed his testimony. He testified that he didn't personally search for the reports. He delegated the search to his secretary, and he said she told him that she searched the NRS 629.041 reports for May, June and July 2001 and found none about a knife wound to a man's groin area or penis. During a continuation of the cross-examination that elicited Thowsen's admission that he testified falsely on direct examination about the reports, Thowsen provided hearsay testimony about what he said he was told by hospital personnel and urologists. Thowsen's hearsay testimony was that that all his inquires were negative for a slashed or severed penis. When asked on cross-examination if he recorded his investigation, Thowsen replied, "It's not in a specific document, no." (8 App. 1399; Trans. XIII-117 (09-27-2006))

Petitioner's counsel made a motion to strike Thowsen's hearsay direct testimony about his secretary's search for NRS 629.041 reports, and to strike his hearsay testimony on cross-examination about what he said he was told by hospital personnel and urologists. At the end of the day when Judge Valorie Vega considered the motions, Petitioner's counsel David Schieck stated: "We'd object that it's hearsay and the Court allowed him to testify. We want to renew that motion and make a motion to strike his testimony in that regard …" (8 App. 1414; XIII-176, 9-27-06)) The purpose of cross-examination is to test the veracity of a witness' testimony on direct examination, and Thowsen's cross-examination is a classic example of how it can expose a witness' direct testimony was false and contrived.

ADA Sandra DiGiacomo attempted to divert the court's attention away from the issue of Thowsen's hearsay direct testimony by saying the prosecution could subpoena records from ten hospitals to show there were no injured penises. Judge Vega then said:

> "THE COURT: -- objection at sidebar was as to hearsay and we had discussion at sidebar that -- cause my initial impression was that Detective Thowsen himself had called the hospitals and was going to rely what the hospital personnel had told him and Mr. Kephart said, no, that that was not the case. That he had internally reviewed reports from Metro that were negative. And that is what Detective Thowsen initially testified to so I want to go back to my notes." (App. 8, 1414; XIII-177, 9-27-06) (Underlining added to original.)

DiGiacomo again attempted to divert the court's attention away from the issue of Thowsen's hearsay direct testimony by pointing out to Judge Vega that Thowsen's testimony about what he was told by hospital personnel was elicited during cross-examination.

At that point Vega had made it clear that Kephart had specifically told her during the bench conference that Thowsen's direct testimony was going to be that "he had internally reviewed reports from Metro." Kephart did elicit that testimony from Thowsen on direct examination, but on cross-examination Thowsen admitted his testimony was not true. He did not search for any NRS 629.041 reports: he testified his secretary told him that she had done so.

During the discussion after Thowsen testified, Kephart made additional misrepresentations to Judge Vega about Thowsen's direct testimony that he searched the NRS 629.041 reports, which he admitted on cross-examination he knew nothing about personally, but his secretary told him she had searched the reports:

> "MR. KEPHART: As I recall specifically in that area because I knew what Mr. Schieck was objecting to. His testimony on direct was he searched for reports and that and found -- and within the department and nothing had been reported and it was left at that. … but he testified on direct that he found no reports. And my specific direct was aimed as to the statute as to whether or not there was any reports made resulting in information about a person being stabbed or cut with a knife and we talked here specifically about in the groin area slashed with a knife or whatever and he said nothing was reported like that. And now Mr. Schieck said, well, what, did you talk to -- you know, he went on beyond reports based on cross-examination." (8 App. 1415; XIII-179, 9-27-06)

Kephart obfuscated the issue that he elicited Thowsen's hearsay testimony on direct

examination after lying to Judge Vega that Thowsen had personal knowledge about the reports; by again lying to Judge Vega that Thowsen didn't provide any information during his direct examination that suggested his testimony was hearsay. And Kephart further lied to Judge Vega about the issue of Thowsen's hearsay on direct examination by telling Vega that Petitioner's counsel was objecting to information elicited from Thowsen during cross-examination.

Petitioner's counsel did not bring to Judge Vega's attention the fraud on the court Kephart was perpetrating by his repeated lying to Judge Vega about what Thowsen's testimony was going to be, and then what his testimony actually was on direct examination about his secretary and the NRS 629.041 reports. Neither did Petitioner's counsel bring to Judge Vega's attention that Kephart suborned perjury from Thowsen on direct examination about his non-exist search for NRS 629.041 reports.

Petitioner's counsel also did not bring to Judge Vegas attention that Kephart was misleading her because Thowsen's hearsay and double hearsay testimony on direct examination about the reports could not be exposed until the defense had an opportunity to cross-examine Thowsen. It was discovered during cross-examination that Thowsen lied during his direct testimony, and that he in fact provided hearsay and double testimony about what he said his secretary told him about the NRS 629.041 reports. Petitioner's counsel did not clarify the issue that Thowsen's testimony about contacting hospital personnel and urologists was a direct consequence and continuation of his cross-examination that exposed Thowsen had fabricated his direct testimony about personally searching for the NRS 629.041 reports. If Kephart had not successfully duped Judge Vega into allowing Thowsen to lie during his direct examination about personally searching for the NRS 629.041 reports, then he never would have asked the questions during cross-examination that resulted in his hearsay and double hearsay testimony about what he said he was told by hospital personnel and urologists in Las Vegas.

Since Petitioner's counsel did not bring to Judge Vega's attention Kephart's multiple frauds on the court, Thowsen's perjury, and DiGiacomo's attempts to divert Judge Vega's attention from what they had done to ensure the jury would hear and be allowed to consider Thowsen's hearsay and double hearsay testimony about the NRS 629.041 reports that he had no personal knowledge

of, Vega rewarded the blatant dishonesty of Kephart, Thowsen and DiGiacomo by ruling: "The motion to strike is denied. The State limited either examination to avoid the hearsay." Crime does pay. At least when it is two Clark County Assistant District Attorneys and a Las Vegas Metropolitan Police Department homicide detective pulling off the crime in a Las Vegas courtroom right under the nose of the judge.

If Kephart had not lied to Judge Vega that Thowsen's direct testimony would be based on his personal knowledge– she would not have been duped into allowing Thowsen's hearsay testimony about the absence any NRS 629.041 reports about an injured penis in May, June and July 2001.

If Kephart had not lied to Judge Vega after Thowsen testified that his direct testimony about the absence of NRS 629.041 reports and an injured penis was not hearsay – she would have stricken Thowsen's hearsay testimony from the record.

And if Kephart had not lied to Judge Vega after Thowsen testified that his hearsay testimony on cross-examination about what he said he was told by hospital personnel and urologists was not a continuation of his hearsay testimony on direct examination about the search of NRS 629.041 reports, Judge Vega would have stricken that testimony from the record. Judge Vega's ruling was the direct result of the multiple frauds on the court that Kephart perpetrated by his lies to deceive Judge Vega about Thowsen's hearsay testimony, both before and after he testified. And Kephart was aided by DiGiacomo's subterfuge of running interference for Kephart.

However, Petitioner's counsel did not object to Kephart's egregious prosecutorial misconduct of repeatedly lying to Judge Vega to perpetrate a fraud on the court, or his subornation of Thowsen's perjury on direct examination. Neither did Petitioner's counsel make a full record of how Thowsen's cross-examination hearsay testimony about what the hospital personnel and urologists told him was intertwined with and a continuation of his direct hearsay testimony about the NRS 629.041 reports that he said his secretary told him about.

Consequently, Kephart and DiGiacomo were rewarded by Judge Vega for their egregious prosecutorial misconduct and Kephart's repeated lying to Judge Vega on the record, when she denied the objection by Petitioner's counsel to Thowsen's hearsay testimony and the motion to strike his testimony.

Petitioner's counsel raised the issue of Thowsen's hearsay testimony on direct and cross-examination in her direct appeal to the Nevada Supreme Court. Petitioner's Appeal Brief argued Judge Vega abused her discretion by not sustaining the Petitioner's objection to Thowsen's hearsay testimony on direct and cross-examination about what he said his secretary told him about her search of NRS 629.041 reports, and what he said hospital personnel and urologists told him.

During oral arguments Petitioner's counsel David Schieck argued that Thowsen's hearsay and double hearsay testimony should have been stricken by Judge Vega. During his argument Schieck outlined Kephart's subterfuge in duping Judge Vega to admit Thowsen's hearsay testimony. Schieck did everything but use the word conspiracy to describe the coordinated effort between Kephart, DiGiacomo and Thowsen to deceive and confuse Judge Vega into allowing Thowsen to knowingly contaminate the jury with his hearsay and double hearsay testimony on direct and cross-examination. The following is an excerpt of Schieck's oral argument:

> Mr. Schieck: … They had pre-trialed him, he had told them what he had done, they were fully aware of it. When we approached the bench, they told the Court that he had done it when, in fact, he hadn't done it, and that's what created the problem when we continued to ask him questions. The State....
> Court: As to this issue, could you clarify the issue as to what you're talking about and the offer by the State to bring forth the custodians of record from the various hospitals, as to this issue?
> Mr. Schieck: They did -- when I renewed my objection after it was clear that it was hearsay and it was improper, and I asked that his testimony be stricken, they said, "Oh, we've already got under subpoena the hospitals in order to prove that." That's because they must have known that his testimony was hearsay and if we objected, they were going to have to do that. They made no offer of proof as to what hospitals, they had every opportunity to bring that in and didn't bring it in. …
> …
> Mr. Schieck: …. if you read the sequence of how this questioning went and how we got to the point we were at, you will see that there was, there was this information given to the Court when the initial ruling was made, and it started to peel away, peel away, peel away till we get to the point where they don't want to bring in those health care providers; they prefer to have Detective Thowsen summarize what happened with every health care provider in Clark County.
> (Nevada Supreme Court oral argument in *State of Nevada vs. Kirstin Blaise Lobato,* No. 49087, on October 17, 2008. Emphasis added to original.) (Audio of Nevada Supreme Court oral arguments available at, www.justicedenied.org/kl/lobato_NSC_arguments_10-7-08.mp3)

Schieck did not argue, and it was not included in the Petitioner's appeal to the Nevada Supreme Court, that Kephart and DiGiacomo's deceptions constitute egregious frauds on the court that prejudiced the Petitioner and affected the jury's verdict. Thowsen's hearsay and double-hearsay testimony about what the NRS 629.041 reports and what he said he was told by hospital personnel and urologists was indispensible to the prosecution. It was the only evidence that could be characterized as providing a link between the Petitioner's Statement and Bailey's murder: If no penis injuries were reported in Las Vegas in May, June and July 2001 – then her Statement must be about Bailey's murder. Or so the prosecution argued.

The NSC ruled that Thowsen's direct testimony was hearsay, but possibly due to the incomplete record because Judge Vega cut the hearing short, it ruled Thowsen's cross-examination hearsay testimony was invited error by Petitioner's counsel. (*Lobato vs. Nevada*, No. 49087 (NV Supreme Ct, 02-05-2009), Order of Affirmance) Also possibly due to the incomplete record, the NSC ruled Thowsen's hearsay testimony was harmless error. The NSC was not cognizant when it made it ruling of the magnitude of what had transpired in Judge Vega's courtroom related to the frauds on the court perpetrated by Kephart and DiGiacomo in deceiving Judge Vega into first allowing, and then declining to strike Thowsen's hearsay and double hearsay testimony on direct and cross-examination.

The egregious prosecutorial misconduct of ADA Kephart and DiGiacomo's frauds on the court was waived as an appealable issue by the failure of Petitioner's counsel to object that Kephart lied repeatedly on the record to Judge Vega so she would rule favorably for the prosecution regarding Thowsen's hearsay testimony. Likewise, Petitioner's counsel did not object to Kephart's egregious prosecutorial misconduct of suborning perjury from Thowsen on direct examination about his non-existent search for NRS 629.041 reports.

The Petitioner was prejudiced because if her counsel had properly objected to Kephart and DiGiacomo's fraud on the court, and Kephart's subornation of perjury, those issues could have been raised in her direct appeal. If they had been raised as an issue the NSC would almost surely have ruled that all of Thowsen's hearsay testimony was prejudicial error and reversed the Petitioner's conviction. For the NSC to have done otherwise would have rewarded the prosecution for Kephart and DiGiacomo's fraudulent misrepresentations to Judge Vega to win favorable rulings

about Thowsen's hearsay and double hearsay testimony on direct and cross-examination. And it would have left Kephart subornation of Thowsen's perjury about personally conducting the NRS 629.041 searches unpunished and emboldened him to continue freely subverting the administration of justice with the sanction of the Court.

The circumstances of ADA Kephart and DiGiacomo's frauds on the court demand a full evidentiary hearing during which all the relevant parties and material witnesses testify. In particular testimony must be obtained from ADA Kephart and Judge Vega about whether and how their relationship while colleagues in the Clark County District Attorney's Office influenced her to tolerate and condone Kephart's multiple lies to her about Thowsen's hearsay testimony, and the influence that relationship had on her decision to deny the motion of Petitioner's counsel to strike Thowsen's hearsay testimony. The testimony of Kephart, DiGiacomo, and Vega as material witnesses, and her court personnel, will also reveal what unrecorded *ex parte* communications occurred between them during Petitioner's trial concerning Thowsen's hearsay testimony.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(aaa) Ground fifty-three.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to use available information to cross-examine LVMPD Detective Thomas Thowsen about his false and possibly perjurious testimony about comments he alleged the Petitioner made about the holding cell she was in at the Clark County Detention Center after her arrest on July 20, 2001, and to object to the prosecution's false statements about Thowsen's testimony during closing and rebuttal arguments, and if the jury had known Thowsen's testimony was false and possibly perjurious, and the prosecution's arguments were false statements about Thowsen's testimony, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

To try and tie the Petitioner to Bailey's murder the prosecution argued to the jury that while the Petitioner was in a Clark County Detention Center cell after her arrest on July 20, 2001, she

described the trash enclosure where Bailey was murdered to LVMPD Detective Thomas Thowsen (and his partner James LaRochelle, who did not testify). Detective Thowsen testified at trial:

> Q. What did she tell you?
> A. While she was standing in this room getting photographed she looked around at it and she made the comment that this looked similar to the structured area where the attack had occurred and made the comment that she could look up and see the covered parking from the parking lot from the position.
> (Trans. XIII - 50-51 (9-27-06) Underlining added to original.)

During cross-examination Petitioner's counsel did not question Thowsen to expose inconsistencies between his trial testimony about the holding cell and the Arrest Report written the day of her arrest, his preliminary hearing testimony 18 days after her arrest, the LVMPD Officer's Report written by Thowsen and his partner James LaRochelle 15 days after the preliminary hearing, and Thowsen's testimony during the Petitioner's first trial. The Arrest Report states:

> "While at CCDC, Lobato told Detective Thowsen and I that the incident occurred in an enclosed area similar to the jail cell, but smaller." (Arrest Report, ID/Event No. 1691351, Lobato, Kirstin Blaise, July 20, 2001, LVMPD. Underlining added to original.)

Contrary to Thowsen's trial testimony, the Arrest Report has the Petitioner saying that the "area" in which she was attacked was smaller than the holding cell. The trash enclosure where Bailey was murdered is twice or more larger than the holding cell, so the Petitioner could not have been referring to the trash enclosure. Also contrary to Thowsen's trial testimony, the Arrest Report does not have the Petitioner saying anything about what she could or couldn't see when looking up. The single most distinctive feature of the trash enclosure is the unmistakable wire mesh fencing material that is only inches above one's head, yet Thowsen doesn't even claim in his testimony the Petitioner said anything about the wire mesh ceiling. Furthermore, a police photo taken the morning after Bailey's murder doesn't show "the covered parking" that Thowsen claimed in his testimony. What you could clearly see from inside the trash enclosure is lots of trash on top of the wire mesh, but Thowsen did not claim in his testimony that the Petitioner made any comment about the very visible trash. (See Exhibit 61, Trash Enclosure Wire Mesh.) So Thowsen claimed in his trial testimony that the Petitioner commented on what is not visible in the photo – "the covered

parking" – while he makes no mention of her saying anything about what can be clearly seen – the wire mesh directly above the head of a person standing in the trash enclosure, and the trash heaped on top of the wire mesh ceiling. Furthermore, the Arrest Report makes no mention the Petitioner said she was attacked in a "structured area" similar to the holding cell.

During Petitioner's preliminary hearing that was 18 days after her arrest, Thowsen testified:

> "she was in a small holding cell and indicated that the place was similar to a small area like this." (*State v. Lobato*, Case No. C177394, Reporter's Transcript of Preliminary Hearing, August 7, 2001, 61. Underlining added to original.)

That testimony was similar to the Arrest Report in describing that where the Petitioner said she was attacked was in an area half or less the size of the trash enclosure where Bailey was murdered, so the Petitioner could not have been referring to the trash enclosure. And Thowsen's preliminary hearing testimony was also consistent with the Arrest Report that makes no mention the Petitioner made any comment while in the holding cell about what she could or could not see when looking up. The single most distinctive feature of the trash enclosure is the unmistakable wire mesh fencing material that is only inches above one's head, yet Thowsen doesn't even claim in his testimony the Petitioner said anything about the wire mesh ceiling. Furthermore, a police photo taken the morning after Bailey's murder doesn't show "the covered parking" that Thowsen claimed in his testimony. What you could clearly see from inside the trash enclosure is lots of trash on top of the wire mesh, but Thowsen did not claim in his testimony that the Petitioner made any comment about the very visible trash. (See Exhibit 61, Trash Enclosure Wire Mesh.) Furthermore, Thowsen's makes no mention in his preliminary hearing testimony the Petitioner said she was attacked in a "structured area" similar to the holding cell.

During Petitioner's first trial Thowsen testified:

> Q. What did she say?
> A. She commented that the room looked similar to the area she was in during the attack, however, it seemed a little bit smaller in that when she looked up she could see the awning of a parking structure I believe is the way she explained it.
> (4 App. 705; Trans. III-70 (05-10-02) Underlining added to original.)

That testimony was similar to the Arrest Report in that he testified the Petitioner said the "area" in which she was attacked was "smaller" than the holding cell, and his preliminary hearing testimony that she was attacked in a "small area like this." The trash enclosure where Bailey was

murdered is twice or more larger than the holding cell, so the Petitioner could not have been referring to the trash enclosure. Furthermore, Thowsen's makes no mention in his first trial testimony the Petitioner said she was attacked in a "structured area" similar to the holding cell. What is new in his testimony that wasn't in the Arrest Report and his preliminary hearing testimony (which was under oath) is that "when she looked up she could see the awning of a parking structure …" However, it is known from Thowsen's testimony the Petitioner could not have been referring to the trash enclosure where Bailey was murdered, because the single most distinctive feature of the trash enclosure is the unmistakable wire mesh fencing material that is only inches above one's head, yet Thowsen doesn't even claim in his testimony the Petitioner said anything about the wire mesh ceiling. Furthermore, a police photo taken the morning after Bailey's murder doesn't show "a parking structure" that Thowsen claimed in his testimony. What you could clearly see from inside the trash enclosure is lots of trash on top of the wire mesh, but Thowsen did not claim in his testimony the Petitioner made any comment about the very visible trash. (See Exhibit 61, Trash Enclosure Wire Mesh.)

The first place where there is any mention of the "covering" is in the Officer's Report dated August 22, 2001 – which was 15 days after the preliminary hearing, and 33 days after Petitioner's arrest. The Officer's Report was signed by Thowsen and his partner LaRochelle. It states:

> "Lobato was photographed in cell Z-4. Lobato said that the cell enclosure reminded her of the location in which she had been attacked; she also added that the location of the attack did not have covering and that he could she the metal covering of a carport area." (LVMPD Officer's Report, August 22, 2001. Underlining added to original.)

The account in the Officer's Report of what the Petitioner said is even more dissimilar from the trash enclosure where Bailey was murdered than the accounts in the Arrest Report, and Thowsen's preliminary hearing and first trial testimony, in that she only said the cell "reminded her of the location in which she had been attacked." A person can see a red Toyota Camry and say it "reminded" them of a yellow Honda Accord they owned ten years ago. It is common that a person is "reminded" of something by something else that is quite different. An even greater dissimilarity between the account in the Officer's Report and the trash enclosure is it has the Petitioner saying, "the location of the attack did not have covering." It is known the Petitioner could not have been referring to the trash enclosure where Bailey was murdered because the single most distinctive

feature of that trash enclosure is the unmistakable wire mesh fencing material covering the enclosure that is only inches above one's head, yet the Officer's Report specifically states "the location of the attack did not have covering." Furthermore, a police photo taken the morning after Bailey's murder doesn't show "the covering of a carport" described in the Officer's Report. What you could clearly see from inside the trash enclosure is lots of trash on top of the wire mesh, but the Officer's Report doesn't mention that the Petitioner made any comment about the very visible trash. (See Exhibit 61, Trash Enclosure Wire Mesh.)

Thus Thowsen's trial testimony 5-1/2 years after the Petitioner's arrest was radically contrary and inconsistent with the Arrest Report written the day of her arrest, his preliminary hearing testimony 18 days after her arrest, and the Officer's Report dated 15 days after the preliminary hearing, and his first trial testimony. The former three events are consistent in describing that the Petitioner said she was attacked in an area as small or smaller than the holding cell. The holding cell is dramatically smaller than the trash enclosure where Bailey was murdered, which is twice or more larger than the holding cell, so the Petitioner could not have been referring to the trash enclosure. Furthermore, Thowsen's makes no mention in the Arrest Report, his preliminary hearing testimony, and his first trial testimony that the Petitioner said anything about being attacked in a "structured area" similar to the holding cell. The Officer's Report that Thowsen co-authored 15 days after his preliminary hearing testimony says the Petitioner was "reminded" of where she was attacked when in the cell, which is even vaguer than the "similar" phrase used in the Arrest Report, and Thowsen's preliminary hearing and first trial testimony.

In both the Arrest Report and Thowsen's preliminary hearing testimony there is no mention whatsoever of what the Petitioner could see from where she was assaulted. The description in the Officer's Report signed 15 days after her preliminary hearing and her formal charging that she said she could see "the metal covering of a carport area." (LVMPD Officer's Report, August 22, 2001.), and Thowsen's testimony in her first trial that she said she could see, "the awning of a parking structure" (Trans. III-70 (05-10-02)), clearly identifies that where she was attacked was not the Nevada State Bank's trash enclosure, because directly above one's head is the unmistakable wire mesh fencing material covering the enclosure that is only inches above one's head, and a police

photo taken the morning after Bailey's murder doesn't show "the metal covering of a carport area" described in the Officer's Report. What you could see from inside the trash enclosure is lots of trash on top of the wire mesh. Yet there is no mention of either the wire mesh ceiling directly above one's head covering the trash enclosure or the trash that was on top of it, in any of Thowsen's five accounts of what he says the Petitioner said in the holding cell.

There was nothing in the Arrest Report, or Thowsen's preliminary hearing or first trial testimony, or the Officer's Report, which suggests the Petitioner made any reference in the holding cell that where she was attacked was the trash enclosure where Bailey was murdered. That supports that where she was assaulted is exactly where she said in her Statement – the Budget Suites Hotel.

The review of Thowsen's accounts of what the Petitioner said in the holding cell prior to his testimony during her second trial makes it clear that Thowsen made up out of thin air the incriminating details that were in his trial testimony – "she made the comment that this looked similar to the structured area where the attack had occurred" – and which was not in any of his four previous accounts (two under oath), which suggests he committed perjury. Thowsen tried to force fit the round peg of where the Petitioner was assaulted at the Budget Suites Hotel into the square hole of the trash enclosure where Bailey was murdered. However, Thowsen got away with his fabricated testimony and the jury didn't know it wasn't true, because the Petitioner's counsel did not cross-examine him based on his four previous accounts that did not support his testimony – including the Arrest Report written the day of the Petitioner's arrest 5-1/2 years earlier, and only shortly after the alleged comments by the Petitioner in the holding cell.

The prejudice to the Petitioner by her counsel's failure to effectively cross-examine Thowsen was magnified during the prosecution's closing when ADA Sandra DiGiacomo argued to the jury:

> "And the only person -- and think about too, she knew what the dumpster enclosure looked like. When she got to that jail cell at CCDC when she's being booked in, she's like yeah, it was just like this except for I could see through the roof," (9 App. 1730; Trans. XIX-149 (10-5-06))

And,

> "The only way she was able to describe the place, the body, the injuries, the you know, where it happened, how it looked, the only way she knew that, 'cause she was there." (Trans. XIX-150 (10-5-06))

And during his rebuttal argument ADA Kephart argued to the jury:

> "And when they bring her back to the jail cell and she talks about the inside of the jail cell looking like where this occurred." (Trans. XIX 204 (10-5-06))

Thowsen's trial testimony does not support DiGiacomo and Kephart's arguments. Thowsen did not testify that the Petitioner knew what the "dumpster enclosure looked like," he did not testify that she said anything remotely similar to "it was just like this except for I could see through the roof," he did not testify that "she was able to describe the place" and "how it looked," and he did not testify she said anything about "the jail cell looking like where this occurred." However, just as Petitioner's counsel failed to cross-examine Thowsen about his direct testimony that was inconsistent with the Arrest Report, his preliminary hearing and first trial testimony, and the Officer's Report, Petitioner's counsel failed to object to DiGiacomo and Kephart's arguments that were based on their imagination and not any evidence presented at trial. Consequently the prosecution succeeded in prejudicially misleading the jury that the Petitioner made comments after her arrest suggesting she had knowledge of the trash enclosure, which none of Thowsen's four prior accounts (two under oath) supports. The Petitioner was prejudiced by her counsel's failure to cross-examine Thowsen about his inconsistent and possibly perjurious testimony, and object to the prosecution's improper closing and rebuttal arguments, because making the truth known to the jury would have provided the jurors with a factual basis to reject that the Petitioner had any knowledge of the trash enclosure, which Bailey's killer(s) would have had, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(bbb) Ground fifty-four.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to either file a pretrial motion, or to cross-examine Detective Thomas Thowsen, to learn the details of how he obtained the information that the Petitioner was serially sexually assaulted when she was five and six years-old, because the admissibility of Petitioner's Statement of July 20, 2001, could have been challenged if it had been learned that Thowsen and his partner James LaRochelle illegally obtained the information about Petitioner's childhood experience they calculatingly used to upset her mentally and put her in a vulnerable emotional state of mind immediately prior to obtaining the Petitioner's waiver of her right to remain silent, to consult with counsel before talking with the detectives, and agreeing to provide a Statement, and without consideration of the Petitioner's Statement that the prosecution characterized as her confession and which was the foundation of their case, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

LVMPD Detectives Thomas Thowsen and James LaRochelle, and Crime Scene Analyst Maria Thomas drove from Las Vegas to Panaca on the afternoon of July 20, 2001, to arrest the Petitioner for the murder of Duran Bailey on July 8, 2001. The decision to arrest the 18-year-old Petitioner was based on a telephone conversation on July 20 between Thowsen and Lincoln County Juvenile Probation Officer Laura Johnson. Johnson told Thowsen she had been told by her friend Dixie Tienken, that Tienken had been told by a former student of hers that she had fought off a rape attempt in Las Vegas by cutting once at her attacker's penis.

