Kirstin Lobato 95558
FMWCC
4370 Smiley Rd
Las Vegas, NV 89115-1808

October 27, 2009

Mr. David Schieck
Clark County Special Public Defender
330 S. Third St. 8th Floor
Las Vegas, NV 89101-6032

RE: Turning over case files

Dear David Schieck,

I previously requested in writing that you turn over all files related to your representation of me to Michelle Ravell, who I have granted full power of attorney to act on my behalf. The files have not been made available for pick-up by Michelle Ravell.

I am in dire need of the files for preparation of my state habeas corpus petition. It is my understanding that under Nevada Revised Statute 7.055 you are required to "immediately deliver to the client all papers, documents, pleadings and items of tangible personal property which belong to or were prepared for that client." As you know there is a strict deadline for the filing of my federal habeas if my state habeas is denied, and the clock is ticking.

Please promptly contact Michelle Ravell by email at, michelleravell@cox.net, or call her at 702-321-3277, to inform her when she can pick-up all my case files.

With regards,

Kirstin Blaise Lobato by Michelle Ravell, Agent

Kirstin Blaise Lobato by Michelle Ravell as Agent

GENERAL POWER OF ATTORNEY

I, Kirstin Blaise Lobato, residing at 4370 Smiley Rd.; Las Vegas, NV 89115, hereby appoint Michelle Ravell of 5813 Santa Catalina Ave; Las Vegas, NV 89108, as my Attorney-in-Fact ("Agent").

I hereby revoke any and all general powers of attorney that previously have been signed by me. However, the preceding sentence shall not have the effect of revoking any powers of attorney that are directly related to my health care that previously have been signed by me.

My Agent shall have full power and authority to act on my behalf. This power and authority shall authorize my Agent to manage and conduct all of my affairs and to exercise all of my legal rights and powers, including all rights and powers that I may acquire in the future. My Agent's powers shall include, but not be limited to, the power to:

1. Open, maintain or close bank accounts (including, but not limited to, checking accounts, savings accounts, and certificates of deposit), brokerage accounts, and other similar accounts with financial institutions.

a. Conduct any business with any banking or financial institution with respect to any of my accounts, including, but not limited to, making deposits and withdrawals, obtaining bank statements, passbooks, drafts, money orders, warrants, and certificates or vouchers payable to me by any person, firm, corporation or political entity.

b. Perform any act necessary to deposit, negotiate, sell or transfer any note, security, or draft of the United States of America, including U.S. Treasury Securities.

c. Have access to any safe deposit box that I might own, including its contents.

2. Sell, exchange, buy, invest, or reinvest any assets or property owned by me. Such assets or property may include income producing or non-income producing assets and property.

3. Purchase and/or maintain insurance, including life insurance upon my life or the life of any other appropriate person.

4. Take any and all legal steps necessary to collect any amount or debt owed to me, or to settle any claim, whether made against me or asserted on my behalf against any other person or entity.

5. Enter into binding contracts on my behalf.

6. Exercise all stock rights on my behalf as my proxy, including all rights with respect to stocks, bonds, debentures, or other investments.

7. Maintain and/or operate any business that I may own.

8. Employ professional and business assistance as may be appropriate, including attorneys, accountants, and real estate agents.

9. Sell, convey, lease, mortgage, manage, insure, improve, repair, or perform any other act with respect to any of my property (now owned or later acquired) including, but not limited to, real estate and real estate rights (including the right to remove tenants and to recover possession). This includes the right to sell or encumber any homestead that I now own or may own in the future.

10. Prepare, sign, and file documents with any governmental body or agency, including, but not limited to, authorization to:

a. Prepare, sign and file income and other tax returns with federal, state, local, and other governmental bodies.

b. Obtain information or documents from any government or its agencies, and negotiate, compromise, or settle any matter with such government or agency (including tax matters).

c. Prepare applications, provide information, and perform any other act reasonably requested by any government or its agencies in connection with governmental benefits (including military and social security benefits).

11. Make gifts from my assets to members of my family and to such other persons or charitable organizations with whom I have an established pattern of giving. However, my Agent may not make gifts of my property to the Agent.