After arriving in Lincoln County the detectives obtained Johnson's statement, although they made no effort to contact Tienken to corroborate Johnson's account. They then arranged to have a tow truck transport the Petitioner's car to the LVMPD crime lab in Las Vegas for examination, and a Lincoln County Sheriff's deputy led the detectives and Thomas to where the Petitioner was living at her parents' house.

Immediately after introducing himself, Thowsen told the Petitioner that he knew she had been hurt in the past. (The Petitioner had been repeatedly raped when she was five and six by her mother's boyfriend.) The Petitioner immediately began to cry and became very emotional. While

she was crying and in her emotional state Thowsen had the Petitioner sign a *Miranda* waiver and he proceeded to question her for about 30 minutes in an audio taped Statement, during which the Petitioner remained very emotional. (Det. LaRochelle asked several questions toward the end.) In her Statement the Petitioner described a rape attempt at the Budget Suites Hotel in east Las Vegas near Sam's Town Casino that she fought off by attempting once to cut her attacker's penis. She described her assailant as alive and crying when she was able to escape in her car. Since her Statement was on July 20, 2001, the sexual assault she identified as happening "over a month ago" occurred prior to June 20, which was weeks before Bailey's July 8 murder. When shown a picture of Bailey the Petitioner didn't recognize him.

On August 9, 2001, the Petitioner was charged with Bailey's first degree murder and the sexual penetration of his dead body (cutting his rectum after his death).

During the Petitioner's trial Medical Examiner Lary Simms testified that after Bailey died his penis was amputated. The prosecution then relied on Thowsen's testimony to characterize the Petitioner's Statement as a confession to Bailey's murder, because she described fighting off her would be rapist by trying once to cut his penis. Thowsen admitted on cross-examination that he deliberately used the Petitioner's childhood victimization against her that evoked an immediate emotional response. (Trans. III-12-13 (5-10-2002)) Thowsen's testimony about the Petitioner's Statement and her comment before it was indispensible for the prosecution to secure the Petitioner's conviction, because the prosecution did not introduce any physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence that at any time on July 8, 2001, the Petitioner had been anywhere in Clark County, Nevada – much less that she was at the Las Vegas scene of Bailey's murder at the exact time it occurred.

However, Petitioner's counsel made no effort to file a pretrial motion or to learn if the information Thowsen relied on to psychologically impair the Petitioner and make her emotionally vulnerable was sealed because it involved her childhood sexual trauma, and if it is only legally obtainable by a court order. Furthermore, Petitioner's counsel made no effort to cross-examine Detective Thowsen to ascertain exactly what report he relied on, such as its title, date, who prepared it, and most specifically, if the report had been sealed by the court, and if Thowsen had

illegally obtained the information about the Petitioner's childhood rapes in violation of the law. If Thowsen illegally obtained the report without the requisite court order – then Petitioner's counsel could have challenged the admissibility of Petitioner's Statement because Thowsen relied on the information about the Petitioner's horrific childhood experience with the intention to put the Petitioner into a state of mind where she was emotionally distraught and vulnerable, and was not exercising judgment sufficient to provide a knowing, intelligent and voluntary *Miranda* waiver to her right to remain silent, and her right to consult with a lawyer prior to speaking with the detectives. Thowsen's sadistic torture like psychological tactic that induced an emotional state in the Petitioner could have affected her rational judgment to the point she could not provide a valid waiver of her rights, and her Statement was inadmissible on that basis. The Petitioner was prejudiced because her counsel made no effort to learn by a pretrial motion or during cross-examination the details of how Thowsen obtained the information of her childhood sexual traumas that he used against her to obtain her Miranda waiver.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ccc) Ground fifty-five.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to impeach Laura Johnson's credibility by cross-examining her about the false statements in her Las Vegas Metropolitan Police Department Statement of July 20, 2001, her testimony about the Petitioner's car, her doubts about the Petitioner's guilt, and the pressure put on her to support the prosecution's case, and the Petitioner was prejudiced, because Johnson was a key prosecution witness and if counsel had impeached her testimony by showing she is not credible, individually or cumulative with other evidence, no reasonable juror would have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

In July 2001 Laura Johnson was the Lincoln County, Nevada Juvenile Probation Officer. Dixie Tienken was a former teacher of the Petitioner's in Panaca, and sometime in late June or early July 2001 the Petitioner went to Tienken's house and during their conversation that lasted for

several hours, the Petitioner told her about being sexually assaulted in Las Vegas. (See Exhibit N, Affidavit of Dixie Tienken.) Tienken and Johnson were friends, and Tienken taught a class at the Lincoln County Jail in Pioche on Wednesdays. She hadn't seen Johnson for at least three weeks, so on Wednesday July 18, 2001, she went by Johnson's office and they caught up on things. Among other things Tienken told Johnson that the Petitioner had told her about fighting off a rape attempt in Las Vegas. Two days later, on July 20, Johnson called the LVMPD and talked with Detective Thomas Thowsen, who was assigned as the lead detective in Duran Bailey's murder. That telephone call set in motion Thowsen, his partner James LaRochelle, and CSA Maria Thomas driving up to Lincoln County that afternoon to arrest the Petitioner at her parents' house in Panaca for Bailey's murder.

Johnson's testimony as a prosecution witness was important because the court allowed her to provide double hearsay testimony about what she said Dixie Tienken told her the Petitioner told Tienken about her car. Johnson's double hearsay testimony was important because it suggested the Petitioner had a guilty mind. Johnson testified:

> Q. (By Ms. DiGiacomo) Did Dixie ever tell you what the defendant had said about her car?
> A. (By Ms. Johnson) Yes.
> Q. What'd she tell you?
> A. She told me that they were hiding the vehicle out in -- that her parents and her were hiding the vehicle out in Panaca and they were gonna get it painted or possibly sell the vehicle. (Trans. VII-41-42 (9-19-06))

Tienken denied the Petitioner told her those things about her car or that she told them to Johnson. Furthermore, Johnson's double hearsay testimony about the Petitioner's car was contrary to the trial testimony by every witness who had personal knowledge about the Petitioner's car – including Detective Thowsen, who along with his partner James LaRochelle took Johnson's Statement on July 20, 2001. Petitioner's car was not hidden at her parents' house as Johnson testified. All the testimony at trial from relative and non-relative witnesses was her car was parked in front of her parents' house on the public street for weeks without being moved. Petitioner's car was in full view of anyone who drove by her parents' house, just as it was seen by detectives Thowsen and LaRochelle when they went to arrest the Petitioner on July 20, 2001. (See Exhibit 82,

Petitioner's car parked on street.) Likewise, there was no testimony the Petitioner or her parents made any effort to have her car painted or to sell it after she parked it on July 2, 2001. When inspected by the LVMPD crime lab the interior of her car was dusty and there was dirt and vomit on the floor, so it is known the car had not been thoroughly cleaned recently. Yet, Petitioner's counsel made no attempt during cross-examination to expose that Johnson's hearsay testimony about the Petitioner's car was not credible, particularly considering that before the Petitioner's arrest Johnson requested that a Lincoln County Sheriff's deputy drive by and check on the car when it was parked on the public street in front of her parents' house.

A significant falsehood in Johnson's Statement of July 20, 2001, the Petitioner's counsel did not cross-examine Johnson about was that the Petitioner had been a probationer under Johnson's supervision in Lincoln County. At the time of her arrest, the Petitioner had no criminal record and had not been on probation, so Johnson fabricated that assertion in her Statement.

Still another significant inconsistency in Johnson's Statement and her testimony that the Petitioner's counsel did not cross-examine Johnson about was she said Dixie told her the Petitioner was attacked when she came out of a Las Vegas club by a guy whose penis was hanging out of his pants. Contrary to Johnson's third-hand account, Petitioner's Statement and Dixie's statement are consistent in describing Petitioner was attacked at night as she was getting out of her car, and neither of them said her attacker's penis was hanging out of his pants when he knocked her down.

But the jury didn't know about the false and inconsistent aspects of Johnson's Statement and testimony because Petitioner's counsel did not cross-examine her about any of them.

Petitioner's counsel also did not cross-examine Johnson about her significant doubts the Petitioner was guilty. Johnson's doubts were so extreme that she went to the scene of Duran Bailey's murder in Las Vegas to see if it matched the place she recollected that Tienken described to her where the Petitioner said she had been attacked by her would be rapist. Of course, when Johnson went to the crime scene she found out that it didn't resemble what she described in her Statement because Bailey was murdered in a bank's trash enclosure, not outside a club.

Petitioner's counsel also did not cross-examine Johnson about the pressure put on her to support the prosecution's case against the Petitioner, or her fear that there would be repercussions

in her job as the Lincoln County Juvenile Probation Officer if she didn't support the prosecution's case. (See Exhibit 14, Affidavit of Dixie Tienken.) Was Johnson's testimony hers? Or did she testify the way the prosecutors and Thowsen wanted her to testimony?

Depending on Johnson's testimony in response to her cross-examination or the prosecution's objections. Dixie Tienken, Johnson's husband, and other people from Lincoln County area could have testified as rebuttal witnesses.

Under the principle of *falsus in uno, falsus in omnibus* ("false in one thing, false in everything") everything that Johnson testified to that is not corroborated by independent evidence should be disregarded as inherently untrustworthy.

The Petitioner was prejudiced because if her counsel had effectively cross-examined Johnson the jury can be expected to have discounted her testimony as not credible. Without any basis to believe the Petitioner allegedly tried to hide or dispose of her car and that Johnson's testimony did not support she had a guilty mind, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ddd) Ground fifty-six.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to investigate or present witnesses who could testify about the areas in Las Vegas where methamphetamine was readily available in 2001, and if the jury had known of this evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

"Naked City" is an area of Las Vegas where in June and July 2001 methamphetamine was readily available. "Naked City" is located near the Stratosphere Hotel and Casino on the far north end of The Strip, and in a different part of Las Vegas than the Nevada State Bank where Bailey was murdered. In 2001 "Naked City" was a quasi-lawless area of open and rampant methamphetamine and other drug dealing.

Skye Campbell is a Las Vegas private investigator. Her "Affidavit of Skye Idris Campbell," dated March 12, 2010, states in part:

> 3. I am familiar because of my work, with areas of Las Vegas where methamphetamine was readily available in June and July 2001.
> 4. In June and July 2001 an area of Las Vegas where methamphetamine and other drugs were readily available from street vendors and drug houses is known as "Naked City," which is located near the Stratosphere Hotel and Casino.
> 5. In June and July 2001 the area around the Nevada State Bank at 4240 W. Flamingo Road was not known as a place where methamphetamine was readily available from street vendors and drug houses, and to my knowledge during that period of time methamphetamine was not readily available by going to the Nevada State Bank's exterior trash enclosure.
> (See Exhibit 23, Affidavit of Skye Idris Campbell.)

It is new evidence that the Nevada State Bank's exterior trash enclosure was not a location where a person would have gone to obtain methamphetamine in June and July 2001. During that period of time a person seeking methamphetamine could readily obtain it all hours of the day and night in "Naked City," which is almost five miles from the Nevada State Bank where Bailey was murdered.

However, Petitioner's jury was unaware that "Naked City" is where a person looking for methamphetamine would have gone in June and July 2001, and not the Nevada State Bank's trash enclosure. The Petitioner was prejudiced because her counsel did not present any witness to testify about where methamphetamine was readily available when Bailey was murdered. If Petitioner's jury had known that areas of Las Vegas such as "Naked City" is where the Petitioner would have gone in June and July 2001 to obtain methamphetamine, they would have rejected the prosecution's baseless speculation that she, or anyone else, would have gone to the Nevada State Bank's trash enclosure, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(eee) Ground fifty-seven.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object to the testimony of Zachory Robinson that was hearsay, irrelevant and/or without foundation because he did not work at the Budget Suites Hotel at 4855 Boulder Highway in May, June and July 2001, and therefore he had no personal knowledge of how it was managed at that time or what happened there, and Petitioner's counsel did not object on confrontation grounds to strike Robinson's testimony about the contents of Hotel records for May, June and July 2001 under *Crawford v. Washington*, 541 US 36 (2004) *et al*, and Petitioner was prejudiced by counsel's failure to object to Robinson's hearsay testimony that there was no record of a sexual assault in the Budget Suites Hotel parking lot in May, June and July 2001, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Petitioner's Statement of July 20, 2001, describes her being sexually assaulted "over a month ago" at the Budget Suites Hotel at 4855 Boulder Highway in east Las Vegas. That means the assault occurred sometime prior to June 20, 2001. Zachory Robinson testified about matters related to the management and security at the Budget Suites Hotel at 4855 Boulder Highway in May, June and July 2001, and he provided hearsay testimony about the contents of reports about that Hotel. There was no evidence that Robinson worked at the Budget Suites Hotel in May, June and July 2001, so he had no personal knowledge of the security and administrative procedures he testified about that were in effect then, and the persons who prepared the reports Robinson testified about were not subpoenaed by Petitioner's counsel. Among other things Robinson testified without objection by Petitioner's counsel that there was no report of a person having their penis cut at the Hotel in May, June and July 2001.

Robinson's hearsay testimony aided the prosecution's argument that Petitioner was not credible and she was untruthful in her Statement. The Petitioner was prejudiced because her counsel failed to object to Robinson's hearsay testimony on confrontation and other grounds. If the jury had not been allowed to hear Robinson's hearsay it would have undermined the prosecution's case, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner requests an evidentiary hearing, and is indigent and requests appointment of counsel.

(fff) Ground fifty-eight.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to file a pre-trial motion for the prosecution to disclose if Detective Thomas Thowsen was on the Clark County District Attorney Office's "Liar's List" of law enforcement officers known to have given false and/or perjurious testimony or false sworn statements in connection with any case, and further to disclose if Thowsen had been disciplined for any dishonest and/or unethical conduct at any time during his law enforcement career whether with the LVMPD or any other agency, and if Thowsen had any history of mental health issues, and because the prosecution's case hinged on the jury believing that Thowsen was telling the truth, the information was relevant and discoverable, and it was imperative for the Petitioner's counsel to know if Thowsen had a history of falsely testifying under oath and/or dishonest and unethical conduct in other aspects of being a law enforcement officer, or he had mental health issues, and if Petitioner's counsel had been provided with evidence casting doubt on Thowsen's truthfulness and credibility, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

LVMPD Detectives Thomas Thowsen and James LaRochelle, and Crime Scene Analyst Maria Thomas drove from Las Vegas to Panaca on the afternoon of July 20, 2001, to arrest the Petitioner for the murder of homeless Duran Bailey on July 8, 2001, in a west Las Vegas bank's trash enclosure. The decision to arrest the 18-year-old Petitioner was based on a telephone conversation on July 20 between Thowsen and Lincoln County Juvenile Probation Officer Laura Johnson. Johnson told Thowsen she had been told by her friend Dixie Tienken, that Tienken had been told by a former student of hers that she had fought off a rape attempt in Las Vegas by cutting once at her attacker's penis.

After arriving in Lincoln County the detectives obtained Johnson's statement, although they made no effort to contact Tienken to corroborate Johnson's account. They then arranged to have a tow truck transport the Petitioner's car to the LVMPD crime lab in Las Vegas for examination, and a Lincoln County Sheriff's deputy led the detectives and Thomas to where the Petitioner was living at her parents' house.

Immediately after introducing himself, Thowsen told the Petitioner that he knew she had been hurt in the past. (The Petitioner had been repeatedly raped when she was five and six by her

mother's boyfriend.) The Petitioner immediately began to cry and became very emotional. While she was crying and in her emotional state Thowsen had the Petitioner sign a *Miranda* waiver and he proceeded to question her for about 30 minutes in an audio taped Statement, during which the Petitioner remained very emotional. (Det. LaRochelle asked several questions toward the end.) In her Statement the Petitioner described a rape attempt at the Budget Suites Hotel in east Las Vegas near Sam's Town Casino that she fought off by attempting once to cut her attacker's penis. She described her assailant as alive and crying when she was able to escape in her car. Since her Statement was on July 20, 2001, the sexual assault she identified as happening "over a month ago" occurred prior to June 20, which was weeks before Bailey's July 8 murder. When shown a picture of Bailey the Petitioner didn't recognize him.

There is not a single specific detail about the attempted rape described in the Petitioner's Statement that matches the specific details of Bailey's murder in a west Las Vegas bank's trash enclosure. While she says she tried once to cut her live attacker's penis before escaping, Bailey's Autopsy Report lists 31 separate ante-mortem and post-mortem external injuries, and numerous internal injuries, and her description of her attacker as "huge" bears no resemblance to the very skinny Bailey who weighed less than 140 pounds. (See Exhibit 85, 40 significant differences between Bailey's murder and Petitioner's Statement.) Among the dissimilarities was Bailey's penis was amputated when he was dead, while the man who assaulted the Petitioner was very much alive when she was able to escape from him. Furthermore, the Arrest Report written the day of the Petitioner's arrest does not allege she confessed to Bailey's murder either in her Statement or at any time to the detectives off-tape, and she did not sign any document confessing to the crime.

On August 9, 2001, the Petitioner was formally charged with Bailey's first degree murder and the sexual penetration of his dead body (cutting his rectum after his death).

Consistent with the absence of any apparent link between the Petitioner's Statement and Bailey's murder, there was no physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence that at any time on July 8, 2001, the Petitioner was anywhere in Clark County, and there was no evidence the homeless Bailey and the Petitioner had ever met, or that she had every been to anyplace that Bailey hung out or "lived." Likewise, no forensic tests of the

Petitioner's personal items and car tested positive for Bailey's DNA or blood, and none of her DNA or fingerprints were found on any crime scene evidence. Furthermore, the Petitioner had a number of alibi witnesses establishing her presence in Panaca from shortly after midnight on the day of Bailey's murder until after his body was discovered that night.

Preparing for Petitioner's trial her counsel knew that in the absence of evidence linking her to the crime the prosecution's case hinged on the jury believing Thowsen's testimony that would try to cast the Petitioner's Statement as a confession to Bailey's murder and mutilation in spite of not having a single specific detail matching the crime.

Consequently, if Thowsen could be shown to have a history of being dishonest or untrustworthy (or even a single recorded instance in his career), or mentally unstable the jury could be expected to reject his testimony – which would almost certainly result in the Petitioner's acquittal.

Some prosecutor's office keep what is sometimes known as a "Liar's List." Which is a list of law enforcement officers known to have given false and/or perjurious testimony or given a false sworn statement in connection with any case, and the details of the instances when they did so. So it was imperative for Petitioner's counsel to file a motion for the prosecution to disclose if Thowsen was on their "Liar's List" and any details it had about him. It was also imperative for Petitioner's counsel in the same motion to seek an order for the prosecution to disclose if Thowsen had been disciplined for any dishonest and/or unethical conduct at any time during his law enforcement career whether with the LVMPD or any other agency, and if Thowsen had any history of mental health issues. All of that material could have been used to impeach Thowsen's truthfulness, credibility and reliability as a witness.

The documents were relevant and discoverable because it was the Prosecution hinging its case on Thowsen's honesty and reliability as a witness, and it was the prosecution that intended to use his testimony to try and convince the jury the Petitioner's Statement was actually a confession and to paint the Petitioner as a liar and guilty of Bailey's murder. If Thowsen was an unreliable and not credible witness then the prosecution's tactic would fail.

Consequently, the Petitioner was gravely prejudiced by her counsel's failure to take affirmative action to obtain all documents available to the prosecution that could impeach Thowsen's testimony. If

the jury had known there was substantial reason to double the truthfulness of Thowsen's testimony, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ggg) Ground fifty-nine.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to make a NRS 175.381(1) motion at the close of the prosecution's case, again at the close of the defense's case, and again at the close of the prosecution's rebuttal evidence, for the judge to advise the jury to acquit Petitioner due to the prosecution's failure to introduce evidence sufficient to prove every essential element of the Petitioner's alleged offenses beyond a reasonable doubt, and most particularly, no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced at trial that the Petitioner was anywhere in Clark County at any time on July 8, 2001, and so she could not have been at the Nevada State Bank's trash enclosure at the precise time of Duran Bailey's murder and she could not have committed her accused crimes, and the failure of Petitioner's counsel to make the NRS 715.381(1) motions prejudiced the Petitioner's state and federal rights to due process and a fair trial.

Facts:

The Petitioner was charged with personally murdering Duran Bailey and then inserting a knife into and/or cutting his anus on July 8, 2001, within Clark County, Nevada. (See Exhibit 99, *State v. Lobato*, No. C177394, Criminal Information.) Consequently, one of the essential elements the prosecution had to introduce evidence proving beyond a reasonable doubt the Petitioner was "within Clark County" at the crime scene at the time the crimes occurred. If the prosecution did not introduce evidence proving beyond a reasonable doubt the Petitioner was "within Clark County" and at the Nevada State Bank and inside the trash enclosure in its parking lot at the exact time Bailey was murdered, she could not have committed her accused crimes, and there was insufficient evidence for the jury to find her guilty.

The prosecution not only failed during it case in chief to present <u>any</u> substantive evidence that Petitioner was in Clark County at the time of Duran Bailey's murder, but the prosecution failed to present <u>any</u> physical, forensic, medical, eyewitness, surveillance, documentary, or confession evidence the Petitioner and her car had been in Clark County at any time on July 8, 2001 – the day

of Duran Bailey's murder. In fact, every prosecution witness that testified to Petitioner's whereabouts on July 8 testified they saw and/or talked with her in Panaca. Since no evidence was introduced by the prosecution the Petitioner was in Clark County at any time on July 8, 2001, she could not have been in Las Vegas at the Nevada State Bank when Bailey was murdered, and so the Petitioner could not have committed her accused crimes.

During the Petitioner's defense every witness that testified to Petitioner's whereabouts on July 8 testified that they saw and/or talked with her in Panaca. Likewise, every defense and prosecution witness who testified about the Petitioner's car said it was parked on July 8 in front of her parents' house. The testimony of the defense and prosecution witnesses was consistent with telephone records of a number of telephone calls during July 8 from between the Petitioner and a boyfriend in Las Vegas who drove up to Panaca to pick her up on the evening of July 8. During the prosecution rebuttal no evidence was presented rebutting the witness testimony and telephone records that the Petitioner and her car were in Panaca on the entire day of July 8.

At the close of the prosecution's case in chief and again at the close of their rebuttal, the only knowledge the jurors had that the Petitioner and her car had been in Clark County on July 8, 2001, was the prosecution's claim during its opening statement. During the jury's deliberations the jurors had no evidence to consider that the Petitioner was in Clark County at the time of Bailey's murder except for the prosecution's claim during its opening statement, and its closing and rebuttal arguments. The prosecution's speculation during its opening statement, and then during closing and rebuttal arguments that the Petitioner and her car were in Clark County at the time of Bailey's murder was not substantiated by any evidence introduced at trial, much less evidence proving beyond a reasonable doubt the Petitioner was in Clark County, or in Las Vegas, or at the Nevada State Bank at any time on July 8, 2001, much less at the specific time of Bailey's murder.

NRS 175.381(1) states:

> 1. If, at any time after the evidence on either side is closed, the court deems the evidence insufficient to warrant a conviction, it may advise the jury to acquit the defendant, but the jury is not bound by such advice.

Since no evidence was presented during Petitioner's trial that she was in Clark County at

any time on July 8, the jury could only have relied on the prosecution's speculation that the Petitioner was at the scene of Bailey's murder, or that she committed her convicted crimes. An essential element of the Petitioner's convicted crimes was that she was at the scene of the crime. Since no evidence was presented by the prosecution, only speculation and speculative inferences, that Petitioner was even in Clark County at the time of Duran Bailey's murder, there is not evidence beyond a reasonable doubt that she committed her convicted crimes.

With no substantive evidence the prosecution met its legal burden of proving beyond a reasonable doubt the essential element the Petitioner was in Clark County and present at the scene of Bailey's Las Vegas murder, Petitioner's counsel was legally obligated to make a motion to the court under NRS 175.381(1) for the court to advise the jury to acquit the Petitioner at the close of the prosecution's case in chief, again at the close of the defense's case in chief, and again after the close of the prosecution's rebuttal evidence. The failure of Petitioner's counsel to do so prejudiced her state and federal rights to due process and a fair trial.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(hhh) Ground sixty.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object to jury instructions 26 and 33 which unconstitutionally alter the prosecution's burden of proving beyond a reasonable doubt Petitioner's guilt of every element of each charge beyond a reasonable doubt by empowering the jury to choose between the Petitioner's "guilt or innocence", and which unconstitutionally alter the Petitioner's presumption of innocence by imposing a presumption of guilt that she must rebut by proving her "innocence" to the jury's satisfaction or be convicted, and determination of the Petitioner's "guilt or innocence" was left for the jury to decide by a standard of proof of their choosing in jury instruction 26, which could be the civil standard of a preponderance of the evidence, and consequently counsel's failure to object to jury instructions 26 and 33 individually and cumulatively prejudiced the Petitioner's state and federal constitutional rights to an impartial jury, due process of law and a fair trial.

Facts:

The prosecution's burden under the Nevada Constitution and the Fifth Amendment to the

U.S. Constitution was to prove the Petitioner's guilt of every element of each charge beyond a reasonable doubt. The Petitioner has no constitutional obligation to present any evidence, because she is presumed legally innocent of her accused crimes until proven guilty of every element of each charge beyond a reasonable doubt.

Jury instructions 33 and 26 alter the relationship between the prosecution's burden of proof and the Petitioner's presumption of innocence by placing a burden on the Petitioner to prove her "innocence." Jury instruction 33 specifically instructs the jury, "You are here to determine the **guilt or innocence** of the Defendant from the evidence in the case." (See Exhibit 80, Jury Instruction 33.) Jury instruction 26 instructs the jury, "The flight of a person immediately after the commission of a crime, or after she is accused of a crime, is not sufficient in itself to establish her guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of her **guilt or innocence**." (See Exhibit 78, Jury Instruction 26.)

Contrary to the specific instruction of the trial court to Petitioner's jurors in instructions 26 and 33, Petitioner's jurors had no lawful role in deciding the Petitioner's "innocence." Jury instructions 26 and 33 emasculated Petitioner's presumption of innocence and imposed a legal obligation on her to prove her "innocence" to the jury's satisfaction. Furthermore, Petitioner's jurors were instructed in instruction 33 to determine the "innocence of the Defendant from the evidence in the case." If the Petitioner did not present evidence during her defense proving her "innocence" to the satisfaction of the jurors, the jury could weigh that against Petitioner in favor of the prosecution, and rely on that to support their determination of her "guilt." Under the court's mandate in instruction 33, the jury was able to consider the Petitioner not testifying as evidence of her guilt – irrespective of any conflicting instruction.

Jury instructions 26 and 33 also relieved the prosecution of its burden of proving the Petitioner's guilt of every essential element of each charge by simply requiring she be found "guilty." Instruction 26 went beyond that by allowing the jury to determine the Petitioner's "guilt" by a standard of proof of the jury's choosing, which could be the civil standard of a preponderance of the evidence, or drawing straws, or reliance on a reading of Tarot cards, or even a coin toss. Jury instruction 26 literally allowed the jury to convict the Petitioner if the prosecution had immediately rested and presented NO

evidence, and the Petitioner did not present evidence of her "innocence" sufficient to satisfy the jurors. With the court's blessing the jurors' could interpret the mere fact of the charges against Petitioner as sufficient proof to find her guilty based on the adage that "where there is smoke there must be fire." Consequently jury instructions 26 and 33 fundamentally altered the relationship between the State and the Petitioner by creating a heretofore unknown legal burden on her to establish her innocence, while at the same time lessening or eliminating the State's burden of proof.

The Petitioner was prejudiced by her counsel failure to object to jury instructions 26 and 33. Jury instructions 26 and 33 fundamentally altered the relationship between the State and the Petitioner by creating a heretofore unknown legal burden on her to establish her innocence, while at the same time lessening the State's burden of proving her guilty beyond a reasonable doubt. Under the theory that all instructions carry equal weight, there is no way to know if the jury applied the juror optional proof standard of instruction 26 or the slightly more demanding standard of instruction 33 to find that the Petitioner had not proven her "innocence" to jury's satisfaction in voting her guilty. What is known is that under the court's mandate of instruction 26 and 33 the Petitioner's "presumption of innocence" was eliminated and it was left for the jury to determine the standard of proof they used to find the Petitioner guilty, and not proof of her guilt beyond a reasonable doubt as required by the Nevada Constitution and the due process clause of the Fifth Amendment to the U.S. Constitution.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(iii) Ground sixty-one.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object to jury instruction 31 that includes "the more weighty affairs of life" as the "reasonable doubt" standard for the jury to follow, which is similar to wording rejected by the Ninth Circuit Court of Appeals, and jury instruction 31 is a combined "reasonable doubt," "burden of proof" and "presumption of innocence" instruction that is fatally compromised and modified by jury instructions 26 and 33, which eliminate the Petitioner's presumption of innocence and also eliminate the prosecution's burden of proving the Petitioner's guilt of every essential element of each charge beyond a reasonable doubt, and consequently counsel's failure to object to jury instruction 31, individually and cumulatively with instructions 26 and 33 prejudiced the state and federal constitutional rights of the Petitioner to an impartial jury, due process of law and a fair trial.

Facts:

The prosecution's burden under the Nevada Constitution and the Fifth Amendment to the U.S. Constitution was to prove the Petitioner's guilt of every element of each charge beyond a reasonable doubt. The Petitioner has no constitutional obligation to present any evidence because she is presumed legally innocent of her accused crimes until proven guilty of every element of each charge beyond a reasonable doubt.

Petitioner's jury instruction 31 reads in part: "A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life." (See Exhibit 79, Jury Instruction 31.)

Concerns that the prosecution's burden of proof was diminished by instructions such as "the more weighty affairs of life" wording in jury instruction 31, led the federal Ninth Circuit Court of Appeals to abandon its similar model jury instruction to find the defendant guilty only if "you find the evidence so convincing that an ordinary person would be willing to make the most important decisions in his or her own life on the basis of such evidence." (See Exhibit 81, Ninth Circuit 3.5 Reasonable Doubt – Defined.) The rationale for rejecting that instruction is the "most important decisions in life—choosing a spouse, buying a house, borrowing money, and the like—may involve a heavy element of uncertainty and risk-taking and are wholly unlike the decisions jurors ought to make in criminal cases." (See Exhibit 81, Ninth Circuit 3.5 Reasonable Doubt – Defined.) The Ninth Circuit determined jury instructions with wording such as Petitioner's jury instruction 31 – "the more weighty affairs of life" – reduce the jury to deciding the Petitioner's fate by calculating odds like the jurors would do if they were playing a game of craps, or poker or blackjack in a Las Vegas casino, and not by the infinitely higher required legal standard of proof beyond a reasonable doubt.

The jury instructions about the prosecution's "burden of proof" and the Petitioner's "presumption of innocence" were included with the "reasonable doubt" instruction in jury instruction 31. The combining of the "reasonable doubt," "burden of proof" and "presumption of innocence" instructions in jury instruction 31 diminished the individual importance of all three instructions, particularly considering that jury instruction 31 was compromised and modified by jury instructions 26

and 33. Jury instructions 26 and 33 alter the relationship between the prosecution's burden of proof and the Petitioner by placing a burden on the Petitioner to prove her "innocence," while reducing the prosecution's burden to merely proving Petitioner's "guilt," and instruction 26 authorized the jury to find the Petitioner guilty by a standard of each juror's choosing, or the jury collectively.

Jury instruction 33 specifically informs the jury, "You are here to determine the **guilt or innocence** of the Defendant from the evidence in the case." (See Exhibit 80, Jury Instruction 33.) While Jury Instruction 26 informs the jury, "The flight of a person immediately after the commission of a crime, or after she is accused of a crime, is not sufficient in itself to establish her guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of her **guilt or innocence**." (See Exhibit 78, Jury Instruction 26.)

Contrary to the specific instruction of the trial court to Petitioner's jurors in instructions 26 and 33, Petitioner's jurors had no lawful role in deciding the Petitioner's "innocence." Jury instructions 26 and 33 emasculated Petitioner's presumption of innocence and imposed a legal obligation on her to prove her "innocence" to the jury's satisfaction. Furthermore, Petitioner's jurors were instructed in instruction 33 to determine the "innocence of the Defendant from the evidence in the case." If the Petitioner did not present evidence during her defense proving her "innocence" to the satisfaction of the jurors, the jury could weigh that against Petitioner in favor of the prosecution and rely on that to support their determination of her "guilt." Under the court's mandate in instruction 33 the jury was able to consider the Petitioner not testifying as evidence of her guilt – irrespective of any conflicting instruction.

Jury instruction 26 and 33 also relieved the prosecution of its burden of proving the Petitioner's guilty of every essential element of each charge by simply requiring she be found "guilty." Instruction 26 went beyond that by allowing the jury to determine the Petitioner's "guilt" by a standard of proof of the jury's choosing, which could be the civil standard of a preponderance of the evidence, or drawing straws, or reliance on a reading of Tarot cards, or even a coin toss. Jury instruction 26 literally allowed the jury to convict the Petitioner if the prosecution had immediately rested and presented NO evidence, and the Petitioner did not present evidence of her "innocence" sufficient to satisfy the jurors. With the court's blessing the jurors' could interpret the mere fact of the charges against Petitioner as sufficient

proof to find her guilty based on the adage that "where there is smoke there must be fire." Consequently jury instructions 26 and 33 fundamentally altered the relationship between the State and the Petitioner, by creating a heretofore unknown legal burden on her to establish her innocence, while at the same time reducing or eliminating the State's burden of proof.

The Petitioner was prejudiced by her counsel failure to object to jury instruction 31. The instruction not only has the deficient "the more weighty affairs of life" reasonable doubt wording, but it combines the instructions for "reasonable doubt," "burden of proof" and "presumption of innocence." So the combined instruction 31 has no more weight than any conflicting instruction, and it was up to the jurors to decide which instruction to give more weight in their deliberations. Taken together jury instructions 26, 31 and 33 present a confusing and contradictory maze for the jury to interpret. Under the theory that all instructions carry equal weight, there is no way to know if the jury applied the jury optional proof standard of instruction 26 or the slightly more demanding standard of instruction 33 to find that the Petitioner did not prove her "innocence" to their satisfaction, or if they applied the Vegas crap table "reasonable doubt" standard of instruction 31 to find the Petitioner guilty. What is known is that under the court's mandate it was left for the jury to determine the standard of proof they used to find the Petitioner guilty, and not proof of her guilt beyond a reasonable doubt as required by the Nevada Constitution and the Fifth Amendment to the U.S. Constitution.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(jjj) Ground sixty-two.

Petitioner's counsel was ineffective under the Nevada Constitution and the Sixth Amendment to the U.S. Constitution for failing to submit a jury instruction that an essential element of Nevada's necrophilia law, NRS 201.450, is the prosecution had to introduce evidence beyond a reasonable doubt the Petitioner engaged in sexual activity with Duran Bailey's corpse that would be considered sexual activity with a life person, because according to the Nevada Legislature's legislative intent in enacting NRS 201.450, a sexual assault under that statute must be considered a sexual assault if committed with a live person, and counsel's failure to submit a jury instruction prejudiced the state and federal constitutional rights of the Petitioner to due process of law and a fair trial, because after consideration of that instruction no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt of violating NRS 201.450.

Facts:

The prosecution argued to the jury that the Petitioner slashed Duran Bailey's rectum with her pocket butterfly knife in an act of spontaneous methamphetamine-fueled rage. The prosecution based Petitioner's charge of violating Nevada's necrophilia law – NRS 201.450 – based on the prosecution's allegation that Duran Bailey's rectum was slashed after he died. The prosecution did not argue that Petitioner had sexual relations with Bailey's rectum after his death, and no testimony was provided at trial that Petitioner had done so. NRS 201.450 is known as Nevada's necrophilia law, and the legislative history of the statute makes clear that it only criminalizes sexual activity with a corpse that would be considered a sexual assault on a live person. The prosecution did not allege, or argue to the jury that Petitioner engaged in an act of sexual relations with Bailey's rectum after his death. A photo of Bailey's rectum at autopsy clearly shows his attacker inflicted a serious wound. (See Exhibit 93, Bailey's rectum wound.)

In 1982 a seven-year-old girl's corpse was stolen from a mortuary in Nevada's Washoe County (Reno). After the thief had sex with the corpse, he deposited it in a garbage can. After the alleged perpetrator's arrest, prosecutors discovered there was no necrophilia (sex with a corpse) law in Nevada, and that the state's sexual assault law only applies to a living "person," so it was inapplicable to sexual intercourse (rape) with the dead girl's body. The Washoe County District Attorney responded by drafting a bill criminalizing necrophilia. The Nevada District Attorney Association co-sponsored the bill. Designated A.B. 287, the bill was introduced in the Nevada Assembly on March 2, 1983, and it was summarized as "Prohibits necrophilia." (See Exhibit 59, A.B. 287 (Necrophilia Law) - Assembly, (Assembly History, Sixty-second Session, March 2, 1983, p. 107.))

Ed Basl represented the Washoe County District Attorney's Office, and in his testimony on March 16, 1983 before the Assembly Judiciary Committee, he made it clear that the purpose of the bill was to criminalize the rape of a corpse. Basl specifically stated that the drafter of the bill and its sponsors wanted "to have the penalty the same as a sexual assault [of a live person]." (See Exhibit 59, A.B. 287 (Necrophilia Law) - Assembly, (Assembly Judiciary Committee, March 16, 1983, 988.)) The proposed law was predicated on the assumption that since a dead person (regardless of

age) can't provide consent, then any sexual activity with a corpse is non-consensual, and thus the equivalent of raping a live person. Rape is defined as, "Nonconsensual sexual penetration of an individual, obtained by force or threat, or in cases in which the victim is not capable of consent." (*Dorland's Illustrated Medical Dictionary, 31st Edition*, (Philadelphia: Saunders/Elsevier (2004)), 1617.))

On March 30, 1983 the Nevada Assembly passed the bill.

Basl reiterated during his testimony before the Senate Judiciary Committee on April 5, 1983, that the sole purpose of the bill was to criminalize sexual relations with a corpse: "Mr. Basl went on to say that he does not believe the bill needs to be amended by adding a series of other felony and/or other offenses: that part of the problem as far as the way dead bodies are handled, is covered already by existing legislation, but the one area that is completely void of mention is the area of sexual assaults being committed on dead bodies." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 788 (Underlining added to original.)) Basl testified before the Senate committee, as he had before the Assembly committee, that the sponsors seeking to criminalize necrophilia wanted "to make the penalty conform to those for sexual assault [of a live person]." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 789.))

The Nevada Senate passed the necrophilia bill (A.B. 287) on April 13, 1983. The governor signed the bill on April 20, and it became effective on July 1, 1983 as NRS 201.450. The statute states in part: "sexual penetration" means cunnilingus, 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).

The only testimony before the House and Senate Judiciary Committees was by Basl. His explanation of the law's intent is unquestionable because he was the official representative of the necrophilia law's drafter and co-sponsor – the Washoe County District Attorney's Office. There was no testimony whatsoever that the law has any application to any situation other than a person engaging in sexual activity with a corpse that would be considered sexual activity if committed

with a live person, which is why it is known as Nevada's necrophilia law. The limited scope of the law's applicability is explained by Basl's testimony before the Senate committee that the law was intended to fill the absence of a law prohibiting "sexual assaults being committed on dead bodies." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 788.)

Basl's testimony of the law's intended purpose is consistent with the sex act that inspired the necrophilia law – sexual intercourse with a dead young girl's body.

That the necrophilia law was intended to criminalize sex acts with a corpse that would be illegal if performed on a nonconsenting (or underage) living person is not only made clear from Basl's testimony before both the Assembly and Senate Judiciary Committees, and the facts of the corpse rape that inspired the law, but from the language of the law itself. It criminalizes "sexual penetration" of a dead body, and it states that "means cunnilingus, 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) Thus insertion of a penis or a dildo into a corpse's anus or vagina would be as punishable as the equivalent of doing the same in an illegal manner with a non-consenting live person.

The intent of the necrophilia law to criminalize the sexual assault of a dead body is further supported by the fact that the definition of "sexual penetration" is almost identical for both the Nevada laws criminalizing "Sexual Assault and Seduction" of a living person and the necrophilia law. The only difference between the definition of "sexual penetration" of a living "person" (in NRS 200.364) and of a corpse in the necrophilia law, is that the latter includes the two words "without limitation," preceding "sexual intercourse in its ordinary meaning if practiced upon the living." The legislative history of the necrophilia law doesn't state what the two additional words mean, however, since they are immediately followed by "sexual intercourse," it is reasonable to assume they directly relate to sexual intercourse "without limitation." That assumption is consistent with the Assembly and Senate committee testimony that the purpose and intent of the necrophilia law to criminalize the same sex acts committed with a corpse as with a living person.

The necrophilia bill's intent to only apply to sex acts with a corpse – as understood from its plain language, Basl's testimony, the circumstances of sexual intercourse with the dead Washoe County girl that inspired the law, and the legislature's definition of "sexual penetration" – is consistent with the *Oxford English Dictionary's* definition of necrophilia: "Fascination with death and dead bodies; esp. sexual attraction to, or intercourse with, dead bodies." The *Oxford English Dictionary* is the world's most authoritative English dictionary.

At the time the Clark County District Attorney's Office filed the necrophilia charge against Blaise on July 31, 2001, the only evidence of Bailey's injuries was ME Simms' Autopsy Report that did not state Bailey was sexually assaulted before or after his death. During Petitioner's preliminary hearing on August 7, 2001, the DA's Office did not present any eyewitness or expert testimony that Bailey experienced any postmortem anal sexual activity. During Petitioner's preliminary hearing Clark County Medical Examiner Lary Simms' testified about his autopsy findings:

> Q. (By Mr. Jorgensen) Now, what were the – what did you find on external examination?
> A. (By Mr. Simms) Well, there was dozens of injuries. Do you want me to go into each individually or sum them up?
> Q. Would you sum them up?
> A. There was a number of blunt force injuries all over the head and face. And there were a number of sharp force injuries including slash wounds and stab wounds that involved the neck, face; there were defensive wounds on the hands; there was a stab wound in the abdomen; and there was some sexual mutilation, the penis was amputated; ***there was a large slash wound in the rectal area***." (***State v. Lobato***, Case No. C177394, Reporter's Transcript of Preliminary Hearing, August 7, 2001, 19. (underlining added to original.)

Simms testified about the "slash wound" to Bailey's rectal area during an additional five exchanges with the assistant district attorney. There was no testimony by Simms that a person had sexual relations with Bailey rectum after his death.

Thus Petitioner was charged with violating the necrophilia law, and then ordered to stand trial after her preliminary hearing, without any evidence offered by the Clark County DA supporting the allegation that she – or anyone else – had any form of sexual relations with Bailey's rectum after his death.

The prosecution justified the necrophilia charge against the Petitioner based on Simms' testimony that after Bailey died his rectum was slashed by a sharp object. While Simms' testimony may support an accusation of corpse mutilation, it doesn't even support the suggestion, much less a substantive allegation, that Bailey was raped after his death. As Basl made clear in his testimony, the purpose of the necrophilia law was to criminalize the same sexual activity conducted with a corpse that constitutes sexual assault of a live person. Inflicting multiple stabbing and slicing injuries on a living person, including slashing his or her rectum, is a form of causing bodily harm. The same is true of slashing a corpse's rectum.

So the Clark County District Attorney's Office effectively created an entirely new law never contemplated or enacted by the Nevada Legislature when it applied the necrophilia law to the allegation that Bailey's rectum was slashed after he died. Application of the necrophilia law doesn't conform to the letter, spirit, or legislative intent of NRS 201.450. The prosecution did not even allege in charging Blaise with violating the necrophilia law that Bailey's corpse had been raped. Nor did the prosecution allege during Blaise's preliminary hearing or her two trials that Bailey's dead body had been raped/sexually assaulted.

The prosecution wasn't even on completely solid ground in alleging that Bailey's rectum injury was due to slashing by a sharp object. During Blaise's retrial defense medical expert Dr. Michael Laufer testified that in his years as a hospital emergency room physician he had seen many people with rectum injuries similar to Bailey's that were caused by the seam of their pants when they were kicked. Thus, in his opinion a sharp object may not have been involved. In spite of their different opinions about the possible cause of Bailey's rectum injury, the common denominator of Simms and Laufer's testimony was that neither opined his injury was caused by a person engaging in sex with Bailey's corpse. Likewise, neither opined that anyone had sex with Bailey after his death. Consequently, regardless of how Bailey's rectum injury occurred – through a kick to the seam of his pants or slashing by a sharp object – no evidence was presented that the person or persons who murdered Bailey had sexual relations with his corpse, so they did not violate the necrophilia law (NRS 201.450).

The facts presented to the jury clearly show that Petitioner was prosecuted for a non-existent violation of Nevada's necrophilia law – NRS 201.450. Petitioner was prejudiced because her counsel was obligated in representing the Petitioner's interests to submit a jury instruction that an essential element of NRS 201.450 is that the prosecution had to prove beyond a reasonable doubt that the Petitioner engaged in sexual activity with Duran Bailey's corpse that would be considered sexual activity with a live person. If Petitioner's counsel had submitted a jury instruction that correctly described the statute's essential element that the prosecution had to prove beyond a reasonable doubt that the Petitioner engaged in sexual activity with Duran Bailey's corpse that would be considered sexual activity with a life person, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt of violating NRS 201.450.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(kkk) Ground sixty-three.

Petitioner's counsel was ineffective under the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, for failing to object to the prosecution's proposed jury instruction of NRS 201.450, because it redefined the statute to a strict liability offense and reduced the prosecution's burden of proof from that imposed by the Nevada Legislature's intent in enacting NRS 201.450 to require an alleged violation to have the same essential elements and impose the same burden of proof on the prosecution as is required for an alleged sexual assault on a live person, and counsel's failure to object, individually or cumulative with other evidence prejudiced the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution argued to the jury the Petitioner slashed Duran Bailey's rectum with her pocket butterfly knife in an act of spontaneous methamphetamine-fueled rage. The prosecution based Petitioner's charge of violating Nevada's necrophilia law – NRS 201.450 – based on the prosecution's allegation that Duran Bailey's rectum was slashed after he died. The prosecution did not argue the Petitioner had sexual relations with Bailey's rectum after his death, and no testimony was provided at trial that Petitioner had done so. NRS 201.450 is known as Nevada's necrophilia law, and the legislative history of the statute makes clear that it only criminalizes sexual activity

with a corpse that would be considered a sexual assault on a live person. The prosecution did not allege, or argue to the jury that Petitioner engaged in an act of sexual relations with Bailey's rectum after his death. A photo of Bailey's rectum at autopsy clearly shows his attacker inflicted a serious wound. (See Exhibit 93, Bailey's rectum wound.)

In 1982 a seven-year-old girl's corpse was stolen from a mortuary in Nevada's Washoe County (Reno). After the thief had sex with the corpse, he deposited it in a garbage can. After the alleged perpetrator's arrest, prosecutors discovered there was no necrophilia (sex with a corpse) law in Nevada, and that the state's sexual assault law only applies to a living "person," so it was inapplicable to sexual intercourse (rape) with the dead girl's body. The Washoe County District Attorney responded by drafting a bill criminalizing necrophilia. The Nevada District Attorney Association co-sponsored the bill. Designated A.B. 287, the bill was introduced in the Nevada Assembly on March 2, 1983, and it was summarized as "Prohibits necrophilia." (See Exhibit 59, A.B. 287 (Necrophilia Law) - Assembly, (Assembly History, Sixty-second Session, March 2, 1983, p. 107.)

Ed Basl represented the Washoe County District Attorney's Office, and in his testimony on March 16, 1983 before the Assembly Judiciary Committee, he made it clear that the purpose of the bill was to criminalize the rape of a corpse. Basl specifically stated that the drafter of the bill and its sponsors wanted "to have the penalty the same as a sexual assault [of a live person]." (See Exhibit 59, A.B. 287 (Necrophilia Law) - Assembly, (Assembly Judiciary Committee, March 16, 1983, 988.)) The proposed law was predicated on the assumption that since a dead person (regardless of age) can't provide consent, then any sexual activity with a corpse is non-consensual, and thus the equivalent of raping a live person. Rape is defined as, "Nonconsensual sexual penetration of an individual, obtained by force or threat, or in cases in which the victim is not capable of consent." (***Dorland's Illustrated Medical Dictionary, 31st Edition***, (Philadelphia: Saunders/Elsevier (2004), 1617.)

On March 30, 1983 the Nevada Assembly passed the bill.

Basl reiterated during his testimony before the Senate Judiciary Committee on April 5, 1983, that the sole purpose of the bill was to criminalize sexual relations with a corpse: "Mr. Basl went on to say that he does not believe the bill needs to be amended by adding a series of other

felony and/or other offenses: that part of the problem as far as the way dead bodies are handled, is covered already by existing legislation, but the one area that is completely void of mention is the area of sexual assaults being committed on dead bodies." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 788 (Underlining added to original.)) Basl testified before the Senate committee, as he had before the Assembly committee, that the sponsors seeking to criminalize necrophilia wanted "to make the penalty conform to those for sexual assault [of a live person]." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 789.))