12. Transfer any of my assets to the trustee of any revocable trust created by me, if such trust is in existence at the time of such transfer.

13. Disclaim any interest which might otherwise be transferred or distributed to me from any other person, estate, trust, or other entity, as may be appropriate.

This Power of Attorney shall be construed broadly as a General Power of Attorney. The listing of specific powers is not intended to limit or restrict the general powers granted in this Power of Attorney in any manner.

Any power or authority granted to my Agent under this document shall be limited to the extent necessary to prevent this Power of Attorney from causing: (i) my income to be taxable to my Agent, (ii) my assets to be subject to a general power of appointment by my Agent, and (iii) my Agent to have any incidents of ownership with respect to any life insurance policies that I may own on the life of my Agent.

My Agent shall not be liable for any loss that results from a judgment error that was made in good faith. However, my Agent shall be liable for willful misconduct or the failure to act in good faith while acting under the authority of this Power of Attorney.

I authorize my Agent to indemnify and hold harmless any third party who accepts and acts under this document.

My Agent shall be entitled to reasonable compensation for any services provided as my Agent. My Agent shall be entitled to reimbursement of all reasonable expenses incurred in connection with this Power of Attorney.

My Agent shall provide an accounting for all funds handled and all acts performed as my Agent, if I so request or if such a request is made by any authorized personal representative or fiduciary acting on my behalf.

This Power of Attorney shall become effective immediately and shall not be affected by my disability or lack of mental competence, except as may be provided otherwise by an applicable state statute. This is a General Power of Attorney. This Power of Attorney may be revoked by me at any time by providing written notice to my Agent.

Dated October 18th, 2009 at Las Vegas, Nevada.

Kirstin Blaise Lobato

Kirstin Blaise Lobato

Witness Information

I have witnessed the principal's signature or the principal's acknowledgment of the signature designating power of attorney. I am an adult at least 18 years old and not the attorney-in-fact. My signature certifies that the principal is known to me and is the same person who signed and dated this affidavit.

Lisa M. K

Signature of Witness 1

Lisa M. Kinsey

Name of Witness 1 (printed)

4370 Smiley Rd.

Address

Las Vegas NV 89115

City, State and Zip

Georgina Gonzalez

Signature of Witness 2

Georgina Gonzalez

Name of Witness 2 (printed)

4370 Smiley Rd.

Address

Las Vegas, NV 89115

City, State and Zip

EXHIBIT 95

Kirstin Blaise Lobato 95558
FMWCC
4370 Smiley Rd
Las Vegas, NV 89115-1808

October 27, 2009

Ms. JoNell Thomas
Clark County Special Public Defender
330 S. Third St. 8th Floor
Las Vegas, NV 89101-6032

RE: Turning over case files

Dear JoNell Thomas,

I am requesting that you turn over all files related to your representation of me to Michelle Ravell, who I have granted full power of attorney to act on my behalf.

I am in dire need of the files for preparation of my state habeas corpus petition. It is my understanding that under Nevada Revised Statute 7.055 you are required to "immediately deliver to the client all papers, documents, pleadings and items of tangible personal property which belong to or were prepared for that client." As you know there is a strict deadline for the filing of my federal habeas if my state habeas is denied, and the clock is ticking.

Please promptly contact Michelle Ravell by email at, michelleravell@cox.net, or call her at 702-321-3277, to inform her when she pick-up all my case files.

With regards,

Michelle Ravell, Agent for
Kirstin Blaise Lobato

Kirstin Blaise Lobato by Michelle Ravell as Agent

GENERAL POWER OF ATTORNEY

I, Kirstin Blaise Lobato, residing at 4370 Smiley Rd.; Las Vegas, NV 89115, hereby appoint Michelle Ravell of 5813 Santa Catalina Ave; Las Vegas, NV 89108, as my Attorney-in-Fact ("Agent").

I hereby revoke any and all general powers of attorney that previously have been signed by me. However, the preceding sentence shall not have the effect of revoking any powers of attorney that are directly related to my health care that previously have been signed by me.