The Nevada Senate passed the necrophilia bill (A.B. 287) on April 13, 1983. The governor signed the bill on April 20, and it became effective on July 1, 1983 as NRS 201.450. The statute states in part: "sexual penetration" means cunnilingus, 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).

The only testimony before the House and Senate Judiciary Committees was by Basl. His explanation of the law's intent is unquestionable because he was the official representative of the necrophilia law's drafter and co-sponsor – the Washoe County District Attorney's Office. There was no testimony whatsoever that the law has any application to any situation other than a person engaging in sexual activity with a corpse that would be considered sexual activity if committed with a live person, which is why it is known as Nevada's necrophilia law. The limited scope of the law's applicability is explained by Basl's testimony before the Senate committee that the law was intended to fill the absence of a law prohibiting "sexual assaults being committed on dead bodies." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 788.)

Basl's testimony of the law's intended purpose is consistent with the sex act that inspired the necrophilia law – sexual intercourse with a dead young girl's body.

That the necrophilia law was intended to criminalize sex acts with a corpse that would be illegal if performed on a nonconsenting (or underage) living person is not only made clear from Basl's testimony before both the Assembly and Senate Judiciary Committees, and the facts of the

corpse rape that inspired the law, but from the language of the law itself. It criminalizes "sexual penetration" of a dead body, and it states that "means cunnilingus, 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) Thus insertion of a penis or a dildo into a corpse's anus or vagina would be as punishable as the equivalent of doing the same in an illegal manner with a non-consenting live person.

The intent of the necrophilia law to criminalize the sexual assault of a dead body is further supported by the fact that the definition of "sexual penetration" is almost identical for both the Nevada laws criminalizing "Sexual Assault and Seduction" of a living person and the necrophilia law. The only difference between the definition of "sexual penetration" of a living "person" (in NRS 200.364) and of a corpse in the necrophilia law, is that the latter includes the two words "without limitation," preceding "sexual intercourse in its ordinary meaning if practiced upon the living." The legislative history of the necrophilia law doesn't state what the two additional words mean, however, since they are immediately followed by "sexual intercourse," it is reasonable to assume they directly relate to sexual intercourse "without limitation." That assumption is consistent with the Assembly and Senate committee testimony that the purpose and intent of the necrophilia law to criminalize the same sex acts committed with a corpse as with a living person.

The necrophilia bill's intent to only apply to sex acts with a corpse – as understood from its plain language, Basl's testimony, the circumstances of sexual intercourse with the dead Washoe County girl that inspired the law, and the legislature's definition of "sexual penetration" – is consistent with the *Oxford English Dictionary's* definition of necrophilia: "Fascination with death and dead bodies; esp. sexual attraction to, or <u>intercourse with, dead bodies</u>." The *Oxford English Dictionary* is the world's most authoritative English dictionary.

At the time the Clark County District Attorney's Office filed the necrophilia charge against Blaise on July 31, 2001, the only evidence of Bailey's injuries was ME Simms' Autopsy Report that did not state Bailey was sexually assaulted before or after his death. During Petitioner's preliminary hearing on August 7, 2001, the DA's Office did not present any eyewitness or expert

testimony that Bailey experienced any postmortem anal sexual activity. During Petitioner's preliminary hearing Clark County Medical Examiner Lary Simms' testified about his autopsy findings:

> Q. (By Mr. Jorgensen) Now, what were the – what did you find on external examination?
> A. (By Mr. Simms) Well, there was dozens of injuries. Do you want me to go into each individually or sum them up?
> Q. Would you sum them up?
> A. There was a number of blunt force injuries all over the head and face. And there were a number of sharp force injuries including slash wounds and stab wounds that involved the neck, face; there were defensive wounds on the hands; there was a stab wound in the abdomen; and there was some sexual mutilation, the penis was amputated; ***there was a large slash wound in the rectal area***." (***State v. Lobato***, Case No. C177394, Reporter's Transcript of Preliminary Hearing, August 7, 2001, 19. (underlining added to original.)

Simms testified about the "slash wound" to Bailey's rectal area during an additional five exchanges with the assistant district attorney. There was no testimony by Simms that a person had sexual relations with Bailey rectum after his death.

Thus Petitioner was charged with violating the necrophilia law, and then ordered to stand trial after her preliminary hearing, without any evidence offered by the Clark County DA supporting the allegation that she – or anyone else – had any form of sexual relations with Bailey's rectum after his death.

The prosecution justified the necrophilia charge against the Petitioner based on Simms' testimony that after Bailey died his rectum was slashed by a sharp object. While Simms' testimony may support an accusation of corpse mutilation, it doesn't even support the suggestion, much less a substantive allegation, that Bailey was raped after his death. As Basl made clear in his testimony, the purpose of the necrophilia law was to criminalize the same sexual activity conducted with a corpse that constitutes sexual assault of a live person. Inflicting multiple stabbing and slicing injuries on a living person, including slashing his or her rectum, is a form of causing bodily harm. The same is true of slashing a corpse's rectum.

So the Clark County District Attorney's Office effectively created an entirely new law never contemplated or enacted by the Nevada Legislature when it applied the necrophilia law to the

allegation that Bailey's rectum was slashed after he died. Application of the necrophilia law doesn't conform to the letter, spirit, or legislative intent of NRS 201.450. The prosecution did not even allege in charging Blaise with violating the necrophilia law that Bailey's corpse had been raped. Nor did the prosecution allege during Blaise's preliminary hearing or her two trials that Bailey's dead body had been raped/sexually assaulted.

The prosecution wasn't even on completely solid ground in alleging that Bailey's rectum injury was due to slashing by a sharp object. During Blaise's retrial defense medical expert Dr. Michael Laufer testified that in his years as a hospital emergency room physician he had seen many people with rectum injuries similar to Bailey's that were caused by the seam of their pants when they were kicked. Thus, in his opinion a sharp object may not have been involved. In spite of their different opinions about the possible cause of Bailey's rectum injury, the common denominator of Simms and Laufer's testimony was that neither opined his injury was caused by a person engaging in sex with Bailey's corpse. Likewise, neither opined that anyone had sex with Bailey after his death. Consequently, regardless of how Bailey's rectum injury occurred – through a kick to the seam of his pants or slashing by a sharp object – no evidence was presented that the person or persons who murdered Bailey had sexual relations with his corpse, so they did not violate the necrophilia law (NRS 201.450).

The facts presented to the jury clearly show that Petitioner was prosecuted of a non-existent violation of Nevada's necrophilia law – NRS 201.450. In spite of that the prosecution submitted without objection by Petitioner's counsel, a jury instruction that was accepted by the Court and read to the jury as Instruction 24:

> "A person who commits a sexual penetration on the dead body of a human being is guilty of Sexual Penetration of a Dead Human Body. "Sexual penetration" is defined as 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." (See Exhibit 77, Jury Instruction 24.)

Petitioner was prejudiced because her counsel was obligated in representing the Petitioner's interests to object to the prosecution's proposed Jury Instruction 24 that redefined NRS 201.450 into a strict liability offense contrary to the will of the Nevada Legislature and the legislative

history of the statute. An essential element of NRS 201.450 is that the prosecution had to provide evidence beyond a reasonable doubt that the Petitioner engaged in sexual activity with Duran Bailey's corpse that would be considered sexual activity with a life person. Jury Instruction 24 omitted that essential element, and if Petitioner's counsel had objected and the instruction had been either corrected or replaced with the correct instruction submitted by counsel, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt of violating NRS 201.450.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(lll) Ground sixty-four.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to explain to the jury the prosecution had to prove each essential element of each crime the Petitioner was charged with beyond a reasonable doubt, one of those elements is the Petitioner had to be "within Clark County" at the crime scene, and if Petitioner's counsel had explained the prosecution had not met its burden because it did not introduce evidence at trial the Petitioner was anywhere in Clark County at any time on July 8, 2001, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The Petitioner was charged with personally murdering Duran Bailey and then inserting a knife into and/or cutting his anus on July 8, 2001, within Clark County, Nevada. (*State v. Lobato*, No. C177394, Criminal Complaint.) Consequently, one of the essential elements the prosecution had to introduce evidence proving beyond a reasonable doubt the Petitioner was "within Clark County" at the crime scene at the time the crimes occurred. If the prosecution did not introduce evidence proving beyond a reasonable doubt the Petitioner was "within Clark County" and at the Nevada State Bank and inside the trash enclosure in its parking lot at the exact time Bailey was murdered, she could not have committed her accused crimes, and there was insufficient evidence for the jury to find her guilty.

No physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced at trial the Petitioner and her car were anywhere in Clark County's 8,091 square miles at any time on July 8, 2001. To the contrary, the unrebutted evidence of every prosecution and defense witness who testified about talking with the Petitioner or seeing her and/or her car on the weekend of July 7 and 8 was that she and her car were in Panaca, 170 miles north of Las Vegas. That testimony was corroborated by telephone records of conversations she throughout the day with a male friend in Las Vegas, Doug Twining, who drove up to Panaca on the evening of July 8 to pick her up to take her back to Las Vegas.

The only information the jury had to rely on that the Petitioner had been in Clark County on July 8 and at the scene of Bailey's murder was the prosecution's speculative argument to the jury it is "possible" she was there. The prosecution's argument was entirely speculative because no evidence was introduced at trial she had been in Clark County at any time on July 8.

However, Petitioner's counsel failed to explain to the jury during closing arguments that one of the essential elements the prosecution had to introduce evidence proving beyond a reasonable doubt, was the Petitioner was in Las Vegas at the scene of Bailey's murder at the time it occurred. Since the prosecution neither presented any evidence the Petitioner and her car were anywhere in Clark County at the time Bailey's murder occurred, nor rebutted the testimony of the prosecution and defense witnesses and the telephone records that she was in Panaca the entire day of July 8, the prosecution did not meet its burden of proving the essential element she was in the Nevada State Bank's trash enclosure at the time of Bailey's murder, because the unrebutted evidence at trial was she was 170 miles away in Panaca. The failure of Petitioner's counsel to explain to the jury that the prosecution had the burden of proving with competent evidence the essential element that she had been "within Clark County" at the crime scene gravely prejudiced the Petitioner because if the jury had understood the prosecution's burden of presenting evidence proving the Petitioner was at the crime scene at the exact time of Bailey's murder, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(mmm) Ground sixty-five.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object during the prosecution's opening statement to dozens of false statements of evidence that would be presented or facts proven, and if the jury had not been contaminated with the prosecution's false statements, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to and impartial and unbiased jury, due process of law and a fair trial.

Facts:

The prosecution's opening statement by Clark County Assistant District Attorney William Kephart repeatedly made references to non-existent evidence that Kephart claimed would be presented by the prosecution to prove the Petitioner's guilt. Petitioner's counsel did not make a single objection, even though it was known to her counsel that Kephart's claims were false and prejudicial to the Petitioner. Twenty-nine of those opening statement false claims are documented in Exhibit 75, "Opening Statement Falsehoods." At least ten of Kephart's opening statement falsehoods were about Dixie Tienken, and things it was known she did not say. A number of the prosecution's false claims were about things the Petitioner allegedly said, but there is no evidence she said them to any person, and Petitioner's counsel knew they would not be proved by evidence introduced at trial.

The effect of the tsunami of false claims about what Kephart claimed the prosecution would prove – but couldn't because they were not true – was the jury was conditioned by Kephart's false claims to believe there is evidence of the Petitioner's guilt that in fact does not exist.

During the Petitioner's trial that followed the opening statements, the prosecution did not introduce any physical, forensic, documentary, eyewitness, surveillance or confession evidence the Petitioner had been anywhere in Clark County on July 8, 2001 – which made it impossible for her to have murdered Bailey. Neither did the prosecution introduce any evidence during the trial the Petitioner had ever met Bailey, knew who he was, or that she had ever been to the Nevada State Bank in her life – much less that she was there at the exact time of his murder in its exterior trash enclosure. Since the prosecution did not introduce any evidence the Petitioner had even been in Clark County at any time on the day of Bailey's murder, and thus she could not have murdered

him, the only tactic available to the prosecution to convince the jury of her guilt was to present its closing and rebuttal argument as the "evidence" of her guilt missing from the trial itself. (See Exhibit 76, Prosecution's improper closing and rebuttal arguments that were not objected to.) The prosecution then built their closing and rebuttal arguments around the multitude of false claims in their opening statement – but which had not been proven by evidence presented at trial.

Consequently the Petitioner's state and federal rights to due process and a fair trial were grievously prejudiced by her counsel's failure to object each and every time Kephart made a claim that her counsel should have known the prosecution would not present evidence to prove, because those false claims laid the foundation for the improper and false closing and rebuttal arguments about non-existent evidence that were a continuation of Kephart's numerous false claims during his opening statement about evidence that would be introduced – but which couldn't because it doesn't exist. If Petitioner's counsel had objected to Kephart's false opening statement claims it would have prevented the jury from being conditioned at the start of the trial to believe there is evidence against the Petitioner that in fact doesn't exist. That would have had the effect of influencing the jurors to have taken a more critical view of the closing and rebuttal arguments when the prosecution would have been making what would have been entirely new claims against the Petitioner that wasn't supported by evidence introduced during the trial.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(nnn) Ground sixty-six.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object to prosecution's extreme misstatement of the facts during its closing and rebuttal arguments to the jury, that the fracture to the back of Bailey's head was inflicted at the same time as his other wounds, because Medical Examiner Lary Simms' testified that Bailey's brain swelling that began at least two hours prior to death was "contemporaneous with the fracture" and it was his primary cause of death, and if Petitioner's counsel had objected and made the jury fully aware that Bailey was subjected to two separate attacks, individually or cumulative with other exculpatory evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution's scenario of the events in the Nevada State Banks' trash enclosure was that the events followed in succession: Bailey was attacked, he died, his postmortem wounds were inflicted, and his killer left.

Bailey had a skull fracture to the back of his head that Clark County Medical Examiner Lary Simms testified did not bleed. The prosecution argued to the jury that Bailey's "skull fracture occurs when he falls" after being "punched" in the mouth. (XIX-123-4, 10-5-06) The prosecution made variations of that argument during their closing and rebuttal arguments, including that his skull fracture was caused by the Petitioner hitting him in the mouth with her bat. Petitioner's counsel failed to object that the prosecution's argument was a misstatement of the evidence. Clark County Medical Examiner Lary Simms testified during cross-examination that Bailey's skull fracture was consistent with being contemporaneous with his brain swelling that began two hours or so before he died:

> Q. (Mr. Schieck) But the fracture could've been two hours old also?
> A. (Mr. Simms) Yes, because it was – that area was on the same side as the fracture, and if it was on the different side then I'd have a different opinion, but because that area is on the same side as the fracture, it could've been that that was contemporaneous with the fracture. (7 App. 1175; Trans. VIII-36-37 (9-20-06))

The fracture to Bailey's head and the resultant brain swelling that occurred two hours prior to his death directly point to Bailey being subjected to two separate attacks on July 8, 2001. The first attack resulted in the fracture to his skull that resulted in the swelling of his brain. In fact, Simms ruled as a Cause of Death that "Bailey died as a result of BLUNT HEAD TRAUMA." (Autopsy Report of Duran[d] Bailey, Clark County Coroner's Office, July 9, 2001.) That head injury was inflicted two hours before the assault in the Nevada State Bank trash enclosure where his body was found. Dr. Simms' testimony established that Bailey would have died from the swelling of his brain caused by the first attack's "blunt head trauma," even if the second attack had never occurred. So while the many visible beating, cutting and stabbing wounds Bailey experienced in the second attack which took place at the trash enclosure mar Bailey's physical appearance, based on Simms' Autopsy Report and testimony they were superfluous to him dying.

Actress Natasha Richardson's March 2009 death is a recent well-publicized case that a person can function normally for a period of time after experiencing their ultimately fatal head injury. (See Exhibit 28, Natasha Richardson, 45, Stage and Film Star, Dies, NY Times, March 19, 2009.)

The Petitioner was prejudiced by her counsel's failure to object to the prosecution's argument that falsely, misleadingly, and contrary to the testimony conflated into one event the two separate attacks on Bailey that were separated by two or more hours. The prosecution focused on the second event that resulted in Bailey's numerous graphic bleeding and cutting wounds, while ignoring the first event that occurred two hours earlier and resulted in the fatal "Blunt Head Trauma" that was Bailey's primary cause of death. The failure of Petitioner's counsel to object left the jury unaware the prosecution's theory of the crime and argument to the jury that Bailey was knocked over and fractured his skull on the concrete curb when the Petitioner either punched him in the mouth or hit his mouth with her bat, was unsupported by the medical evidence and directly contrary to Simm's trial testimony that Bailey experienced his fatal head injury at least two hours before his other injuries. The prejudice to the Petitioner of her counsel's failure to object to the prosecution's arguments that Bailey's skull fracture happened at the same time as his many external injuries was compounded by her counsel's failure to argue during closing that the medical evidence supported Bailey was subjected to two separate and distinct fatal injury causing events in the last hours of his life. If the jury had known that in the last two hours of Bailey's life he experienced two grave injury causing events, and the first was his skull fracture two hours before his many visible injuries, the jury would have known the prosecution's closing and rebuttal arguments that the Petitioner caused Bailey's skull fracture by knocking him over with a punch or bat hit to his mouth was a complete fiction fabricated from whole cloth. With the jury aware that Bailey had either two different people or groups who wanted to cause him harm, or a single person or group determined to kill him, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ooo) Ground sixty-seven.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object and move for a mistrial when Clark County Assistant District Attorney William Kephart expressed his personal opinion to the jury that the Petitioner is guilty, and that they should follow his lead in voting her guilty when he instructed them, "it's time for you to mark it as I did, guilty of first degree murder with the use of a deadly weapon, and guilty of sexual penetration of a dead human body," and as the representative of the public Kephart's exhortation for the jurors to also mark their ballot "guilty" fatally prejudiced the Petitioner so that no curative instruction could remove the taint, and the Petitioner's state and federal constitutional rights to an impartial and unbiased jury, due process of law and a fair trial were prejudiced by her counsel failure to object and move for a mistrial, and dismissal of the charges with prejudice because of Kephart's egregious, deliberate, extreme and prejudicial prosecutorial misconduct that interfered with the fair administration of justice, and the Petitioner was further prejudiced by her counsel because by not objecting the issue was not preserved for appeal to the Nevada Supreme Court.

Facts:

Toward the end Clark County Assistant District Attorney William Kephart's rebuttal argument he expressed his personal opinion the Petitioner is guilty and the jurors should follow his lead and mark their ballots to convict her as he did: "it's time for you to mark it as I did, guilty of first degree murder with the use of a deadly weapon, and guilty of sexual penetration of a dead human body." (9 App. 1746; Trans. XIX–213 (10-5-06)) As a prosecutor and representative of the public's interests, Kephart has a position of great responsibility. Kephart's personal vote for conviction would be expected to carry particular weight with the other jurors during their deliberations, and have an influence on them far beyond that of any other person with the possible exception of the judge. Kephart's argument created the impression he was a quasi-13th juror hovering in the background of the jury room.

The Petitioner was gravely prejudiced and irreparably harmed by Kephart's personal plea and impassioned exhortation for the jury to join hands with him in marking their ballots guilty "as I did". As the government's representative to enforce the laws and protect the public from bad and harmful people, Kephart's personal statement of his opinion the Petitioner is guilty carried significant weight with the juror's perception of the case, and once Kephart rung the bell of gravely

prejudicing the Petitioner, no curative instruction by the court cold have unrung the bell and caused the jury to disregard the taint of Kephart's comment and to give it no weight during their deliberations.

The failure of Petitioner's counsel to object and move for a mistrial left the jury unaware there was anything improper about Kephart telling the jurors that he wanted to personally lead them to vote guilty in the jury room and convict the Petitioner.

Petitioner's state and federal constitutional rights to an impartial and unbiased jury, due process of law and a fair trial were prejudiced by her counsel failure to object and move for a mistrial, and dismissal of the charges with prejudice because of Kephart's egregious, deliberate, extreme and prejudicial prosecutorial misconduct that interfered with the fair administration of justice. If the motion for mistrial had not been granted, the Petitioner was further prejudiced because by her counsel not objecting the issue was not preserved for appeal to the Nevada Supreme Court.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ppp) Ground sixty-eight.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object to the prosecution's closing and rebuttal arguments that prejudicially smeared and disparaged the credibility and truthfulness of defense alibi witnesses John Kraft, Larry Lobato, and Ashley Lobato because they had not previously been called as witnesses, and Kraft and Larry Lobato were critical alibi witnesses whose testimony fatally undermined the prosecution's case, so Petitioner was gravely prejudiced by her counsel's failure to object to each improper argument and to request that the court admonish the jury to disregard the prosecution's disparaging arguments, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

During Clark County ADA Sandra DiGiacomo's closing argument and ADA William Kephart's rebuttal argument they both cast aspersions on the credibility of defense alibi witnesses John Kraft, Larry Lobato (father), and Ashley Lobato (sister) by suggesting there was something nefarious about their testimony because they had not been called as witnesses during the

Petitioner's first trial. DiGiacomo argued in her closing: "And then you have John Kraft. John and Ashley and her father are all new. They did not testify previously. The come in here and they say that she was there the morning of July 8 at 7:00 a.m. That's new". (9 App. 1727; Trans. XIX-137 (10-5-06)) Kephart similarly argued in his rebuttal: "And for the first time -- and also we hear from Mr. Lobato. He comes in here and now he tells you that at 7 o'clock in the morning John, who we hear from the first time, came over and woke me up and asked me on that particular day, when he was leaving a week later, to help out with checking with my family when I'm gone, the first time." (9 App. 1741; Trans. XIX-190 (10-5-06)).

Larry Lobato and Kraft were critical alibi witnesses because Larry Lobato testified to seeing the Petitioner on July 8, 2001, sleeping on the futon in the living room of the Lobato's house in Panaca after arriving home from work around 1 am on July 8, 2001, when he went to bed about 2 am, and again at about 7am that morning when she woke him up because Kraft had come over to their house to talk with him. Kraft testified the Petitioner answered the door when he went to the Lobato's house at about 7am on July 8 to talk with Larry Lobato. He also testified the Petitioner appeared sleepy like he had woken her up. Ashley Lobato testified to seeing the Petitioner that day.

If the jury considered Larry Lobato and Kraft credible then they could not find the Petitioner guilty of murdering Bailey. The testimony of the two men established she was in Panaca from shortly after midnight to 7am. It was during that period of time the prosecution argued she murdered Bailey and was in Las Vegas – not 170 miles away sleeping in Panaca. Consequently, it was imperative for the prosecution to disparage and smear Larry Lobato and Kraft as not credible – the Petitioner's conviction depended on it.

There is nothing in the record to suggest Larry Lobato, Kraft, and Ashley Lobato did not testify truthfully and that they were not willing and able to testify during the Petitioner's first trial as they did during the Petitioner's second trial. That they didn't testify during the first trial had nothing to do with them, but it was due to the decision of the Petitioner's counsel and the prosecutors who did not have them testify.

Petitioner's counsel did not object to either DiGiacomo or Kephart's arguments disparaging the integrity of the three defense alibi witnesses. The Petitioner was gravely prejudiced by her

counsel's failure to object in response to the prosecution's disparaging comments branding Larry Lobato, Kraft, and Ashley Lobato as liars, because they placed the Petitioner in Panaca on July 8, 2001, and Kraft and Larry Lobato specifically placed her in Panaca from between shortly after midnight and 7am – which based on the prosecution's argument that Bailey was murdered prior to dawn. That eliminated the Petitioner from any "possibility" of being Bailey's killer, because if she was in Panaca she could not have "possibly" committed the crime – based on the prosecution's own timeline of the crime. If Petitioner's counsel had objected to each improper disparaging comment about the three alibi witnesses the court would have each time admonished the jury each time to disregard the prosecution's disparaging statement, and with there being no reason for the jury to doubt the honesty of the witnesses, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, and acquitted her.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(qqq) Ground sixty-nine.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the US Constitution, and prejudiced by counsel's objectively unreasonable failure to object to each comment during the prosecution's closing and rebuttal arguments that the Petitioner was bloody when she got in her car after the assault described in her Statement of July 20, 2001, and that blood was found in her car, when there was no testimony at trial that the Petitioner had any blood on her, and the scientific tests conducted on her car by the LVMPD Crime Lab did not find any blood in her car, and Petitioner was further prejudiced by her counsel's failure to make a motion for a mistrial and dismissal of the charges with prejudice as the appropriate sanction for the egregious prosecutorial misconduct by ADAs Sandra DiGiacomo and William Kephart of the improper arguments about the non-existent blood evidence that individually and cumulatively fatally contaminated the jury, and if the motion for a mistrial had not been not granted, by failing to object the Petitioner's counsel waived claims on direct appeal based on the prosecution's closing and rebuttal arguments that fatally prejudiced the Petitioner's state and federal constitutional rights to an impartial and unbiased jury, due process of law, and a fair trial.

Facts:

During DiGiacomo's closing argument and Kephart's rebuttal argument they both falsely stated that the presumptive luminol and phenolphthalein tests proved there was blood in her car,

even though the confirmatory HemaTrace and DNA tests of her car tested negative for blood. The presumptive tests return positive reactions for a multitude of natural and man-made substances, and blood is only one of those many substances, which is why a confirmatory test is necessary to determine if blood is in fact present. DiGiacomo argued: "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." (9 App. 1730; Trans. XIX-147 (10-5-06)); and, "That does give you some physical evidence that links her to the crime, that's blood." (9. App. 1730; Trans. XIX-148 (10-5-06)) Kephart argued: "…even though we had two tests, presumptive tests that said it's blood." (9 App. 1740; Trans. XIX-188 (10-5-06)) Kephart and DiGiacomo falsely claimed in their arguments that the presumptive luminol or phenolphthalein positive reactions were for blood, even though the confirmatory DNA tests scientifically proved that blood did not cause the reactions. Although it was absolutely critical to the Petitioner's defense that the jury understand the truth that no blood was found in her car, Petitioner's counsel did not object to any of DiGiacomo or Kephart's arguments that erroneously led the jury to believe blood was found in the Petitioner's car. The prosecution's arguments about blood in the Petitioner's car were the equivalent of them arguing that it is possible 2+2 equals 7, how do we know it doesn't?, or that it is possible the Earth rotates around the Moon, how do we know it doesn't. The prosecution's false argument that blood was found in the Petitioner's car was the equivalent of DiGiacomo and Kephart elevating Voodoo and Black Magic above scientific truth.

During DiGiacomo's closing she stated about what the Petitioner said in her Statement, "… she got rid of the clothes she was wearing that she said had blood on them." (9 App. 1728; Trans. XIX-139 (10-5-06)) During Kephart's rebuttal he stated three separate times that the Petitioner said in her Statement that she was bloody after she fought off her attacker and got in her car to leave: "I mean she said in her statement she'd gotten her car bloody." (9 App. 1744; XIX-202 (10-5-06)); "She talked about taking her clothes off in the car because they were bloody" (9 App. 1744; XIX-202 (10-5-06)); and, "Said that she was bloody and got in her car, Corroborated." (9 App. 1747; Trans. XIX-214 (10-5-06)). Both DiGiacomo and Kephart's statements have no basis in reality because the Petitioner not only doesn't say anywhere in her Statement that she or her clothes were

bloody, but the words bloody, blood, bled, bleed or bleeding do not appear a single time in her Statement, and no witness testified that she took her clothes off in her car because they were bloody. DiGiacomo and Kephart's statements that the Petitioner said she was bloody were not just false, they were outright deliberate lies, and they had to have known it at the time they made those declarations to the jury. Yet, Petitioner's counsel did not object to any of DiGiacomo or Kephart's arguments that erroneously led the jury to believe the Petitioner said she and her clothes were bloody after the assault that she describes in her Statement.

It is not a mystery why DiGiacomo and Kephart wanted to falsely implant the ideas in the minds of the jurors that Petitioner had said in her Statement that she was bloody when she got in her car, and that blood was found in her car. If she was bloody and there was blood in her car then that suggests she was at the scene of Bailey's bloody murder. Although it is known the presumptive tests did not test positive for blood and the Petitioner did not say a single time in her Statement that she or her clothes were bloody, Petitioner's counsel did not object a single time to DiGiacomo and Kephart's false arguments that were based on their imagination and not the trial testimony.

The Petitioner was greatly prejudiced by her counsel's failure to object to each improper argument about the non-existent blood evidence at trial, all of which could have the effect of prejudicing the jury's judgment. The Petitioner was further gravely prejudiced by her counsel's failure to make a motion for a mistrial and dismissal of the charges with prejudice based on the egregious prosecutorial misconduct of ADAs DiGiacomo and Kephart's improper arguments based on their imagination and not evidence that individually and cumulatively irreparably prejudiced the jury's judgment. The prosecution's case for the Petitioner's conviction wasn't based on the evidence presented during trial, but by the prosecution's improper closing and rebuttal arguments that her counsel failed to object to. The jury was so prejudiced by the baseless arguments that no curative instruction could undo the jury's contamination by the prosecution's repeated arguments that the Petitioner was bloody after the assault described in her Statement and that there was blood in her car, neither of which is supported by the trial testimony. The appropriate sanction for the prosecution's egregious prosecutorial misconduct was a mistrial and dismissal of the charges with

prejudice. Furthermore, if the motion for a mistrial was not granted, by failing to object the Petitioner's counsel waived claims on direct appeal based on the prosecution's closing and rebuttal arguments – including gross prosecutorial misconduct prejudicial to the Petitioner's state and federal constitutional rights to a unbiased and impartial jury, due process of law, and a fair trial.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(rrr) Ground seventy.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object to each of more than two hundred and fifty improper and prejudicial closing and rebuttal arguments that were used as a substitute for evidence of the Petitioner's guilt not introduced during trial, including ADA William Kephart expressing his personal opinion that the Petitioner is guilty and exhorting the jurors to mark their ballots "guilty" as he did, and Petitioner's counsel allowed the juries judgment to be contaminated without objection to the hundreds of baseless and speculative arguments, and Petitioner was further prejudiced by her counsel's failure to make a motion for a mistrial and dismissal of the charges with prejudice as the appropriate sanction for the egregious prosecutorial misconduct of the improper arguments that individually and cumulatively irreparable affected the jury, and if the motion for a mistrial had not been not granted, by failing to object the Petitioner's counsel waived claims on direct appeal based on the prosecution's closing and rebuttal arguments that fatally prejudiced the Petitioner's state and federal constitutional rights to an impartial and unbiased jury, due process of law, and a fair trial.

Facts:

The prosecution's opening statement by Clark County Assistant District Attorney William Kephart repeatedly made references to non-existent evidence that Kephart claimed would be presented by the prosecution to prove the Petitioner's guilt of murdering Duran Bailey and the post-mortem cutting of his rectum on July 8, 2001, in the trash enclosure for the Nevada State Bank at 4240 West Flamingo Road in Las Vegas. Petitioner's counsel did not make a single objection during the opening statement, even though it was known to her counsel that Kephart's claims were not true, no evidence would be presented to prove them, and the claims were prejudicial to the Petitioner. Twenty-nine of those opening statement evidence claims are documented in Exhibit 75, "Opening statement false evidence claims."

Petitioner's counsel failed during the prosecution's closing argument by ADA Sandra DiGiacomo and rebuttal argument by ADA Kephart to make more than 250 objections to improper arguments that were based on facts not in evidence, misstatements of evidence, improper opinion argument, disparaging the honesty and credibility of defense witnesses, expressing personal opinions, stating contradictory theories of the crime, misstating the law, conflating and confusing facts in evidence, drawing conclusions from speculative inferences, speculation, improper argument that it is the duty of the jury to find the Petitioner guilty, misstatements of what constitutes reasonable doubt, stating personal opinions about the case as fact, and ADA William Kephart expressing his personal opinion that the Petitioner is guilty and the jurors should follow his lead and mark their ballots "guilty" "as I did." ("it's time for you to mark it as I did, guilty of first degree murder with the use of a deadly weapon, and guilty of sexual penetration of a dead human body.", App. 9, 1746; Trans. XIX–213 (10-5-06)) The more than 250 improper and false prosecution closing and rebuttal arguments that were not objected to by Petitioner's counsel are documented in Exhibit 76, "Prosecution's improper closing and rebuttal arguments that were not objected to." Included are 123 improper closing arguments by DiGiacomo, and 130 improper rebuttal arguments by Kephart.

The prosecution's closing and rebuttal arguments that were not based on evidence introduced during trial, were a continuation of their opening statement claims that were not based on evidence to be presented at trial. The trial sandwiched in between the opening statement, and the closing and rebuttal arguments was superfluous to the core of the state's charges that the Petitioner murdered Duran Bailey and cut his rectum after he was dead. Petitioner's trial was little more than a prop in between the "meat" of the prosecution's case –its opening statement, and its closing and rebuttal arguments. The opening statement and closing and rebuttal arguments actually constituted the prosecution's case in chief that filled in the many critical evidentiary holes that were empty after the prosecution presented its case.

During Petitioner's trial no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced that she or her car was anywhere in Clark County at any time on July 8, 2001 – the day Bailey was murdered. So when the jury began its deliberations all the

jurors had to rely on to decide if the Petitioner and her car had been somewhere in Clark County's 8,091 square miles at sometime on July 8, 2001, was that claim during DiGiacomo's closing argument and Kephart's rebuttal argument. Consequently, all the jurors had to rely on to decide if the Petitioner and her car had been in Las Vegas at the specific location of the Nevada State Bank's trash enclosure at the specific time Bailey died was that claim during DiGiacomo's closing argument and Kephart's rebuttal argument.

During the Petitioner's trial no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced that she drove her car the 340-mile round-trip from Panaca to Las Vegas on the weekend of July 6 to 8, 2001. To the contrary, the unrebutted testimony by prosecution and defense witnesses and telephone records established the Petitioner was in Panaca on July 6, 7 and during the early morning, the morning, the afternoon, and the evening of July 8, 2001. Likewise, the unrebutted testimony was the Petitioner's car was parked in front of her parents' house all that weekend. So when the jury began its deliberations all the jurors had to rely on to decide if the Petitioner and her car had not been in Panaca all weekend of July 6 to 8, and that she had driven her car the round-trip from Panaca to Las Vegas, was that claim during DiGiacomo's closing argument and Kephart's rebuttal argument.

During the Petitioner's trial no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced that the Petitioner had ever met the homeless Bailey, talked with him in person or on the telephone, knew where he stayed, or that she knew anyone who had ever met Bailey or knew where he stayed. So when the jury began its deliberations all the jurors had to rely on to decide if the Petitioner knew Bailey or had ever had any contact with him, was that claim during DiGiacomo's closing argument and Kephart's rebuttal argument.

During the Petitioner's trial no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced that the Petitioner had ever been to the Nevada State Bank. So when the jury began its deliberations all the jurors had to rely on to decide if the Petitioner had ever been to the Nevada State Bank, much less at the specific time of Bailey's death, was that claim during DiGiacomo's closing argument and Kephart's rebuttal argument.

During the Petitioner's trial no physical, forensic, medical, documentary, eyewitness, surveillance or confession evidence was introduced that somewhere in Las Vegas the Petitioner inflicted the wound that according to the Autopsy Report caused Bailey's death – his head fracture and resultant brain swelling that Medical Examiner Lary Simms' testified occurred two hours prior to his severed carotid artery that contributed to his death in the Nevada State Bank's trash enclosure, or that she had cut his rectum after he died. (App. 7, 1175; Trans. VIII-36-37 (9-20-06)) So when the jury began its deliberations all the jurors had to rely on to decide if the Petitioner had inflicted Bailey's head fracture, and then two hours later inflicted his carotid artery wound that contributed to his death, and then cut his rectum after he died, was that claim during DiGiacomo's closing argument and Kephart's rebuttal argument.

During the Petitioner's trial there was no testimony that a single specific detail of the Petitioner's Statement of July 20, 2001, matches a single specific detail of Bailey's murder and the post-mortem cutting of his rectum (her accused crimes ("sexual penetration of a dead body")). According to the Autopsy Report, Bailey had 31 separate external wounds plus his skull fracture and its associated brain swelling, plus numerous internal injuries. Not a single one of Bailey's injuries that ME Simms testified were inflicted ante-mortem or post-mortem is described in the Petitioner's Statement, which also describes her being sexually assaulted in an east Las Vegas hotel parking lot, while Bailey was murdered inside a west Las Vegas bank's trash enclosure. So when the jury began its deliberations all the jurors had to rely on to decide if the Petitioner's Statement described Bailey's murder and the cutting of his rectum after death, was that claim during DiGiacomo's closing argument and Kephart's rebuttal argument.

During the Petitioner's trial no physical, forensic, eyewitness or confession evidence was presented linking any personal item of the Petitioner or her car to Bailey's murder and the cutting of his rectum after death, or to the crime scene. So when the jury began its deliberations all the jurors had to rely on to decide if any personal item of the Petitioner or her car was linked to Bailey's death or the crime scene, was that claim during DiGiacomo's closing argument and Kephart's rebuttal argument.

Consequently, based on the evidence introduced at trial it is impossible the Petitioner murdered Bailey and cut his rectum after death, because she was not anywhere in Clark County at anytime on July 8, 2001; she had not driven the round-trip from Panaca to Las Vegas on the weekend of July 6 to 8, 2001; she had never met the homeless Bailey or knew where he stayed; she had never been to the Nevada State Bank; she did not somewhere in Las Vegas inflict the skull fracture that triggered his fatal brain swelling and then two hours later in the trash enclosure stab his carotid artery that contributed to his death, and then after his death cut his rectum; there is no detail in her Statement describing the specific location where Bailey was murdered or his ante-mortem and post-mortem injuries; and no personal item of the Petitioner or her car is linked to Bailey's murder or the crime scene.

Since the prosecution did not introduce any evidence the Petitioner had been anywhere in Clark County at anytime on the day of Bailey's murder, the only tactic available to the prosecutors to convince the jury of her guilt was to present its closing and rebuttal argument as the phantom "evidence" of her guilt missing from the trial itself. The prosecution's closing and rebuttal arguments were based on 'guilty by imagination', not guilt by fact. The following are among the egregiously prejudicial improper prosecution arguments.

- Toward the end of his rebuttal argument Kephart expressed his personal opinion the Petitioner is guilty and the jurors should mark their ballots to convict her as he did: "it's time for you to mark it as I did, guilty of first degree murder with the use of a deadly weapon, and guilty of sexual penetration of a dead human body." (App. 9, 1746; Trans. XIX–213 (10-5-06)) Kephart's argument created the impression he was a quasi-13th juror. As the prosecutor and representative of the public Kephart's vote for conviction would be expected to carry particular weight with the other jurors. Petitioner's counsel did not object.
- During DiGiacomo's closing argument and Kephart's rebuttal argument they both denigrated the credibility of defense alibi witnesses John Kraft, Larry Lobato (Petitioner's father), and Ashley Lobato (Petitioner's sister) by suggesting there was something nefarious about their testimony because they had not been called as witnesses previously. DiGiacomo argued: "And then you have John Kraft. John and Ashley and her father are all new. They did not testify

previously. The come in here and they say that she was there the morning of July 8 at 7:00 a.m. That's new". (App. 9, 1727; Trans. XIX-137 (10-5-06)) Kephart similarly argued: "And for the first time -- and also we hear from Mr. Lobato. He comes in here and now he tells you that at 7 o'clock in the morning John, who we hear from the first time, came over and woke me up and asked me on that particular day, when he was leaving a week later, to help out with checking with my family when I'm gone, the first time". (App. 9, 1741; Trans. XIX-190 (10-5-06)) Kraft and Larry Lobato were very important alibi witnesses because Larry Lobato testified to seeing the Petitioner on July 8, 2001, sleeping on the futon in the living room of the Lobato's house after arriving home from work in the very early morning hours of July 8, 2001, when he went to bed after watching some television, and again at about 7am that morning when she woke him up because Kraft had come over to their house to talk with him. Ashley Lobato testified to seeing the Petitioner that day. If the jury deemed Larry Lobato and Kraft credible they could not find the Petitioner guilty of murdering Bailey, because they established she was not in Las Vegas "sometime before sunup" when the prosecution argued he died. (Trans. XIX-121 (10-5-06)) Contrary to the negative comments by DiGiacomo and Kephart, there is nothing in the record to suggest Ashley Lobato, Larry Lobato and Kraft did not testify truthfully and that they were not willing and able to testify during the Petitioner's first trial as they did during the Petitioner's second trial. That they didn't testify during the first trial had nothing to do with them, but it was due to the decision of the Petitioner's counsel or the prosecutors who did not have them testify. Petitioner's counsel did not object to either DiGiacomo or Kephart's arguments.

- During Kephart's rebuttal he stated that the Petitioner hit Bailey with her baseball bat while he was standing up and that it caused him to fall backwards and he fractured his skull when his head hit the concrete curb at the base of the trash enclosure's wall. Kephart argued: "And she went back and smacked him in the mouth with the bat where his teeth busted out, he fell back and he hit his head on that curb, and that's consistent with busting his skull." (9 App. 1743; Trans. XIX-198 (10-5-06)) Contrary to Kephart's argument Clark County Medical Examiner Lary Simms testified on cross-examination that Bailey's skull fracture was contemporaneous with his brain swelling that began at least two hours prior to his death. So it was impossible that

the Petitioner could have caused his head wound by knocking him over with a baseball bat immediately prior to inflicting his many stabbing, beating and cutting wounds. Bailey's head wound was a preexisting condition prior to him being fatally attacked. Petitioner's counsel did not object to Kephart's argument.

- During DiGiacomo's closing argument and Kephart's rebuttal argument they both falsely stated what the Petitioner said while in a CCDC holding cell after her arrest. DiGiacomo argued: "And the only person -- and think about too, she knew what the dumpster enclosure looked like. When she got to that jail cell at CCDC when she's being booked in, she's like yeah, it was just like this except for I could see through the roof," …." (Trans. XIX-149 (10-5-06)); and, "The only way she was able to describe the place, the body, the injuries, the you know, where it happened, how it looked, the only way she knew that, 'cause she was there." (Trans. XIX-150 (10-5-06)) Kephart argued: "And when they bring her back to the jail cell and she talks about the inside of the jail cell looking like where this occurred." (Trans. XIX-204 (10-5-06)). The only testimony about what the Petitioner said while in the holding cell was by Detective Thomas Thowsen. His testimony doesn't support DiGiacomo and Kephart's arguments. Thowsen did not testify that the Petitioner knew what the "dumpster enclosure looked like," he did not testify that she said anything remotely similar to "it was just like this except for I could see through the roof," he did not testify that "she was able to describe the place" and "how it looked," and he did not testify she said anything about "the jail cell looking like where this occurred." The Petitioner was gravely prejudiced by DiGiacomo and Kephart's arguments that were not based on the evidence, because they falsely projected to the jury that the Petitioner had knowledge of the trash enclosure where Bailey was murdered that she did not have, and which Bailey's killer(s) would have had. Petitioner's counsel did not object to any of DiGiacomo or Kephart's arguments.
- During DiGiacomo's closing argument and Kephart's rebuttal argument they both falsely stated that the presumptive luminol and phenolphthalein reactions proved there was blood in her car, even though the confirmatory HemaTrace and DNA tests of her car were negative for blood. The presumptive tests return positive reactions for a multitude of natural and man-made

substances, and blood is only one of those many substances, which is why a confirmatory test is necessary to determine if blood is in fact present. DiGiacomo argued: "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." (9 App. 1730; Trans. XIX-147 (10-5-06)); and, "That does give you some physical evidence that links her to the crime, that's blood." (9 App. 1730; Trans. XIX-148 (10-5-06)). Kephart argued, "…even though we had two tests, presumptive tests that said it's blood". (9 App. 1740; Trans. XIX-188 (10-5-06)) Although it was absolutely critical to the Petitioner's defense that the jury understand the truth that no blood was found in her car, Petitioner's counsel did not object to either DiGiacomo or Kephart's arguments that erroneously led the jury to believe blood was found in the Petitioner's car.

- During DiGiacomo's closing she stated about what the Petitioner said in her Statement, "… she got rid of the clothes she was wearing that she said had blood on them.." (9 App. 1728; Trans. XIX-139 (10-5-06)) During Kephart's rebuttal he stated three separate times that the Petitioner said in her Statement that she was bloody after she fought off her attacker and got in her car to leave: "I mean she said in her statement she'd gotten her car bloody." (9 App. 1744; XIX-202 (10-5-06)); "She talked about taking her clothes off in the car because they were bloody" (9 App. 1744; XIX-202 (10-5-06)); and, "Said that she was bloody and got in her car, Corroborated." (9 App. 1747; Trans. XIX-214 (10-5-06)). Both DiGiacomo and Kephart's statements have no basis in reality because the Petitioner not only doesn't say anywhere in her statement that she or her clothes were bloody, but the words bloody, blood, bled, bleed or bleeding do not appear a single time in her statement, and no witness testified that she said she was bloody and took her clothes off in her car because they were bloody.

It is not a mystery why DiGiacomo and Kephart wanted to falsely implant the ideas in the minds of the jurors that the Petitioner said in her Statement she was bloody when she got in her car, when in fact there is not a single mention of blood in her Statement. It was the same reason DiGiacomo and Kephart wanted to falsely implant the ideas in the minds of the jurors that the preliminary (presumptive) luminol and phenolphthalein positive reactions were for blood, even

though the confirmatory tests scientifically proved blood did not cause the reactions and no blood was found in her car. The single most distinctive feature of Bailey's murder was the amount of blood at the crime scene, so if the jury could be misled to believe the Petitioner said in her Statement she was bloody and misled to believe blood was in her car, then they could conflate that "phantom" blood into somehow being from Bailey's bloody crime scene. Yet, even though it was gravely prejudicial to the Petitioner, her counsel did not object a single time to DiGiacomo and Kephart's fabricated arguments. It was absolutely critical for the Petitioner to counteract every untrue and baseless assertion by the prosecution related to blood that could result in the jurors being mislead by the prosecution to erroneously believe there was evidence of blood in the Petitioner's car or on her, when there was no evidence of that introduced during her trial.

The above arguments only scratch the surface of the more than 250 improper arguments the prosecution relied on to try and convince the jury that the Petitioner murdered and mutilated Bailey in the absence of evidence she did so. If the prosecution had relied on the evidence presented at trial its closing argument could have gone something like:

> "Ladies and gentlemen of the jury, thank you for your patience during the weeks of this trial. We didn't present any evidence the defendant or her car were in Clark County at any time on July 8, 2001. We didn't present any evidence the defendant and her car were not in Panaca the entire weekend of July 6 to July 8. We didn't present any evidence that the defendant had at any time in her life been to the Nevada State Bank, or inside its trash enclosure. We didn't present any evidence the defendant had ever met Duran Bailey, knew who he was, or knew anyone who knew him. We didn't present any evidence the Petitioner inflicted a single one of Bailey's almost three dozen ante-mortem and post-mortem external injuries. We also have to be candid and admit that we prevented you from hearing testimony by alibi witnesses who would have corroborated the defendant's Statement on July 20, 2001, in which she positively stated that she was attacked "over a month ago." That means she was attacked before June 20 – which was weeks before Bailey's murder. However, keep in mind that we have presented evidence that the defendant used methamphetamine when she was in Las Vegas before she returned to Panaca on July 2, and we have presented evidence that she had a knife given to her as a present by her father for self-defense. So we argue to you that we have proven the defendant was an 18-year-old knife toting meth user before she returned to Panaca six days before Bailey's murder. Our case against the Petitioner is thin, but we are nevertheless asking you to find the defendant guilty of first degree murder with a deadly weapon and sexual penetration of a dead body. We apologize for being so brief, but we don't have a whole lot to say based on the evidence we've presented during this trial. Thank you."

That hypothetical argument is not much of an exaggeration if the prosecution had been honest during its closing and rebuttal arguments, which is why DiGiacomo and Kephart each had to rely on more than one hundred improper arguments during their closing and rebuttal arguments respectively, to avoid simply standing in front of the jury slack jawed with almost nothing to say. Yet, they were only able to make extensive false and improper arguments and repeat some fabrications over and over because Petitioner's counsel failed to repeatedly interrupt their arguments with objection after objection after objection.

The Petitioner was gravely prejudiced by her counsel's failure to object to each of the more than 250 improper and false arguments, all of which could have the effect of prejudicing the jury's judgment. The Petitioner was further gravely prejudiced by her counsel's failure to make a motion for a mistrial and dismissal of the charges with prejudice based on the egregious prosecutorial misconduct of ADAs DiGiacomo and Kephart's improper arguments based on their imagination that individually and cumulatively irreparably prejudiced the jury's judgment. The prosecution's case for the Petitioner's conviction wasn't based on the evidence presented during trial, but by the prosecution's improper closing and rebuttal arguments that her counsel failed to object to. The jury was so prejudiced that no curative instruction could undo the jury's contamination by the tsunami of improper and false arguments unsupported by trial testimony. The appropriate sanction for the prosecution's egregious prosecutorial misconduct was a mistrial and dismissal of the charges with prejudice. Furthermore, if the motion for a mistrial was not granted, by failing to object the Petitioner's counsel waived claims on direct appeal based on the prosecution's closing and rebuttal arguments – including gross prosecutorial misconduct prejudicial to the Petitioner's state and federal constitutional rights to a unbiased and impartial jury, due process of law, and a fair trial.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(sss) Ground seventy-one.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to retain a dental expert to analyze the case evidence and testify about Duran Bailey's six teeth found intact in the trash enclosure and that they were not removed by a blow from a baseball bat, and counsel's failure prejudiced the Petitioner because after considering the dental expert's evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution argued to the jury that the Petitioner was kneeling in front of Duran Bailey when she stabbed him in the scrotum, and she then went and got her bat and "smacked him in the mouth with the bat where his teeth busted out, he fell back and he hit his head on that curb, and that's consistent with busting his skull." (Trans. XIX-198 (10-5-06)

The prosecution's expert Medical Examiner Lary Simms testified on direct examination:

Q. Okay. And is it possible he received a blow to his face, fell back, struck his head on the curb?
A. Definitely possible.
Q. Injuries are consistent with that?
A. Yes.
(6 App. 1160; VII-133 (9-19-2010))

The Petitioner's medical expert Dr. Michael Laufer testified on cross-examination:

Q. Okay. And would you expect,...—at that force hitting him in the mouth would cause not only would his teeth possibly get busted out but it may cause him to go backwards?
A. It's possible. Sure.
(8 App. 1448-9; XIV-129-30 (9-28-06) cross-examination)

So the testimony by both the prosecution and Petitioner's medical expert was Bailey's teeth could have been "busted out" by the blow from a bat. Neither Simms nor Laufer are dental experts, nor were they qualified to testify about dental matters. There was no testimony by a prosecution or defense dental expert about Bailey's teeth. Only a dental expert would be qualified to testify about the condition of Bailey's teeth that were knocked out of his mouth.