My Agent shall have full power and authority to act on my behalf. This power and authority shall authorize my Agent to manage and conduct all of my affairs and to exercise all of my legal rights and powers, including all rights and powers that I may acquire in the future. My Agent's powers shall include, but not be limited to, the power to:

1. Open, maintain or close bank accounts (including, but not limited to, checking accounts, savings accounts, and certificates of deposit), brokerage accounts, and other similar accounts with financial institutions.

a. Conduct any business with any banking or financial institution with respect to any of my accounts, including, but not limited to, making deposits and withdrawals, obtaining bank statements, passbooks, drafts, money orders, warrants, and certificates or vouchers payable to me by any person, firm, corporation or political entity.

b. Perform any act necessary to deposit, negotiate, sell or transfer any note, security, or draft of the United States of America, including U.S. Treasury Securities.

c. Have access to any safe deposit box that I might own, including its contents.

2. Sell, exchange, buy, invest, or reinvest any assets or property owned by me. Such assets or property may include income producing or non-income producing assets and property.

3. Purchase and/or maintain insurance, including life insurance upon my life or the life of any other appropriate person.

4. Take any and all legal steps necessary to collect any amount or debt owed to me, or to settle any claim, whether made against me or asserted on my behalf against any other person or entity.

5. Enter into binding contracts on my behalf.

6. Exercise all stock rights on my behalf as my proxy, including all rights with respect to stocks, bonds, debentures, or other investments.

7. Maintain and/or operate any business that I may own.

8. Employ professional and business assistance as may be appropriate, including attorneys, accountants, and real estate agents.

9. Sell, convey, lease, mortgage, manage, insure, improve, repair, or perform any other act with respect to any of my property (now owned or later acquired) including, but not limited to, real estate and real estate rights (including the right to remove tenants and to recover possession). This includes the right to sell or encumber any homestead that I now own or may own in the future.

10. Prepare, sign, and file documents with any governmental body or agency, including, but not limited to, authorization to:

a. Prepare, sign and file income and other tax returns with federal, state, local, and other governmental bodies.

b. Obtain information or documents from any government or its agencies, and negotiate, compromise, or settle any matter with such government or agency (including tax matters).

c. Prepare applications, provide information, and perform any other act reasonably requested by any government or its agencies in connection with governmental benefits (including military and social security benefits).

11. Make gifts from my assets to members of my family and to such other persons or charitable organizations with whom I have an established pattern of giving. However, my Agent may not make gifts of my property to the Agent.

12. Transfer any of my assets to the trustee of any revocable trust created by me, if such trust is in existence at the time of such transfer.

13. Disclaim any interest which might otherwise be transferred or distributed to me from any other person, estate, trust, or other entity, as may be appropriate.

This Power of Attorney shall be construed broadly as a General Power of Attorney. The listing of specific powers is not intended to limit or restrict the general powers granted in this Power of Attorney in any manner.

Any power or authority granted to my Agent under this document shall be limited to the extent necessary to prevent this Power of Attorney from causing: (i) my income to be taxable to my Agent, (ii) my assets to be subject to a general power of appointment by my Agent, and (iii) my Agent to have any incidents of ownership with respect to any life insurance policies that I may own on the life of my Agent.

My Agent shall not be liable for any loss that results from a judgment error that was made in good faith. However, my Agent shall be liable for willful misconduct or the failure to act in good faith while acting under the authority of this Power of Attorney.

I authorize my Agent to indemnify and hold harmless any third party who accepts and acts under this document.

My Agent shall be entitled to reasonable compensation for any services provided as my Agent. My Agent shall be entitled to reimbursement of all reasonable expenses incurred in connection with this Power of Attorney.

My Agent shall provide an accounting for all funds handled and all acts performed as my Agent, if I so request or if such a request is made by any authorized personal representative or fiduciary acting on my behalf.

This Power of Attorney shall become effective immediately and shall not be affected by my disability or lack of mental competence, except as may be provided otherwise by an applicable state statute. This is a General Power of Attorney. This Power of Attorney may be revoked by me at any time by providing written notice to my Agent.

Dated October 18th, 2009 at Las Vegas, Nevada.

Kirstin Blaise Lobato

Kirstin Blaise Lobato

Witness Information

I have witnessed the principal's signature or the principal's acknowledgment of the signature designating power of attorney. I am an adult at least 18 years old and not the attorney-in-fact. My signature certifies that the principal is known to me and is the same person who signed and dated this affidavit.

Signature of Witness 1

Lisa M. Kinsey

Name of Witness 1 (printed)

4370 Smiley Rd.

Address

Las Vegas NV 89115

City, State and Zip

Signature of Witness 2

Georgina Gonzalez

Name of Witness 2 (printed)

4370 Smiley Rd.

Address

Las Vegas, NV 89115

City, State and Zip

EXHIBIT 96

Kirstin Blaise Lobato 95558
FMWCC
4370 Smiley Rd
Las Vegas, NV 89115-1808

December 15, 2009

Mr. David Schieck
Clark County Special Public Defender
330 S. Third St. 8th Floor
Las Vegas, NV 89101-6032

RE: Case documents not turned over

Dear David Schieck,

I requested in a letter dated October 27, 2009, that in accordance with Nevada Revised Statute 7.055 you "immediately deliver to the client all papers, documents, pleadings and items of tangible personal property which belong to or were prepared for that client."

As you know several boxes of files related to my case were picked up from your office on November 4, 2009. However, examination of the contents of those files has revealed there are numerous missing documents. Among the missing documents are hardcopies of emails and text messages, handwritten and typed correspondence, and typed and handwritten notes of telephone and in person conversations involving the following people:

Attorney David Schieck
Attorney Shari Greenberger
Attorney Sara Zalkin
Attorney Phillip Kohn
Attorney Gloria Navarro
Attorney JoNell Thomas
Investigator James Aleman
Doctor Michael Laufer
Forensic scientist Brent Turvey
Forensic consultant William Bodziak
Forensic scientist George Schiro
False confession expert Richard Leo
False confession expert Richard Ofshe

In addition there are no hardcopies of emails and text messages, handwritten and typed correspondence, and typed and handwritten notes of telephone and in person conversations between yourself (David Schieck), Shari Greenberger, Sara Zalkin, Phillip Kohn, Gloria Navarro or James Aleman, and any of the following people:

Clark County Assistant District Attorney William Kephart

Clark County Assistant District Attorney Sandra DiGiacomo
Clark County Medical Examiner Lary Simms
Clark County Coroner Investigator Shelley Pierce-Stauffer
Las Vegas Metropolitan Police Department Crime Scene Analyst Louise Renhard
Las Vegas Metropolitan Police Department Crime Scene Investigator Maria Thomas
Las Vegas Metropolitan Police Department Crime Scene Analyst Daniel Ford
Las Vegas Metropolitan Police Department Officer James Testa
Las Vegas Metropolitan Police Department Forensic Lab Analyst Thomas Wahl
Las Vegas Metropolitan Police Department Latent Print Examiner Joel Geller
Las Vegas Metropolitan Police Department Forensic Lab Criminalist Kristina Paulette
Las Vegas Metropolitan Police Department Detective Thomas Thowsen
Las Vegas Metropolitan Police Department Detective James LaRochelle
Lincoln County Juvenile Probation Officer Laura Johnson
Lincoln County Sheriff's Deputy Keith Bowman

In addition, the following documents are missing:

* Reports by investigator James Aleman for his work that preceded the second trial.

* The second report by the Clark County medical examiner's office.

* Detective Thomas Thowsen and Detective James LaRochelle's case notes, or any record made about those notes by attorney David Schieck, Shari Greenberger, Sara Zalkin, Phillip Kohn, Gloria Navarro or James Aleman.

I am in immediate need of the missing documents for preparation of my state habeas corpus petition. As you know there is a strict deadline for the filing of my federal habeas if my state habeas is denied, and the time it takes for me to file my state habeas petition counts against that federal filing deadline.

Please promptly gather all of the missing documents, and contact Michelle Ravell by email at, michelleravell@cox.net, or call her at 702-321-3277, to inform her when she can pick-up the missing documents.