In testifying that it is possible Bailey's teeth could have been "busted out" by the blow from a baseball bat no consideration was given by Simms or Laufer to one of the most important aspects of Bailey's facial injuries – his six intact teeth that were found in a small area of the trash enclosure's southwest corner. (See, Autopsy Report of Duran[d] Bailey, Clark County Coroner's Office, July 9, 2001, 1; and, Testimony of CSA Louise Renhard, 7 App. 1225; Trans. IX-37 (9-21-06))

After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a dental expert willing to conduct a post-conviction review of the evidence related to Bailey's teeth on a *pro bono* basis to determine if a bat could have been used to remove them from his mouth. Doctor of Dental Surgery Mark Lewis agreed to review the evidence in the Petitioner's case. Dr. Lewis states in the "Affidavit of Mark Lewis DDS" dated April 26, 2010:

> 3. I was asked to give my opinion of whether a baseball bat could have been used to knock out the teeth of Duran Bailey.
> 4. I reviewed photographs of the crime scene and autopsy, the autopsy report and trial testimony regarding the condition of the teeth and the location the teeth were found.
> 5. In my professional opinion, I do not believe that a baseball bat was used to knock out Bailey's teeth because I would expect that the teeth would have been fragmented by the force needed to forcibly remove them with a baseball bat.
> (See Exhibit 100, Affidavit of Mark Lewis DDS, April 26, 2010.)

Dr. Lewis' analysis and new evidence is the first time since the Petitioner's arrest in July 2002 that a dental expert examined the evidence related to the condition of Bailey's teeth that were knocked out by his assailant(s).

The prosecution's argument that Bailey's teeth were knocked out by a baseball bat was speculative, and there was no blood from anyone on the petitioner's bat, so the prosecution's argument that her bat was used was also pure speculation. The prosecution's speculative argument was critical to their case because the Petitioner's bat was the only personal item introduced into evidence they claimed linked her to the crime. Simms and Laufer's respective testimony that a baseball bat blow could have knocked out Bailey's teeth was also speculation on their part. However, the testimony of Simms and Laufer gave the prosecution's speculative argument a degree of believability, even though they were not qualified to evaluate the crucial evidence that Dr. Lewis and other dental experts are qualified to examine and testify about – <u>the condition of Bailey's teeth that had been knocked out of his mouth</u>.

Dr. Lewis' analysis reveals the prosecution's argument that the jury relied on to convict the Petitioner was not just speculative – but it was dead wrong. Dr. Lewis' new expert dental evidence provides critical evidence the jury did not know – Bailey's six intact teeth are positive physical evidence he was not hit in the mouth with a baseball bat. Which means the Petitioner's bat was not used to hit him in the mouth and knock him down. In convicting the Petitioner the jury relied on the prosecution's imagination based arguments that falsely linked her bat to Bailey's murder.

There were no bruises, scars or injuries to the Petitioner's hands when she was arrested, so it is known that she didn't inflict Bailey's severe beating injuries with her hands. It is invaluable exculpatory evidence that Bailey's facial injuries were not inflicted by the Petitioner' baseball bat because she was convicted by the jury on the basis that she used her bat to do so, and since she had no injuries to her hands the prosecution can not fall back and say she physically beat him.

However, the jury didn't know Bailey wasn't hit in the mouth with a bat because the Petitioner's counsel didn't retain a dental expert to examine the evidence related to Bailey's teeth that were knocked out. There was nothing preventing the Petitioner's counsel from retaining a dental expert, and it was crucial to do so because a centerpiece of the prosecution's case known before the trial was their speculation that Bailey's teeth were knocked out when he was hit in the mouth with the Petitioner's baseball bat, and that blow also caused him to fall backwards. That didn't happen.

Furthermore, the new dental evidence corroborates a key part of the Petitioner's Statement of July 20, 2001, that describes her being sexually assaulted "over a month ago" at a Budget Suites Hotel in east Las Vegas. When asked if she hit her assailant she said "No", but that he slapped her.

The Petitioner was gravely prejudiced by her counsel's failure to retain a dental expert and introduce their expert testimony that Bailey's six intact teeth would have been shattered if he had been hit in the mouth with a bat. If the jurors had known the exculpatory dental evidence that corroborate the Petitioner's Statement that she didn't hit her assailant, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ttt) Ground seventy-two.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to make a NRS 175.381(2) motion within seven days of the jury's verdict to set aside the verdict and enter a judgment of acquittal, on the ground the prosecution introduced insufficient evidence to prove every essential element of the Petitioner's alleged offenses beyond a reasonable doubt, and most particularly, no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced at trial that the Petitioner was anywhere in Clark County at any time on July 8, 2001, and so she could not have been at the Nevada State Bank's trash enclosure at the precise time of Duran Bailey's murder and she could not have committed her accused crimes, and the failure of Petitioner's counsel to make the NRS 715.381(2) motions prejudiced the Petitioner's state and federal rights to due process and a fair trial.

Facts:

The Petitioner was charged with personally murdering Duran Bailey and then inserting a knife into and/or cutting his anus on July 8, 2001, within Clark County, Nevada. (*State v. Lobato*, No. C177394, Criminal Complaint.) Consequently, one of the essential elements the prosecution had to introduce evidence proving beyond a reasonable doubt the Petitioner was "within Clark County" at the crime scene at the time the crimes occurred. If the prosecution did not introduce evidence proving beyond a reasonable doubt the Petitioner was "within Clark County" and at the Nevada State Bank and inside the trash enclosure in its parking lot at the exact time Bailey was murdered, she could not have committed her accused crimes, and there was insufficient evidence for the jury to find her guilty.

The prosecution not only failed during it case in chief to present <u>any</u> substantive evidence that Petitioner was in Clark County at the time of Duran Bailey's murder, but the prosecution failed to present <u>any</u> physical, forensic, medical, eyewitness, surveillance, documentary, or confession evidence the Petitioner and her car had been in Clark County at any time on July 8, 2001 – the day of Duran Bailey's murder. In fact, <u>every</u> prosecution witness that testified to Petitioner's whereabouts on July 8 testified they saw and/or talked with her in Panaca. Since no evidence was introduced by the prosecution the Petitioner was in Clark County at any time on July 8, 2001, she could not have been in Las Vegas at the Nevada State Bank when Bailey was murdered, and so the Petitioner could not have committed her accused crimes.

During the Petitioner's defense every witness that testified to Petitioner's whereabouts on July 8 testified that they saw and/or talked with her in Panaca. Likewise, every defense and prosecution witness who testified about the Petitioner's car said it was parked on July 8 in front of her parents' house. The testimony of the defense and prosecution witnesses was consistent with telephone records of a number of telephone calls during July 8 from between the Petitioner and a boyfriend in Las Vegas who drove up to Panaca to pick her up on the evening of July 8. During the prosecution rebuttal no evidence was presented rebutting the witness testimony and telephone records that the Petitioner and her car were in Panaca on the entire day of July 8.

At the close of the prosecution's case in chief and again at the close of their rebuttal, the only knowledge the jurors had that the Petitioner and her car had been "within Clark County" on July 8, 2001, was the prosecution's claim during its opening statement. During the jury's deliberations the jurors had no evidence to determine the Petitioner and her car were in Clark County at the time of Bailey's murder except for the prosecution's claim during its opening statement, and its closing and rebuttal arguments. The prosecution's speculation during its opening statement, and then during closing and rebuttal arguments that the Petitioner and her car were in Clark County at the time of Bailey's murder was not substantiated by any evidence introduced at trial, much less evidence proving beyond a reasonable doubt the Petitioner was in Clark County, or in Las Vegas, or at the Nevada State Bank at any time on July 8, 2001, much less at the specific time of Bailey's murder.

NRS 175.381(2) states:

> 2. The court may, on a motion of a defendant or on its own motion, which is made after the jury returns a verdict of guilty or guilty but mentally ill, set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. The motion for a judgment of acquittal must be made within 7 days after the jury is discharged or within such further time as the court may fix during that period.

Since no evidence was presented during Petitioner's trial that she was in Clark County at any time on July 8, the jury could only have relied on the prosecution's speculation that the Petitioner was at the scene of Bailey's murder, or that she committed her convicted crimes. An essential element of the Petitioner's convicted crimes was that she was at the scene of the crime.

Since no evidence was presented by the prosecution, only speculation and speculative inferences, that Petitioner was even in Clark County at the time of Duran Bailey's murder, there is not evidence beyond a reasonable doubt that she committed her convicted crimes.

With no substantive evidence the prosecution met its legal burden of proving beyond a reasonable doubt the essential element the Petitioner was "within Clark County" and present at the scene of Bailey's Las Vegas murder, Petitioner's counsel was legally obligated to make a NRS 175.381(2) motion within seven days of the jury's verdict to set aside the verdict and enter a judgment of acquittal, on the ground the prosecution introduced insufficient evidence to prove every essential element of the Petitioner's alleged offenses beyond a reasonable doubt. Most particularly, no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced at trial that the Petitioner was anywhere in Clark County at any time on July 8, 2001, and so she could not have been at the Nevada State Bank's trash enclosure at the precise time of Duran Bailey's murder and she could not have committed her accused crimes. The failure of Petitioner's counsel to make the NRS 715.381(2) motions prejudiced the Petitioner's state and federal rights to due process and a fair trial.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(uuu) Ground seventy-three.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to file a post-verdict motion for DNA testing of crime scene evidence that could not be tested by technology available at the time of Petitioner's trial, but could have been tested by techniques developed prior to the Nevada Supreme Court's ruling in Petitioner's case, and this testing would be expected to produce results that would scientifically exclude Petitioner from her convicted crimes and provide the basis for a new trial motion.

Facts:

Through 2006 when the Petitioner was convicted, 194 people in the United States had their convictions overturned as a result of new evidence discovered by DNA testing. (Source, Innocence Project website, http://www.innocenceproject.org/know/Browse-Profiles.php)

During Petitioner's trial there was testimony that the Petitioner was excluded as the source of DNA recovered from a pubic hair on Bailey's body, gum recovered from a piece of cardboard covering his torso, and two cigarette butts that were lying directly on Bailey's body underneath the plastic sheeting wrapped over his groin area before the cardboard was placed over him.

Former LVMPD crime lab technician Thomas Wahl testified at trial that there were swabs of Bailey's penis and rectum on which semen lacking sperm was detected. Wahl also testified DNA technology at the time was unable to obtain DNA profile from spermless semen. The semen was among several pieces of evidence that could not be tested by DNA technology available at the time of trial.

While Petitioner's case was pending before the Nevada Supreme Court, Petitioner's counsel David Schieck and JoNell Thomas were informed that after Petitioner's trial several DNA techniques were developed that could obtain a DNA profile from the swabs of Bailey's penis and rectum and other evidence in the Petitioner's case that could either directly or in combination with other evidence conclusively establish the Petitioner did not murder and slash Duran Bailey's rectum. The Petitioner's two counsels were informed of the new DNA testing techniques in a letter from Hans Sherrer dated January 19, 2009 that states in part:

> "The purpose of this letter is to inform you that there have been several significant advances in DNA testing since Ms. Lobato's conviction in October 2006. These new techniques enable the testing of evidence in her case to possibly identify the DNA profile of the person or persons responsible for the murder of Mr. Bailey. Negative test results for the presence of Ms. Lobato's DNA will provide valuable new exculpatory evidence for her.
>
> **DNA testing of spermless semen**
>
> One of the developments is the testing of spermless semen to identify the DNA profile of the male it originated from. Previously sperm cells needed to be present for DNA testing. The first reported use of this technology was in the March 7, 2007 issue of *New Scientist* magazine (See Exhibit A.). This was five months after Ms. Lobato's conviction. I have talked with Bode Technology Group, one of the leading DNA laboratories in the United States, and they informed me they first commercially offered this technology in October 2007. This was a year after Ms. Lobato's conviction. Bode Technology Group also has a new technique that can distinguish between the DNA profile of a male's spermless semen intermixed with the DNA of another male, which is the situation of the male who had anal sex with Mr. Bailey.
>
> ….

Touch DNA testing

Another development is the ability to determine the DNA profile of the person who "touched" something and left identifiable skin cells, oils or perspiration. (See Exhibit C) The first reported use of touch DNA testing was in November 2007. (See Exhibit D) This was 13 months after Ms. Lobato's conviction. In January 2008 Timothy Masters became the first person in the United States exonerated by touch DNA testing when he was excluded as the source of DNA recovered from the clothing of the woman he had been convicted in 1999 of murdering. (See Exhibit 5)

On July 9, 2008 the District Attorney for Boulder, Colorado announced that members of the John and Patsy Ramsey family had been cleared of involvement in the 1996 murder of their daughter JonBenet. Touch DNA testing of her long johns identified a male DNA profile that matched the male DNA profile previously recovered from biological material on her underwear. That profile excludes members of the Ramsey family. (See Exhibit F)

…

DNA testing of degraded or impure evidence

There have also been additional refinements in the ability of a DNA test to detect a DNA profile from a degraded, impure or minute evidence sample. In February 2007 it was announced that STR MiniFiler PCR Amplification was available to generate a profile from "degraded DNA as well as from samples that are limited by an impurity." (See Exhibit G) This was four months after Ms. Lobato's conviction.

Items in Ms. Lobato's case that can be tested by new DNA techniques

There are a number of items in Ms. Lobato's case that either have not been DNA tested, or which were tested by techniques far inferior to those that became available after her conviction. These items individually, or in concert with other evidence can establish either to a scientific certainty – or at a minimum beyond a reasonable doubt – that Ms. Lobato is not responsible for Mr. Bailey's murder. I will list some of these items with a brief explanation:

The plastic sheeting that covered Mr. Bailey's body can be tested by the touch DNA technique. The killer or killers extensively handled the sheeting, and Bode Technology Group specifically identifies plastic as a surface from which skin cells can be recovered for touch DNA testing. Bode Technology Group performed the touch DNA testing in the Ramsey case. (See Exhibit C)

Testimony during Ms. Lobato's trial established that Mr. Bailey's pants may have been pulled down by his killer, and if so that person's skin cells may be recoverable from the fabric by the touch DNA technique. The Bode Technology Group explains that in a "case in which the victim's clothing had been removed by the perpetrator, areas such as the waistband may contain sufficient cells belonging to the perpetrator to produce a profile." (See Exhibit C) Handling of the victim's clothing is precisely how Timothy Masters was exonerated. (See Exhibits E)

The rectal swab is known to have the semen of a male, and it can be tested by a spermless DNA technique to identify the DNA profile of the male who had anal sex with Mr. Bailey.

Penile swab "1B"is known to have the semen of a male, and it can be tested by a spermless DNA technique to identify the DNA profile of that male. That penile

swab is also testable by the touch DNA technique to possibly identify the DNA profile of the person who removed Mr. Bailey's penis.

"Penile swab "A" (and which may also be known as "1A") did not have detectable semen, but it can be tested by the touch DNA technique to possibly identify the DNA profile of the person who removed Mr. Bailey's penis. (See Exhibit B, V-175)

The three cigarette butts that were recovered from under the plastic sheeting can be tested by the touch DNA technique to obtain the DNA profile of the person or persons who handled those cigarettes and placed them on Mr. Bailey's body. Although DNA testing of biological material recovered from two of the cigarettes has already excluded Ms. Lobato as the source, the more sophisticated DNA techniques now available can more precisely identify who those people are, one of whom has already been identified as a male.

State of the art DNA techniques can be used to test the chewing gum recovered from the crime scene. Although DNA testing of the chewing gum has already excluded Ms. Lobato as the source of the DNA profile detected on it, the more sophisticated testing techniques now available can more precisely identify the DNA profile recoverable from the chewing gum.

State of the art DNA techniques can be used to test the pubic hair recovered from Mr. Bailey's body. Although DNA testing of the pubic hair has already excluded Mr. Bailey and Ms. Lobato as the hair's source, the more sophisticated testing techniques now available can more precisely identify the DNA profile of the person who is the pubic hair's source.

State of the art DNA techniques can be used to test for the presence of blood on the car seat cover and any available car seat fabric preserved as evidence. Although confirmatory tests have excluded the presence of blood on those items, the prosecution still contends the inconclusive presumptive tests conducted in 2001 have evidentiary value. Negative DNA test results would affirm the confirmatory tests and completely undercut any pretense the inconclusive presumptive tests have any evidentiary value, and thus support their inadmissibility.

Mr. Bailey's killer unquestionably handled his penis in the course of removing it. So the single most important DNA test that can be performed is a test to obtain the DNA profile of the person who handled it in the course of removing it. If Ms. Lobato is excluded as that person, that is conclusive scientific proof she is not Mr. Bailey's murderer. As has been mentioned touch DNA testing of the two penile swabs may be able to identify the DNA profile of that person. However, if for some reason the swabs prove insufficient to identify the DNA profile of the person who handled Mr. Bailey's penis, there is another option. It is my understanding that Bailey's penis was buried with his body, so his body can be exhumed to provide samples from his penis for a thorough DNA analysis. There also may be other areas of Mr. Bailey's body that were obviously handled by his killer, and touch DNA testing of those areas could yield a DNA profile of his killer.

DNA testing can provide exculpatory evidence

DNA exclusion of Ms. Lobato as the person who handled Mr. Bailey's penis (or other parts of his body) would constitute irrefutable exculpatory evidence of her actual innocence – particularly since the prosecution's theory from the day of her

> arrest is that he was killed by a lone person. However, exclusionary DNA test results from other tests outlined in this letter would be new scientific evidence refuting involvement by Ms. Lobato in Mr. Bailey's murder. For example, if the DNA profile of the semen recovered from Mr. Bailey's rectum matches DNA recovered from one of the cigarette butts, or possibly other evidence such as the plastic sheeting, then it would stretch rational credulity not to recognize that that male was Mr. Bailey's murderer. It would also give credence to the homosexual scenario suggested during Ms. Lobato's 2006 trial by the testimony of Clark County Chief Medical Examiner Lary Simms and forensic scientist and criminal profiler Brent Turvey. The process of identifying the same person's DNA on several items of JonBenet's clothing is how the Ramsey family was excluded from involvement in her murder. (See Exhibit F)
>
> In summary, since Ms. Lobato's October 2006 conviction at least three types of DNA testing have evolved that can provide compelling exculpatory evidence sufficient to support the filing of a motion to dismiss the indictment against her, or at a minimum support a motion for a new trial based on new evidence of her actual innocence.
>
> (See Exhibit 71, Letter of Hans Sherrer to David Schieck and JoNell Thomas, January 19, 2009.)

Petitioner's counsel did nothing with the new information about how advances in DNA technology could result in irrefutable exculpatory scientific evidence. The extraordinary circumstances of the new DNA testing techniques that could exculpate the Petitioner of her convicted crimes required extraordinary action by Petitioner's counsel. One option is they could have filed for a Stay of Petitioner's Supreme Court appeal in the interests of justice and obtained an order from the court for DNA testing of the evidence. If the evidence singularly or in conjunction with other evidence scientifically excluded the Petitioner from Bailey's murder and rectum slashing, her counsel could have taken appropriate action to vacate her conviction and have the charges dismissed. But instead Petitioner's counsel did nothing on the Petitioner's behalf to represent her interest in having the DNA testing conducted.

Considering that all the DNA testing in the Petitioner's case conducted prior to or during trial excludes the Petitioner, and there is no physical, forensic, documentary, eyewitness, surveillance or confession evidence that Petitioner was anywhere in Clark County on July 8, 2001 – the day of Bailey's murder – there is every reason to believe that the evidence tested by the DNA techniques developed after her trial would also be exculpatory. And if Petitioner's DNA was not detected on Bailey's penis, that would in and of itself constitute almost irrefutable new evidence

that she did not murder Bailey, because there is no question that his murderer grasped his penis to pull it up and amputate it. Consequently the Petitioner was gravely prejudiced by her Petitioner's failure to represent her interests and do everything possible to ensure that the DNA testing was conducted in a timely manner.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(vvv) Ground seventy-four.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure in Argument A. of Petitioner's direct appeal to the Nevada Supreme Court to correctly argue and brief the Court that there is insufficient evidence to support Petitioner's conviction beyond a reasonable doubt because it is based on a series of assumptions, interpretations, inferences, conjectures, and speculations by the prosecution that are themselves based on Detective Thomas Thowsen's speculative assumption that Petitioner *de facto* confessed to murdering Duran Bailey in her Statement of July 20, 2001, and if Petitioner's counsel had correctly argued and briefed the Court on the proper grounds of insufficiency of the evidence, Petitioner's conviction would have been vacated by the Court as violating the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

At trial the prosecution presented evidence that on July 8, 2001, in the exterior trash enclosure for the Nevada State Bank at 4240 West Flamingo Road in Las Vegas, Duran Bailey was beaten about the face, seven teeth were knocked out, he had been stabbed in his face, neck and abdomen multiple times, and after death his penis was amputated, his rectum slashed and his abdomen stabbed multiple more times. He also had a fracture in the back of his skull. At autopsy there was not a determination that Bailey's death had anything to do with him either being the victim or perpetrator of a sexual assault. LVMPD homicide Detectives Thomas Thowsen and James LaRochelle were assigned the case. No arrests had been made when on July 20, 2001, Thowsen received a telephone tip from Lincoln County Juvenile Probation Officer Laura Johnson that she had been told by a teacher friend that a former student told her she had cut the penis of a man who tried to rape her in Las Vegas. Thowsen was told the teacher's former student was 18-

year-old Kirstin Blaise Lobato (Petitioner). Johnson told Thowsen that she had been told Lobato lived with her parents in Panaca, about 170 miles north of Las Vegas.

Thowsen, LaRochelle and LVMPD Crime Scene Analyst Maria Thomas drove up to Lincoln County on the afternoon of July 20, 2001. After interviewing Johnson they followed a Lincoln County Sheriff's deputy to the Lobato's home. They arrived about 5:45 pm, and after Petitioner signed a *Miranda* card at 5:55 p.m., the detectives began a taped interview of her at 6:07 pm. Petitioner was shown a photo of Bailey but she didn't recognize him. Petitioner described defending herself with her pocket butterfly knife by attempting one time to cut the exposed penis of a black man who sexually assaulted her in the parking lot of the Budget Suites Hotel near Sam's Town Casino on Boulder Highway in east Las Vegas. Petitioner described her assailant as very much alive and "crying" when she escaped from him in her car. Petitioner described this incident as happening "over a month ago" from the date of her Statement on July 20, 2001. The Petitioner is 5'-6", and she said her assailant was "huge" compared to her.

Thowsen assumed the Petitioner's admission to trying to cut her assailant's penis was a confession to the murder and post-mortem mutilation of Duran Bailey, and arrested Petitioner. Petitioner was initially charged with the first-degree murder of Bailey, and a few days later she was charged with violating Nevada's necrophilia law for allegedly cutting his rectum after his death ("sexual penetration of a dead body").

The beginning point and foundation of the prosecution's case against the Petitioner is Detective Thowsen's assumption that her admission in her Statement that she made one attempt to cut her would be rapist's penis is a confession to viciously beating and repeatedly cutting Bailey before his death, and then inflicting multiple cutting and stabbing wounds after he died. The prosecution conceded during its rebuttal argument that the Petitioner's admission in her Statement was the foundation of her prosecution:

> "But we have her words, ladies and gentlemen, her words. We're here -- they said why are we here? We're here because of her mouth, because of what she said." (Trans. XIX-186 (10-5-06))

The Nevada Supreme Court also recognized Thowsen's assumption about Petitioner's admission in her Statement is the foundation of her prosecution, when on direct appeal it affirmed Petitioner's conviction by ruling: "based on Lobato's admission, there was substantial evidence that she committed the murder." (*Lobato vs. Nevada*, No. 49087 (NV Supreme Ct, 02-05-2009), Order of Affirmance, 4) Absent Detective Thowsen's assumption that Petitioner's admission in her Statement to making a single attempt to cut her would be rapist's penis was a confession to Bailey's murder and post-mortem mutilation, the Nevada Supreme Court acknowledged there was no basis to uphold her conviction.

However, Thowsen's assumption that Petitioner's description of attempting once to cut her attacker's penis is an admission to Bailey's murder and mutilation is based on his speculative interpretation of a few words of what she said in her 26-minute Statement, while ignoring the rest of her statement that has information excluding her from the crime. Thowsen's assumption the Petitioner confessed was then used to support a chain of speculative inferences that the prosecution argued linked her to the crimes. The following is an abbreviated list of the most important of the prosecution's speculative inferences:

1. Petitioner said in her Statement, and she told a number of friends and acquaintances, that she fended off a rape attempt in Las Vegas by making a single attempt to cut her assailant's penis, so that must be a confession to Bailey's murder and post-mortem mutilation.

2. Petitioner said in her Statement that she was assaulted in the parking lot of an east Las Vegas hotel, so she must have "jumbled" and "minimized" those details and she actually meant she attacked Bailey in the exterior trash enclosure of the west Las Vegas bank where he was murdered and mutilated.

3. Petitioner said in her Statement she was assaulted around midnight or in the early morning hours, and Bailey was murdered on July 8, 2001, so she must have murdered him "sometime before sunup" on July 8.

4. Petitioner said she had been high on methamphetamine for a week before and after the assault, and that she had been up for three consecutive days when it happened, so she must have gone to the trash enclosure to get methamphetamine from Bailey.

5. Bailey was a crack cocaine user who was known to have traded crack cocaine for sex, and since the Petitioner was known to use methamphetamine and she had been repeatedly sexually assaulted by her mother's boyfriend when she was a child, she must have expressed her pent up anger against men by (allegedly) attacking Bailey and beating and stabbing him, and then mutilating his body because he was smelly and wanted to have sex with her.

6. Petitioner was seen by a doctor at the medical clinic in Caliente (about 10 miles from Panaca) at 5:15 pm on July 5, 2001, and tests of her blood detected no methamphetamine, so she must have driven to Las Vegas on July 6 when she started the three consecutive days of being up from using methamphetamine described in her Statement.

7. Petitioner's urine sample collected by her mother on the morning of July 7, 2001, in Panaca and taken to the medical clinic in Caliente, tested negative for methamphetamine, so she must have left her urine sample before she left for Las Vegas on July 6.

8. Non-relative alibi witnesses positively established that on July 8, 2001, Petitioner was in Panaca from 11:30 am through the rest of day, so she must have driven to Panaca from Las Vegas after the murder. The alibi testimony of the Petitioner's father, stepmother and cousin-in-law that she was seen at her parents' home in Panaca from shortly after midnight until after 7am was discounted as unreliable because they were relatives.

Those are all speculative inferences by the prosecution because a regular inference must have a factual basis. Petitioner's prosecutors relied on speculative inferences because none of them is rooted in a factual basis, as the following brief analysis of each point makes clear:

1. Petitioner said in her Statement that she made one attempt to cut her assailant's penis, after which she was able to escape and left in her car while her assailant was alive and "crying." Prosecution and defense witnesses testified that Petitioner had told them about the rape attempt, and every witness was consistent that the Petitioner told them she attempted one time to cut at her assailant's penis, and no witness testified that she made any attempt to strike or hit her assailant. Furthermore, every witness was consistent in that Petitioner did not tell anyone she killed the man who assaulted her. The July 9, 2001, Clark County Coroner's Autopsy Report for Duran Bailey lists 31 separate external injuries that include: multiple trauma to the face—including abrasions,

contusions, and numerous lacerations; missing teeth; laceration to left side of the neck; multiple stab wounds to the abdomen; multiple lacerations to the left hand; a severed penis; laceration to the anus; laceration of his scrotum; and abrasions on his back. In addition, Bailey's body was moved several feet before or after death, and it was covered with trash and cardboard; however, Petitioner made no mention of that in her Statement. Because there is a complete absence of any mention in Petitioner's Statement, or in testimony about any conversation she had with any person about 30 of Bailey's 31 external injuries, the prosecution assumed that Petitioner simply omitted those details, along with omitting any mention of moving and covering his body, or that her assailant died.

2. Petitioner described being assaulted in the parking lot of a Budget Suites Hotel in east Las Vegas, and identified the hotel's outside fountain, Boulder Highway as the major street, the shopping center directly across Boulder Highway, and Sam's Town Casino to the south. Petitioner did not describe a single identifiable landmark around the Nevada State Bank, even though the high-rise Palms Hotel and Casino was under construction directly across the street, and just east is the Gold Coast Casino and the high-rise Rio Hotel and Casino. There was no shopping center or fountain or Sam's Town Casino within eyesight of Bailey's murder scene. (See Exhibit 84, Landmarks around the Budget Suites Hotel and the Nevada State Bank.)

3. Petitioner said she was "bum rushed" as she was getting in her car to go out around midnight or very early in the morning. Medical Examiner Lary Simms testified that it was possible Bailey died 8 to 24 hours after his body was examined at the crime scene by Coroner's Investigator Shelley Pierce-Stauffer at 3:50 a.m. on July 9, 2001. Based on Simms' testimony 3:50 a.m. on July 8 was the absolute latest time Bailey died from when his body was discovered, but that was later in the morning than Petitioner described being assaulted.

4. Petitioner said in her Statement she had been high on methamphetamine for a week before and after she was assaulted and she had been up continuously for the previous three days. Bailey was murdered on July 8, 2001. That means the Petitioner would have been continuously high speeding on methamphetamine from July 1 to July 15, and that she was up from the early morning of July 5 to at least the morning of July 8. However, it is known that isn't true, because not a single prosecution or defense witness who testified seeing the Petitioner from July 1 to July 15 said she exhibited any sign

of being high on methamphetamine. To the contrary, many witnesses testified that Petitioner was lethargic on July 3 and 4, and on July 5 her mother took her to the Caliente Clinic where she saw a doctor at 5 pm – when according to the prosecution she should have been buzzing around high on methamphetamine – but her blood tested negative for methamphetamine. Consistent with that Petitioner's urine sample collected by her mother on the morning of July 7 tested negative for methamphetamine. Furthermore, of the many prosecution and defense witnesses who saw Petitioner on July 8, none described her as exhibiting any signs of being high on methamphetamine or having been up for three consecutive days – from July 5 to July 8. In addition, Doug Twining testified that from July 9 to July 13 he and the Petitioner only smoked some marijuana. There was no testimony the Petitioner used any methamphetamine in July 2001.

5. The only testimony was that Bailey used crack cocaine, and at autopsy his toxicology tests showed he had cocaine in his system. Diann Parker testified she had traded sex for crack cocaine with Bailey on several occasions. There was no testimony Bailey had sold crack cocaine or any other drug. The Petitioner described using methamphetamine in her Statement and that was supported by testimony from other people. There was no testimony she used cocaine or had traded sex for methamphetamine. There was no expert testimony by a qualified psychologist that because she was sexually assaulted as a child the Petitioner had a smoldering homicidal rage against men in general that could be triggered by exposure to a smelly man. There was neither any testimony that the Petitioner had ever met Bailey, knew who he was, knew anyone who knew him, or that she had any idea where he hung out in Las Vegas.

6. There was no testimony by any prosecution or defense witness who saw or talked with the Petitioner that she was anywhere other than Panaca the entire day of July 8. The next door neighbors of Petitioner's parents, Robert and Wanda McCrosky, testified they did not see Petitioner's car moved from where it was parked in front of the Lobato's home. Petitioner said in her Statement she had been high on methamphetamine for a week before and after she was assaulted and she had been up continuously for the previous three days. Bailey was murdered on July 8, 2001. That means the Petitioner would have been continuously high speeding on methamphetamine from July 1 to July 15, and that she was up from the early morning of July 5 to at least the morning of July 8. However, it is

known that isn't true, because not a single prosecution or defense witness who testified seeing the Petitioner from July 1 to July 15 said she exhibited any sign of being high on methamphetamine. To the contrary, many witnesses testified that Petitioner was lethargic on July 3 and 4, and on July 5 her mother took her to the Caliente Clinic where she saw a doctor at 5 pm – when according to the prosecution she should have been buzzing around high on methamphetamine – but her blood tested negative for methamphetamine. Consistent with that Petitioner's urine sample collected by her mother on the morning of July 7 tested negative for methamphetamine. Furthermore, of the many prosecution and defense witnesses who saw Petitioner on July 8, none described her as exhibiting any signs of being high on methamphetamine, or having been up for three consecutive days – from July 5 to July 8. In addition, Doug Twining testified that from July 9 to July 13 he and the Petitioner only smoked some marijuana. There was no testimony the Petitioner used any methamphetamine in July 2001.

7. There was no evidence introduced that Petitioner's urine sample collected by her mother on the morning of July 7 was not for the previous 24-hour period. There was no testimony by any prosecution or defense witness who saw or talked with the Petitioner that she was anywhere other than Panaca or nearby Caliente on July 6 and July 7. The next door neighbors of Petitioner's parents, Robert and Wanda McCrosky, testified they did not see Petitioner's car moved from where it was parked in front of the Lobato's home. Petitioner said in her Statement she had been high on methamphetamine for a week before and after she was assaulted and she had been up continuously for the previous three days. Bailey was murdered on July 8, 2001. That means the Petitioner would have been continuously high speeding on methamphetamine from July 1 to July 15, and that she was up from the early morning of July 5 to at least the morning of July 8. It is known that isn't true, because not a single prosecution or defense witness who testified seeing the Petitioner from July 1 to July 15 said she exhibited any sign of being high on methamphetamine. To the contrary, many witnesses testified that Petitioner was lethargic on July 3 and 4, and on July 5 her mother took her to the Caliente Clinic where she saw a doctor at 5 pm – when according to the prosecution she should have been buzzing around high on methamphetamine – but her blood tested negative for methamphetamine. Consistent with that Petitioner's urine sample collected by her mother on the morning of July 7 tested negative for methamphetamine. Furthermore, of the many prosecution and defense witnesses who saw Petitioner on

July 8, none described her as exhibiting any signs of being high on methamphetamine, or having been up for three consecutive days – from July 5 to July 8. In addition, Doug Twining testified that from July 9 to July 13 he and the Petitioner only smoked some marijuana.

8. There was no testimony by any prosecution or defense witness who saw or talked with the Petitioner that she was anywhere other than Panaca or nearby Caliente from the afternoon of July 2 to the early morning of July 9, 2001. Consistent with that was the testimony of many non-relative witnesses who testified that on Sunday, July 8 they saw and/or talked with the Petitioner in Panaca from 11:30 a.m. through that night. Also, consistent with the evidence by non-relatives that Petitioner was in Panaca is her father Larry Lobato's testimony he saw her sleeping on the living room futon when he got home from work around 1 am and when he went to bed around 2 a.m., and again at about 7 am; the testimony of Petitioner's stepmother that she saw Petitioner sleeping on the living room futon when she got up at 5:45 am and when she left for work at 6:50 a.m.; and Petitioner's cousin-in-law John Kraft saw her when she answered the door at about 7 am when he went to the Lobato's house to talk with Larry.

Likewise, there was no testimony by any prosecution or defense witness that they saw the Petitioner's car anywhere but in front of her parents' house in Panaca from the afternoon of July 2 to the evening of July 20, 2001. (When her car was put on a tow truck and transported to the Las Vegas Metropolitan Police Department crime lab for inspection.)

Consistent with all the non-relative and relative alibi testimony establishing the Petitioner and her car was in Panaca the entire 24-hours of July 8, 2001, is the absence of any physical, forensic, eyewitness, documentary, surveillance or confession evidence introduced by the prosecution at trial that Petitioner or her car was in Las Vegas at any time on July 8, 2001.

So the prosecution's case against the Petitioner was based on a series of speculative inferences that all originated from a single source: Detective Thowsen's assumption that petitioner's admission of trying one time to cut her would be rapist's exposed penis after he "bum rushed" her in the parking lot of a Budget Suites Hotel in east Las Vegas, "must be" a confession to her attacking Bailey in the trash enclosure at the Nevada State Bank in west Las Vegas, and then

beating, stabbing, cutting and murdering him, and then dragging him several feet, mutilating his body and then covering his body with cardboard and piling garbage on and around him.

It is known that Thowsen's assumption that Petitioner "confessed" to Bailey's murder in her Statement is itself pure speculation. That is revealed in the above analysis of key prosecution speculative inferences upon which the Petitioner's prosecution was based, and also because there are known to be at least 40 specific and significant differences between Bailey's murder and Petitioner's Statement. (See Exhibit 85, 40 significant differences between Bailey's murder and Petitioner's Statement.) Even more important, there is no specific detail of Petitioner's Statement that matches the specific details of Bailey's murder. Thowsen's claim that Petitioner "confessed" by trying to cut or cutting her attacker's penis doesn't remotely match Bailey's murder because the Petitioner specifically identified that her attacker was not only alive but he was kneeling above her when she tried to cut him, and that when she left he was not only alive, but "crying." And that doesn't even take into consideration that her description that her assailant was "huge" compared to her doesn't remotely match Bailey who was only 4" taller and about 30 pounds heavier than her, and that she did not identify Bailey when shown his picture. Petitioner did not confess to murdering her attacker, so it is pure speculation on Detective Thowsen's part without a substantive factual basis that her Statement constitutes a confession to any person's murder, much less Bailey's murder, without even taking into consideration that there is no detail of her Statement that matches the details of Bailey's crime scene and pre and post death injuries.

The prosecution's case can be described as an inverted pyramid, with the balancing point being Thowsen's speculative assumption that the Petitioner confessed to Bailey's murder, and from there the prosecution piled speculative inference upon speculative inference upon speculative inference to argue she committed the crime – when there is no physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence that even places her in Clark County at any time on the day of Bailey's murder – much less that establishes she was in Las Vegas at the Nevada State Bank at any time on the day of his murder – much less that puts her there at the time of his murder – much less that establishes she committed the crimes.

The prosecution improperly relied on "speculative inferences" that were not based on facts – but on the prosecution's speculation about what might possibly have happened. For example, the prosecution stated during open and closing arguments that Petitioner was in Las Vegas at the time of the crime – but presented no testimony supporting that speculation. So the jury drew the "inference" that Blaise was in Las Vegas at the time of Bailey's death from the prosecution's speculation that she was there – and not evidence. The prosecution's case rested on the foundation of Thowsen's speculative assumptions about the Petitioner's Statement, and the prosecution's argument to the jury was that all of its speculation about the case amounted to evidence the Petitioner was at the Nevada State Bank's trash enclosure and committed the crimes.

In Petitioner's direct appeal brief to the Nevada Supreme Court her counsel based Argument A. on, "there is insufficient evidence to support Lobato's conviction." (***Kirstin Blaise Lobato vs. The State of Nevada***, No. 49087, Supreme Court of The State of Nevada, Appellant's Opening Brief, December 26, 2007, 14.) Although the key argument of why the evidence was insufficient is that the prosecution's case was a series of unbridled speculative inferences based on Detective Thowsen's speculative assumption that Petitioner confessed to Bailey's murder in her Statement, Petitioner's counsel devoted only one sentence of its argument to inferences: "Additionally, it must be determine whether the defendant was inferred to be guilty based upon evidence from which only uncertain inferences may be drawn." (15)

If Petitioner's counsel had correctly and fully briefed the Nevada Supreme Court on the law and circumstances of her prosecution to show it is based on a "house of unsubstantiated speculative inferences" built on top of Detective Thowsen's speculative assumption that she confessed to Bailey's murder in her Statement, it can be expected that the Court would have been vacated her conviction on the basis of insufficiency of the evidence.

Although Petitioner's counsel did not know it at the time, the magnitude of their failure to properly brief and argue Argument A. (insufficiency of the evidence) is proven by the "Report of Dr. Allison D. Redlich," dated February 10, 2010. Dr. Allison D. Redlich is an Assistant Professor in the School of Criminal Justice at the University at Albany, State University of New York. Dr. Redlich's doctoral degree is from the University of California, Davis, in Developmental

Psychology, with a focus on psychology and law. For more than a decade she has conducted research on and written extensively about the social psychology of police interrogation and the causes and consequences of police-induced false confessions. She has researched, written and published numerous peer-reviewed articles on interrogation and confession in scientific journals and in scholarly books, as well as giving invited presentations at national conferences. Dr. Redlich is one of six experts who authored a scientific "white paper" on police interrogations and false confessions for the American Psychology Law Society, a Division of the American Psychological Association. To determine if Petitioner's Statement of July 20, 2001, constitutes a confession to Duran Bailey's murder and mutilation on July 8, 2001, Dr. Redlich reviewed trial testimony, and evidence and information related to the Petitioner's Statement of July 20, 2001. Dr. Redlich's report of February 10, 2010 states in part:

> "From reviewing the materials, it is my expert opinion that Ms. Lobato was not confessing to the murder of Mr. Bailey. Rather, she was "confessing" to an assault in which she was the alleged victim and in which she defended herself by attempting to cut the penis of a man who was allegedly sexually assaulting her. It appears to me that Ms. Lobato believed she was cooperating with a police investigation, not admitting to a murder that occurred on the other side of town some weeks after her alleged assault.
>
> …
>
> Thus, in my opinion, Ms. Lobato's version of events should not be construed as minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her."
>
> (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010.)

Thus in Dr. Redlich's expert opinion the Petitioner was neither confessing to Bailey's murder and mutilation in her Statement, nor was she "minimizing or jumbling the details of the murder of Mr. Bailey." Her Statement is exactly what it appears to be, the description of a rape assault against her that occurred weeks prior to Bailey's murder.

It is now known that Thowsen's non-expert assumption that Petitioner's Statement is a confession to Bailey's murder is false and his testimony was false because she did not "jumble" or "minimize" details in her Statement. The information available now undermines the entire foundation of the prosecution's case against the Petitioner that rests on a series of unsubstantiated speculative inferences that depend on Thowsen's assumption. That it is now known the prosecution's case

against the Petitioner has no basis in fact emphasizes the prejudice to the Petitioner by her counsel's failure to raise the proper argument in her direct appeal to the Nevada Supreme Court that the evidence is insufficient because the Petitioner's case is based on the prosecution's speculative inferences of where she was on July 8, 2001, and what she did, and not actual evidence.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(www) Ground seventy-five.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure in Argument H-1 of Petitioner's direct appeal to the Nevada Supreme Court to correctly brief and argue to the Court that Judge Valorie Vega abused her discretion by misapplying the "law of the case" doctrine in denying the Petitioner's motion ***in limine*** to exclude as evidence her Statement on July 20, 2001, and a prior comment, and if Petitioner's counsel had correctly briefed and argued the proper application of "law of the court" to the circumstances of the Petitioner's Statement and her retrial, Petitioner's conviction would have been vacated by the Court and remanded with appropriate instructions.

Facts:

LVMPD Detectives Thomas Thowsen and James LaRochelle, and Crime Scene Analyst Maria Thomas drove from Las Vegas to Panaca on the afternoon of July 20, 2001, to arrest the Petitioner for the murder of Duran Bailey on July 8, 2001. The decision to arrest the 18-year-old Petitioner was based on a telephone conversation on July 20 between Thowsen and Lincoln County Juvenile Probation Officer Laura Johnson. Johnson told Thowsen she had been told by her friend Dixie Tienken, that Tienken had been told by a former student of hers that she had fought off a rape attempt in Las Vegas by cutting once at her attacker's penis.

After arriving in Lincoln County the detectives obtained Johnson's statement, although they made no effort to contact Tienken to corroborate Johnson's account. They then arranged to have a tow truck transport the Petitioner's car to the LVMPD crime lab in Las Vegas for examination, and a Lincoln County Sheriff's deputy led the detectives and Thomas to where the Petitioner was living at her parents' house.

Immediately after introducing himself, Thowsen told the Petitioner that he knew she had been hurt in the past. (The Petitioner had been repeatedly raped when she was five and six by her mother's boyfriend.) The Petitioner immediately began to cry and became very emotional. While she was crying and in her emotional state Thowsen had the Petitioner sign a *Miranda* waiver and he proceeded to question her for about 30 minutes in an audio taped Statement, during which the Petitioner remained very emotional. (Det. LaRochelle asked several questions toward the end.) In her Statement the Petitioner described a rape attempt at the Budget Suites Hotel in east Las Vegas near Sam's Town Casino that she fought off by attempting once to cut her attacker's penis. She described her assailant as alive and crying when she was able to escape in her car. Since her Statement was on July 20, 2001, the sexual assault she identified as happening "over a month ago" occurred prior to June 20, which was weeks before Bailey's July 8 murder. When shown a picture of Bailey the Petitioner didn't recognize him.

There is not a single specific detail about the attempted rape described in the Petitioner's Statement that matches the specific details of Bailey's murder in a west Las Vegas bank's trash enclosure. While she says she tried once to cut her live attacker's penis before escaping, Bailey's Autopsy Report lists 31 separate ante-mortem and post-mortem external injuries, and numerous internal injuries, and her description of her attacker as "huge" bears no resemblance to the very skinny Bailey who weighed less than 140 pounds. (See Exhibit 85, 40 significant differences between Bailey's murder and Petitioner's Statement.) Furthermore, the Arrest Report written the day of the Petitioner's arrest does not allege she confessed to Bailey's murder either in her Statement or at any time to the detectives off-tape, and she did not sign any document confessing to the crime.

On August 9, 2001, the Petitioner was charged with Bailey's first degree murder and the sexual penetration of his dead body (cutting his rectum after his death).

On the third day of the Petitioner's trial in May 2002, the prosecution intended to introduce the Petitioner's Statement into evidence during Thowsen's testimony. The prosecution requested a voluntariness hearing to get a ruling on her Statement's admissibility. The hearing was held outside the presence of the jury.

After Thowsen completed his direct and cross-examination about the circumstances of the Petitioner giving her Statement and making a comment prior to the Statement, Petitioner's then counsel made his argument for their exclusion that was transcribed into about one full page. His argument was based on: "I believe that this statement is the product of overbearing and it is not free and voluntary." (Trans. III-18 (5-10-02)) The prosecution's counter argument was transcribed into less than one page. Neither Petitioner's counsel nor the prosecution filed a brief or cited any case law supporting their respective arguments, or introduced expert psychology testimony about the effect Thowsen's sadistic psychological torture like tactic of using the Petitioner's childhood rapes against her had on her ability to make a knowing, intelligent and voluntary waiver of her Constitutional rights to remain silent, and to consult with an attorney before talking with the detectives. Instead both Petitioners' counsel and the prosecution gave very brief unprepared off-the-cuff arguments.

Judge Valorie Vega immediately and summarily ruled the Petitioner's Statement was admissible. (Trans. III-20 (5-10-02)) If you blinked you practically would have missed the hearing, because only a couple of minutes passed from when the Petitioner's counsel began his argument to when Judge Vegas issued her ruling. And this abbreviated lightning fast hearing was for the most important evidence in the Petitioner's case, and without which there would likely be no prosecution of the Petitioner.

During the Petitioner's trial Medical Examiner Lary Simms testified that after Bailey died his penis was amputated. The prosecution then relied on Thowsen's testimony to characterize the Petitioner's Statement as a confession to Bailey's murder, because she described fighting off her would be rapist by trying once to cut his penis. Thowsen admitted on cross-examination that he deliberately used the Petitioner's childhood victimization against her that immediately evoked a very emotional response. (Trans. III-12-13 (5-10-2002)) Thowsen's testimony about the Petitioner's Statement and her comment before it was indispensible for the prosecution to secure the Petitioner's conviction, because the prosecution did not introduce any physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence that at any time on July 8,

2001, the Petitioner had been anywhere in Clark County, Nevada – much less that she was at the Las Vegas scene of Bailey's murder at the exact time it occurred.

The Petitioner's conviction was overturned on direct appeal by the Nevada Supreme Court based on evidentiary errors by Judge Vega. (***Lobato v. State***, 96 P.3d 765 (Nev. 09/03/2004)) If it had not been overturned and the Petitioner had to file a habeas corpus petition, an important claim of ineffective assistance of counsel would have been her counsel's complete lack of effort to exclude her Statement, which had the consequence that Judge Vega made her ruling admitting the Petitioner's Statement without actually having any case law or legal arguments or expert testimony to base her ruling on. The Petitioner's Statement was the centerpiece of the prosecution's case, but it was literally admitted as evidence by default due to her counsel's ineffective representation or her interests regarding exclusion of her Statement and related comments. In fact, there would have been no hearing about the admissibility of the Petitioner's Statement if the prosecution had not requested it to ensure her conviction wouldn't be overturned on appeal due to the lack of a hearing.

Prior to Petitioner's second trial her new counsel filed a "Motion In Limine To Exclude Statements Made By Ms. Lobato" that was 32-pages long, and extensively cited case law. The Motion stated in part:

> "The defense moves to exclude all evidence relating to the July 20, 2001, interrogation of Ms. Lobato at her home by Detectives Thomas Thowsen, Jim LaRochelle and Sergeant Carey Lee. The information derived from that interrogation fails on three respects.
>
> First, her statements made before a Miranda waiver was obtained was allegedly made are nevertheless a result of interrogation as they are the product of psychological ploy utilized by the detectives.
>
> Second, the alleged Miranda waiver Ms. 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.
>
> Third, any statements made by Ms. Lobato are irrelevant because she was speaking of a different occurrence than the July 8, 2001, death of Duran Bailey."
>
> ***State v. Lobato***, No. C177394, District Court, Clark County, Nevada, "Motion In Limine To Exclude Statements Made By Ms. Lobato During The Course Of The July 20, 2001 Interrogation."

During the motions hearing on May 19, 2006, Judge Vega did not consider the merits of the Motion. She summarily denied it ruling, "The prior hearing and ruling is law of the case." *State v. Lobato*, No. C177394, District Court, Clark County, Nevada, "Hearing Of All Pending Motions."

During the Petitioner's retrial Medical Examiner Lary Simms testified that after Bailey died his penis was amputated. The prosecution then relied on Thowsen's testimony to characterize the Petitioner's Statement as a confession to Bailey's murder, because she described fighting off her would be rapist by trying once to cut his penis. Thowsen admitted on cross-examination that he deliberately used the Petitioner's childhood victimization against her that immediately evoked a very emotional response. (Trans. XIII-93-94 (09-27-06)) Thowsen's testimony about the Petitioner's Statement and her comment before it was indispensible for the prosecution to secure the Petitioner's conviction, because the prosecution did not introduce any physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence that at any time on July 8, 2001, the Petitioner had been anywhere in Clark County, Nevada – much less that she was at the Las Vegas scene of Bailey's murder at the exact time it occurred.