With regards,

Michelle Ravell as
attorney
Kirstin

Kirstin Blaise Lobato by Mi

Case

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

David Shieck
Clark County SPD
330 S. Third St 8th FL
LAS VEGAS NV 89101-6032

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X CLARK COUNTY MAIL SERVICES 309 SOUTH 3RD LAS VEGAS, NV 89155 ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

DEC 21 2009

3. Service Type
☒ Certified
☐ Register
☐ Insured
001908
rchandise

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7009 0820 0001 8020 1590

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

EXHIBIT 97

Kirstin Blaise Lobato 95558
FMWCC
4370 Smiley Rd
Las Vegas, NV 89115-1808

December 15, 2009

Ms. JoNell Thomas
Clark County Special Public Defender
330 S. Third St. 8th Floor
Las Vegas, NV 89101-6032

RE: Failure to turning over case documents

Dear JoNell Thomas,

Attached is a copy of the letter dated October 27, 2009, in which it was requested that you promptly turn over all documents related to your representation of me to Michelle Ravell, who I have granted full power of attorney to act on my behalf.

Almost seven weeks has passed and you have failed to provide my case documents, even though Nevada Revised Statute 7.055 requires you to "**immediately** deliver to the client all papers, documents, pleadings and items of tangible personal property which belong to or were prepared for that client."

I am in immediate need of the documents you have failed to provide for preparation of my state habeas corpus petition. As you know there is a strict deadline for the filing of my federal habeas if my state habeas is denied, and the time it takes for me to file my state habeas petition counts against that federal filing deadline.

Please promptly contact Michelle Ravell by email at, michelleravell@cox.net, or call her at 702-321-3277, to inform her when she pick-up all my case files.

With regards,

Michelle R
attorney f
Kirstin Bl

Kirstin Blaise Lobato by Mic

7009 0820 0001 8020 1606

SENDER: COMPLETE THIS SECTI

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

A. Signature
X CLARK COUNTY MAIL SERVICES 309 SOUTH 3RD LAS VEGAS, NV 89155 ☑ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

DEC 21 2009

1. Article Addressed to:

Ms. Jonell Thomas
Clark County Spd
330 Third St 8th Floor
Las Vegas NV 89101-6032

3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricte ☐ Yes

001910

2. Article Number
(Transfer from service lab 7009 0820 0001 8020 1606

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-154

EXHIBIT

98

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

April 7, 2010

MR. HANS SHERRER
JUSTICE DENIED
POST OFFICE BOX 68911
SEATTLE, WA 98168 0911

FOIPA Request No.: 1145680- 000
Subject: BAILEY, DURAND

Dear Mr. Sherrer:

This is in response to your Freedom of Information/Privacy Acts (FOIPA) request dated March 12, 2010.

In order to respond to our many requests in a timely manner, our focus is to identify responsive records in the automated and manual indices that are indexed as main files. A main index record carries the names of subjects of FBI investigations. Records which may be responsive to your Freedom of Information-Privacy Acts (FOIPA) request were destroyed August 1, 1995. Since this material could not be reviewed, it is not known if it was responsive to your request. The retention and disposal of records is governed by statute and regulation under the supervision of the National Archives and Records Administration (NARA), Title 44, United States Code, Section 3301 and Title 36, Code of Federal Regulations, Chapter 12, Sub-chapter B, Part 1228. The FBI Records Retention Plan and Disposition Schedules have been approved by the United States District Court for the District of Columbia and are monitored by NARA.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be identified easily.

Enclosed for your information is a copy of the FBI File Fact Sheet.

Very truly yours,

David M. Hardy
Section Chief,
Record/Information
Dissemination Section
Records Management Division

Enclosure

001912

EXHIBIT

99

ORIGINAL

FILED
Aug 9 1 46 PM '01
CLERK

INFO
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

I.A. 8/21/01
8:30 A.M.
SPECIAL PD

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

KIRSTIN BLAISE LOBATO,
#1691351

Defendant.

Case No. C 177394
Dept. No. II

INFORMATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

STEWART L. BELL, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That KIRSTIN BLAISE LOBATO, the Defendant(s) above named, having committed the crimes of **MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER) (Felony - NRS 200.010, 200.030, 193.165); and SEXUAL PENETRATION OF A DEAD HUMAN BODY (Felony - NRS 201.450)**, on or about the 8th day of July, 2001, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT I - MURDER WITH USE OF A DEADLY WEAPON (OPEN MURDER)

did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill DURAN BAILEY, a human being, by the said Defendant beating the said DURAN BAILEY with a blunt object and/or by stabbing and/or

RECEIVED
AUG 09 2001
COUNTY CLERK

cutting the said DURAN BAILEY, with a deadly weapon, to-wit: a knife.