The Petitioner's appellate counsel did make an Argument in her direct appeal that the Petitioner's Statement should have been suppressed as evidence. (*Lobato v. State*, No. 49087, Supreme Court of Nevada, Appellant's Opening Brief, 12-26-2007, (Argument H-1: "Lobato's statements to detectives on July 20, 2001, were not voluntary and should have been suppressed from use as evidence," 42-46.)) However, Argument H-1 did not raise the critical issue that Judge Vega abused her discretion by misapplying the "law of the case" doctrine in denying the Petitioner's "Motion In Limine To Exclude Statements Made By Ms. Lobato", because there had been no briefing of case law, expert testimony, or argument, or any consideration whatsoever of the complex legal, psychological and ethical issues involved in admission of the Petitioner's Statement and a related comment, during the hearing on May 10, 2002, and therefore that ruling was not binding for the Petitioner's retrial. In fact, from Petitioner's counsel beginning his argument to Vega making her ruling only takes up about three transcript pages, and part of that is taken up by questioning of Thowsen by Petitioner's then counsel. (Trans. III-17-20 (5-10-02)) The May 2002 hearing was a lightning fast "slam-bang-thank-you ma'am" proceeding about the single most

important evidentiary issue in the Petitioner's case. And because Judge Vega blindly relied on that hasty ruling as the "law of the case," admission of the Petitioner's Statement was an automatic "gimme" for the prosecution in the Petitioner's second trial without them even having to take a deep breath.

The Petitioner was gravely prejudiced by her appellate counsel's failure to properly brief and argue in Argument H-1 that Judge Vega's May 10, 2002, ruling on the admissibility of the Petitioner's Statement and her comment preceding it was not binding as the "law of the case" for the Petitioner's retrial, and that Judge Vega abused her discretion by misapplying the "law of the case" doctrine. If there has ever been an issue in a criminal case that demands a full evidentiary hearing, it is one to determine the admissibility of the Petitioner's Statement and a comment elicited by Thowsen after his sadistic psychological torture like use of her childhood rapes against her that he relied on to obtain a waiver of her Constitutional rights to remain silent and to consult with an attorney, in order to get her to talk to him.

If Petitioner's counsel had properly briefed and argued Argument H-1, it would have requested that the Court rule Judge Vega's May 10, 2002, ruling was not the "law of the case", and that the Court vacate the Petitioner's conviction and remand with appropriate instructions that if the prosecution sought to use the Petitioner's Statement in a retrial that a full voluntariness evidentiary hearing would have to be conducted.

Without admission of the Petitioner's Statement that the prosecution argued directly and indirectly was a ***de facto*** confession to Bailey's murder and the post-mortem cutting of his rectum, no reasonable juror could find the Petitioner guilty beyond a reasonable doubt. And beyond that, without admission of the Petitioner's Statement there is a strong likelihood the prosecution would dismiss the charges without a retrial due to a lack of evidence.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(xxx) Ground seventy-six.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and her state and federal right to due process were prejudiced by her counsel's objectively unreasonable failure to include in the "Petition For Rehearing" to the Nevada Supreme Court that its affirmation of the Petitioner's conviction was based on two false assumptions of fact – that "based on Lobato's admission," there was substantial evidence that she committed the murder", and that the State introduced "evidence of positive luminol and phenolphthalein tests for blood." – when neither of those is either factually true or supported by the record, and if Petitioner's counsel had informed the Court about the factual errors the Court could have reversed its decision and vacated the Petitioner's convictions, and if it didn't do so, the issue of the factual errors could have been included in the "Petition For Reconsideration En Banc," but since the factual errors were not brought to the Court's attention, the Petitioner was prejudiced because her counsel did not provide the Court with the opportunity to correct its ruling in the Petitioner's case that is based on factual errors.

Facts:

On February 5, 2009 a panel of three Nevada Supreme Court justices unanimously affirmed the Petitioner's October 2006 convictions of the voluntary manslaughter of 44-year-old homeless Duran Bailey in the trash enclosure for a Nevada State Bank in west Las Vega on July 8, 2001, and the "sexual penetration of his dead body." The latter conviction was based on ME Lary Simms' testimony that a cutting wound to Bailey's anus was post-mortem. The justice's written ruling states, "based on Lobato's admission, there was substantial evidence that she committed the murder." (*Lobato vs. Nevada*, No. 49087 (NV Supreme Ct, 02-05-2009), Order of Affirmance, 4)

Clark County Medical Examiner Lary Simms determined from Bailey's autopsy that his cause of death was: "Blunt head trauma. Significant contributing conditions include multiple stab and incised wounds." One of the incised wounds was a severed carotid artery. Petitioner was interrogated on July 20, 2001, by two LVMPD homicide detectives. Her Statement was audio taped and introduced into evidence, so it is a matter of public record.

Did the Petitioner admit to bludgeoning or otherwise doing anything to cause injury to Bailey's head?

No.

Did she admit to hitting Bailey's mouth with her fists or an object and knocking out many teeth?

No.

Did she admit to pummeling Bailey's face and giving him black eyes?
No.
Did she admit to stabbing Bailey face, neck and abdomen multiple times?
No.
Did she admit to inflicting "incised wounds" that included severing the carotid artery in Bailey's neck?
No.
Did she admit to any involvement in Bailey's death?
No.
Did she admit to having any knowledge of the location or manner of Bailey's death?
No.
Did she admit to knowing Bailey or ever having met him?
No.
Did she admit to ever having been to where Bailey was killed?
No.
Did she admit to being anywhere in Clark County (or Las Vegas) at anytime on the day of Bailey's murder – July 8, 2001?
No.

Furthermore, there was no testimony during Petitioner's trial that she made any admission to Bailey's murder or that she knew any specific details of the crime, including any of the almost three dozen external wounds ME Lary Simms testified were inflicted prior to and after his death. (See Exhibit 85, 40 significant differences between Bailey's murder and Petitioner's Statement.) Neither did she identify a single landmark at the scene of Bailey's murder. (See Exhibit 84, Landmarks around the Budget Suites Hotel and the Nevada State Bank.)

The public record in Petitioner's case is absolutely crystal clear: she did not make any "admission" to any involvement in Bailey's death.

Affirming Petitioner's voluntary manslaughter conviction was a predicate for the three justices to uphold her companion conviction of "sexual penetration of a dead body." The basis of that charge – which is Nevada's corpse rape "necrophilia law" – was a cutting injury to Bailey's anus that ME Simms testified was inflicted after his death. Taking into consideration the Petitioner made no admission to being within 170 miles of Las Vegas at the time of Bailey's death – the following questions are presented to further clarify what Petitioner did not make an "admission" to in her statement.

Did Petitioner admit to cutting Bailey's anus after his death?

No.

Did she admit – since Bailey was found face-up – to turning his body over onto his stomach after he was dead, inflicting an anus wound, and then again turning him over onto his back?

No.

Did she admit to moving his body to where it was found several feet from where his carotid artery and other cutting and beating wounds were inflicted?

No.

The public record is crystal clear: the Petitioner made no "admission" to cutting Bailey's anus after he was dead, or turning his body over or moving him, and there is no physical, forensic, or eyewitness evidence that she did so.

The lack of an "admission" of guilt by the Petitioner to murdering Bailey or slashing his anus after he was dead – the acts underlying her convicted crimes – is consistent with the crime scene DNA evidence that excludes her but implicates one or more men as Bailey's assailant; it is consistent with the crime scene fingerprints that excludes her; it is consistent with the shoeprints imprinted in blood leading away from Bailey's body that are 2-1/2 sizes larger than her shoe size; it is consistent with the fresh tire tracks at the crime scene that don't match her car's tires; it is consistent with the confirmation by scientific tests that none of Bailey's blood was found on any personal item of hers or in her car. The complete absence of an incriminating "admission" by the Petitioner linking her to Bailey's murder is also consistent with the absence of any medical evidence from the infliction of Bailey's wounds that incriminates Petitioner. The lack of any incriminating physical, forensic or medical evidence is consistent with the fact there is no eyewitness, documentary (gas station receipt, etc.), surveillance video, or confession evidence the Petitioner was anywhere in Clark County at anytime on the day of Bailey's death. Likewise, there is mention in the Petitioner's Statement, and there was no testimony that she told anyone she was anywhere in Clark County on July 8, 2001.

Contrasted with that lack of incriminating evidence are the eleven eyewitnesses who saw her at her parents' home in Panaca 170 miles north of Las Vegas from shortly after midnight on the day of Bailey's July 8 death until after his body was found that night. Two other witnesses, next door neighbors, testified they did not see Petitioner's car moved anytime on July 8 or for several days preceding the 8th. Telephone records also verify Petitioner was in Panaca the weekend of July 7 and 8 until after Bailey's body was found.

There is perfect 100% consistency between the absence of an "admission" by Petitioner to any involvement in Bailey's death, the physical and forensic evidence excluding her from involvement in the crime, and the eyewitness and telephone record evidence establishing she was 170 miles from Las Vegas on the day of his death.

The prosecution speculated and argued to the jury the Petitioner alone killed Bailey, and then she alone committed the separate act of cutting his anus. Yet the actual record of facts and evidence in her case supports that she was in Panaca 170 miles north of Las Vegas, while there is no evidence whatsoever she was anywhere in Clark County at anytime on July 8, and therefore she could not have been at the crime scene, or had anything to do with Bailey's death and anything done afterwards with his corpse.

So there is no factual basis whatsoever in the record of the Petitioner's case for the panel of Supreme Court justices to have determined "based on Lobato's admission, there was substantial evidence that she committed the murder." (***Lobato vs. Nevada***, No. 49087 (NV Supreme Ct, 02-05-2009), Order of Affirmance, 4)

Yet, in the "Petition For Rehearing," filed on February 12, 2009, and then in the "Petition For Reconsideration En Banc" filed on April 2, 2009, Petitioner's counsel did not argue and explain there is no incriminating "admission" in the Petitioner's statement, and correction of that factual error in the panel's ruling undercuts the foundation of the Court's affirmation, and requires reversal of her convictions.

Another issue the three justices addressed in affirming the Petitioner's convictions was testimony about luminol and phenolphthalein testing conducted on the Petitioner's car. Luminol and phenolphthalein are imprecise and indiscriminate preliminary (presumptive) "screening" tests conducted to detect the possible presence of blood. The tests are so nonspecific and nonselective that they are known to react positively to a plethora of natural and man-made substances and manufactured products. A positive reaction can be triggered by things that include an iron or copper bearing substance, a cleaning agent, vegetable and animal matter, or even pollen, horseradish, urine and fecal matter, and dozens of other natural and man-made substances – including blue jeans. Luminol and phenolphthalein reactions also cannot distinguish between

animal and human blood. Consequently, if there is a positive luminol or phenolphthalein reaction, a scientifically precise confirmatory test must be conducted to determine if the substance is human blood, one of the other many natural and man-made substances that can cause a positive luminol and phenolphthalein reaction, or if the reaction is a false positive. The HemaTrace confirmatory test is one hundred times more precise than a phenolphthalein test is at identifying blood. (See Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010, 6.) A DNA test is even more accurate.

The following is an example to illustrate the relationship and difference between a preliminary (presumptive) screening test and a precise confirmatory test. If a photograph taken at a particular location on a particular day shows a person at a distance that to an observer looks like it possibly could be Joe. That is the equivalent of a preliminary test. To determine if the person in the photo is Joe the observer has the picture enlarged many times to show facial details, which unmistakably reveals the person is not Joe. That is the equivalent of a negative confirmatory test. Joe was not in the picture, and so the picture has zero value in proving Joe was at that location on that day. Anyone subsequently shown the original photo by the observer and told that the indistinguishable person might "possibly" be Joe would be misled, because it had been conclusively proven the person in the photo was not Joe. A HemaTrace test for blood is the equivalent of examining a sample at one hundred times the magnification of a phenolphthalein test. A DNA test is even more precise.

After Petitioner's car was impounded no blood was visibly apparent in it. Luminol and phenolphthalein tests were conducted that reacted positively for several spots. Subsequent scientific confirmatory tests were negative for blood. The public record in Petitioner's case is absolutely crystal clear: no blood was found in the Petitioner's car. The positive preliminary reactions were either to one of the many dozens of natural and man-made substances other than blood that can trigger a positive reaction, or they were false positives.

Petitioner's counsel made a pre-trial motion *in limine* to exclude testimony about the preliminary luminol and phenolphthalein tests. They argued the likelihood the Petitioner would be prejudiced by the jury being misled and confused by testimony about the preliminary tests

outweighed their probative value because the conclusive tests determined no blood was found in the Petitioner's car. Judge Valerie Vega denied the motion, so the prosecution was able to introduce unrestricted testimony about the preliminary luminol and phenolphthalein tests that had already been scientifically disproven.

During Petitioner's trial the prosecution ensured during the presentation of its case and during cross-examination of the defense's expert forensic scientist Brent Turvey, that the jury was exposed to more testimony concerning the preliminary tests, than about the subsequent conclusive scientific tests that proved no blood was found in her car. The prosecutors relied on Judge Vega's nonrestrictive ruling to bombard the jurors with testimony about the possible meaning of the positive preliminary tests – even though the confirmatory tests established it is a scientific fact as certain as 2+2=4 that no blood was found in the Petitioner's car.

The Petitioner's counsel argued in her appeal to the Nevada Supreme Court that Judge Vega abused her discretion in admitting testimony about the disproven results of the luminol and phenolphthalein test reactions. (***Lobato vs. Nevada***, No. 49087 (NV Supreme Ct, 12-26-2007), Appellant's Opening Brief, 28.) Petitioner's counsel argued her right to due process and a fair trial was prejudiced by Judge Vega's ruling and the subsequent extensive testimony about the preliminary luminol and phenolphthalein tests. In rejecting that claim the three justices stated in their February 5 ruling, "Lobato argues that the district court abused its discretion when it permitted the State to introduce evidence of positive luminol and phenolphthalein tests for blood when the subsequent confirmatory tests were negative. We disagree." (***Lobato vs. Nevada***, No. 49087 (NV Supreme Ct, 02-05-2009), Order of Affirmance, 2. The justices made a similar statement on page 3.) However, contrary to the justice's statement there were no "positive luminol and phenolphthalein tests for blood." There were positive preliminary test results for several spots that subsequent confirmatory scientific tests proved were not blood. It is a scientific fact the preliminary tests <u>did not test positive for blood</u>: they either detected one of the dozens of natural and man-made substances other than blood that can produce a positive result, or they registered a false positive.

Yet, in the "Petition For Rehearing," filed on February 12, 2009, and then in the "Petition For Reconsideration En Banc" filed on April 2, 2009, Petitioner's counsel did not argue there were

no "positive luminol and phenolphthalein tests for blood" in the Petitioner's car, and correction of that factual error in the panel's ruling undercuts the foundation of the Court's ruling that Judge Vega did not abuse her discretion in allowing the luminol and phenolphthalein testimony, and requires reversal of Petitioner's convictions. Evidence that the testimony misled the jury, just as was argued by Petitioner's lawyers prior to trial, is the fact that the three justices on the Petitioner's panel were completely misled into believing those tests were "positive" for blood, when the scientific truth is the complete opposite.

It is a fact known from the record of the Petitioner's case that she did not make any admission to either murdering Bailey or cutting his rectum after he was dead, and corroborating that lack of any admission is a complete absence of any physical, forensic, medical, eyewitness, documentary, surveillance, or confession evidence the Petitioner was anywhere in Clark County at any time on the day of Bailey's death. Corroborating that evidence are the thirteen eyewitnesses who saw the Petitioner and/or her unmoved parked car in Panaca from shortly after midnight on July 8 until after Bailey's body was found that night. Yet, the Petitioner's counsel did not include in her "Petition For Rehearing" or in her "Petition For Reconsideration En Banc" that the Court factually erred in affirming her conviction by relying on a phantom "admission" by the Petitioner that doesn't exist in the record.

Likewise, it is a fact known from the record of Petitioner's case that there were no "positive luminol and phenolphthalein tests for blood" in her car. The truth is the complete opposite – the confirmatory scientific tests for blood in the Petitioner's car were <u>all negative</u>. Yet, the Petitioner's counsel did not include in her "Petition For Rehearing" or in her "Petition For Reconsideration En Banc" that the Court factually erred by relying on "positive luminol and phenolphthalein tests for blood" in the Petitioner's car that don't exist in the record, to justify finding that Judge Vega did not abuse her discretion in allowing unrestricted testimony about the preliminary luminol and phenolphthalein tests that in fact tested negative for blood.

The Petitioner was gravely prejudiced by her counsel's failure to argue to the Court that correction of the factual errors upon which its ruling affirming the Petitioner's conviction was based – that she made an "admission" of guilt, and there were "positive luminol and

phenolphthalein tests for blood" in her car – would result in a reversal of the ruling of February 5, 2009, and her convictions would be vacated with dismissal of the charges or a new trial would be ordered.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(yyy) Ground seventy-seven.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by her counsels objectively unreasonable prejudicial errors that are included in her habeas corpus petition committed prior to trial, during trial, post-trial, and during Petitioner's appeal, even if the errors considered individually, would not be considered harmful under the standards established by the state and federal constitutional rights of the Petitioner to effective assistance of counsel, due process of law, and a fair trial.

Facts:

All the grounds in Petitioner's habeas corpus petition citing claims of prejudicial error by counsel are incorporated into this ground. These are: (aa) Ground twenty-seven to (www) Ground seventy-five, and Ground (zzz) Ground seventy-eight.

Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(zzz) Ground seventy-eight.

Petitioner has twenty-four (24) grounds of new evidence in her habeas corpus petition that cumulatively establishes no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial, even if the grounds of new evidence considered individually, would not be considered sufficient do so.

Facts:

All the Claims in Petitioner's habeas corpus petition citing new evidence are incorporated into this ground. These are: (a) Ground one to (x) Ground twenty-four .

Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(aaaa) Ground seventy-nine.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by her counsels objectively unreasonable failure to diligently represent the Petitioner or the interests of Petitioner, and individually or cumulative with other evidence, the Petitioner's representation by counsel was fatally deficient under the standards established by the state and federal constitutional rights of the Petitioner to effective assistance of counsel, due process of law and a fair trial.

Facts:

Shari Greenberger and her colleague Sara Zalkin were San Francisco based attorneys who represented the Petitioner *pro bono* as associate counsel with lead counsel, Clark County Special Public Defender David Schieck. Schieck determined how the CCSPD's money was to be spent and what evidence and witnesses were to be introduced at trial.

Beginning at least a year prior to Petitioner's trial and continuing up to the eve of trial, Greenberger expressed grave concern about what she described on August 16, 2006 as Schieck's "attitude of indifference towards this case in general." (See Exhibit 86, Shari Greenberger letter to David Schieck, August 16, 2006.) That was less than four weeks prior to the start of Petitioner's trial. Ten months earlier Greenberger wrote Schieck:

> "I am concerned specifically with preventing an ineffective assistance of counsel claim in this case, a third retrial, as well as a second wrongful conviction of Blaise, based on a failure to present all relevant expert testimony on our part. I do not want the jury to be left with a false impression on any of the evidence, especially when we have experts in our court who can effectively explain that the evidence does not match our client and to prevent Kephart from making false statements in closing unsupported by the evidence. … I know the budget on this case in terms of experts' fees has been raised as an issue."
> (Shari Greenberger email to David Schieck, October 17, 2005.)

Four days before that email, Greenberger emailed impressions expert William Bodziak:

> "Our office is in the unique situation of associating with the special defender's office based on Ms. Lobato's indigency. Previously their office had agreed to authorize all necessary expert witness costs. I am trying to find another source of funds because I desperately believe we need you and they have not agreed to make a final commitment to this." (See Exhibit 87, Shari Greenberger email to William Bodziak, October 13, 2005.)

Bodziak worked with the FBI for 26 years and is a leading shoeprint, fingerprint, and tire track expert. Although Greenberger considered Bodziak's expert testimony critical to the Petitioner's defense, Schieck refused to authorize the money to retain him. Bodziak did not testify about the exclusionary bloody shoeprint, fingerprint, and tire track evidence, and Petitioner was prejudiced by her counsel relying on the same prosecution testimony that was introduced to secure her conviction.

Schieck also refused to authorize the money to retain forensic scientist and blood pattern expert George Schiro, who provided limited expert testimony at Petitioner's May 2002 trial, due to improper noticing by Petitioner's then counsel. (See Exhibit 86, Shari Greenberger letter to David Schieck, August 16, 2006.) Schiro would have provided extensive expert testimony about the crime scene and reconstruction of the crime that was not provided by Brent Turvey, the expert forensic scientist the defense used at trial. Among other expert skills, Schiro is a bloodstain pattern analysis expert, while Turvey is not, and the most distinctive feature of the crime scene is the significant amount of blood and the type of blood evidence available. The prejudice of not having Schiro's testimony available is established by the testimony favorable to petitioner that Schiro would have presented to the jury at trial. What Schiro's expert testimony would have been is documented in his Forensic Science Resources Report dated March 8, 2010 that states eight areas of evidence that wasn't testified to at trial or expands on that testimony. Among other expert evidence, Schiro outlines a scenario of the crime based on the evidence that no one else testified to at trial, and which is at odds on key points with what prosecution argued to the jury and upon which Petitioner's conviction is based. Schiro's crime scene reconstruction has Bailey lying down when he was attacked, which is completely incompatible with the prosecution's scenario that he was standing when stabbed in his scrotum and that he fractured his skull on the concrete curb when he was knocked down by a blow to his mouth from a baseball bat, and that scenario is what the jury relied on to convict the Petitioner:

> Crime scene reconstruction:
> 1. The killer enters the enclosure.
> 2. Mr. Bailey is lying on the ground, possibly sleeping.
> 3. (These events cannot be sequenced. They all happened at some point, but not

> necessarily in the order listed. His pants could have been down prior to the stabbing or they could have come down sometime during the stabbing but prior to the scrotum wound. He might have been masturbating prior to getting killed. This could explain the presence of the adult magazines at the crime scene. He may also have fallen asleep with his pants down.) The killer stabs the victim in the face, head, scrotum, and possibly the abdomen. At some point, Mr. Bailey's pants come down. Mr. Bailey manages to use his hands and arms in an effort to defend himself. His left carotid artery is cut while he is on the ground. Mr. Bailey is also beaten forcefully about the head with a blunt object most likely using a pounding or punching type motion or his head is slammed forcefully against the surrounding concrete.
> 4. Mr. Bailey's anus was then lacerated.
> 5. Mr. Bailey's body was turned over.
> 6. The killer stabs Mr. Bailey in the abdomen and severs his penis.
> 7. Mr. Bailey is covered with the cardboard.
> 8. Trash is deposited on Mr. Bailey and the blood.
> 9. The killer exits the enclosure.
>
> (See Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010. 6-7.)

Schiro's reconstruction has Bailey lying down during the entire attack. This is contrary to the prosecution's argument to the jury that Bailey was standing and was knocked backwards. He also has Bailey's killer turning him over to cut his rectum (not "dragging" him), and his killer covered Bailey and his blood with trash and cardboard. Since Petitioner's shoeprint doesn't match the shoeprints imprinted in blood on the concrete leading away from Bailey's body, Schiro's scenario excludes Petitioner as Bailey's killer – who covered all the blood before leaving.

Schieck also would not authorize retaining Dr. Richard Leo, one of the world's leading experts at analyzing a defendant's statement to determine whether it is a false confession, a confession, or no confession at all. Greenberger wrote Schieck on October 17, 2005 regarding Dr. Leo:

> "Sara and I are hoping to do a conference call with you and Richard Leo as soon as you are available. … What we believe happened in this case is that the police provided Blaise selective information, elicited a statement of her prior attack, and turned this into a confession to murder. They never disclosed the date, time, location, or brutality of Duran[d] Bailey's murder to her, despite the fact they had that key information. By withholding this information, they engaged in improper police tactics. Moreover, had they discussed this information with Blaise, she would have been able to disassociate herself from the crime based on critical facts such as timing, date, location and brutality of the crime. Thereafter the police went to talk to

> witnesses, manipulated and badgered witnesses and selectively disclosed limited information to the defense, to try to make a strong case against Blaise, without properly recording all information and seeking for the truth. This is all information that Mr. Leo can testify to and supports his preliminary findings that this occurred in this case.
>
> He advised me his is giving us a discounted rate and normally does not provide a cap rate but is willing to discuss this with you, that is why I am trying to coordinate a conference call between us." (Shari Greenberger email to David Schieck, October 17, 2005.) (Underlining added to original.)

Although Dr. Leo was willing to reduce his fee and willing to consider capping his charges, he was not retained. Petitioner's counsel did not present any expert testimony concerning her credibility and truthfulness in her Statement of July 20, 2001, or her comments to people that were consistent with her Statement. Consequently, LVMPD homicide Detective Thomas Thowsen's "expert" opinion psychology testimony that based on a few on-the-job experiences he believes methamphetamine users such as the Petitioner "jumble" details to "minimize" their involvement in a crime, was the only so-called "psychology" evidence the jury considered. Yet, Thowsen's testimony stood unchallenged because Petitioner's counsel made no objection to his testimony on the basis that the prosecution did not comply with the statutory requirements to provide 21 days notice of Thowsen's "expert" psychology opinion testimony; a summary of his proposed expert testimony; his C.V. documenting his formal psychology education, advanced degrees, specialized training, and articles and papers he has written related to psychologically analyzing the statements of a criminal suspect; and any reports related to the Petitioner he has written as a psychology expert.

The prejudice to Petitioner caused by Schieck's refusal to retain Leo or another qualified psychology expert to analyze Petitioner's Statement is conclusively proven by the post-conviction "Report of Dr. Allison D. Redlich," dated February 10, 2010. Dr. Allison D. Redlich is an Assistant Professor in the School of Criminal Justice at the University at Albany, State University of New York.

After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a qualified psychologist willing to review the Petitioner's Statement and associated materials on a *pro bono* basis to determine if the Petitioner's Statement could be considered a confession, a false