COUNT II - SEXUAL PENETRATION OF A DEAD HUMAN BODY

did then and there wilfully, feloniously, and without authority of law, sexually penetrate a dead human body, to-wit: DURAN BAILEY, in the following manner, by inserting a knife into and/or cutting the anal opening of the said DURAN BAILEY.

STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY _____
ERIC G. JORGENSON
Chief Deputy District Attorney
Nevada Bar #001802

Names of witnesses known to the District Attorney's Office at the time of filing this Information are as follows:

NAME	ADDRESS
FORD, D.	LVMPD #4244
HEFNER, K.	LVMPD #2185
HUTCHISON, J.	LVMPD #3230
JOHNSON, LAURA	HC 74 BOX 295, PIOCHE, NV
LAROCHELLE, J.	LVMPD #4353
MORGAN, B.	LVMPD #4216
PARKER, DIANN	4255 W. VIKING #Y-816, LV, NV
PIERCE-STAUFFER S.	CC CORONER'S OFFICE
RENHARD, L.	LVMPD #5223

P:\WPDOCS\INF\112\11220901.WPD

SHOTT, RICHARD	5412 RETABLO AVE., LV, NV
SIMMS, L.	CC MEDICAL EXAMINER
TESTA, J.	LVMPD #6181
THOMAS, M.	LVMPD #4032
THOWSEN, T.	LVMPD #1467

DA#01F12209X/mb
LVMPD EV#0107082410
MURD W/DW; PEN O/HMN BDY - F
(TK2)

EXHIBIT

100

AFFIDAVIT OF MARK LEWIS DDS

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

I, MARK LEWIS DDS, 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 licensed dentist who practices in Las Vegas, Nevada.
2. I graduated from Creighton University in 1997 with a degree in Doctor Dental Surgery.
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 removed them with a baseball bat.
6. 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.

Mark Lewis

SUBSCRIBED AND SWORN before me this 21 day of April, 2010.

Notary Public

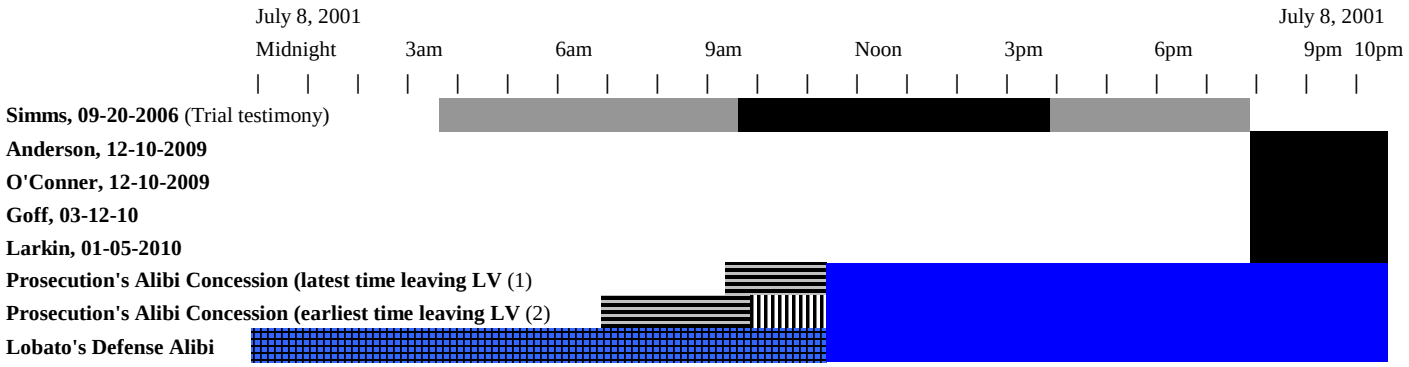
KATHRYN MCADAM
Notary Public-State of Nevada
APPT. NO. 07-1604-1
My App. Expires February 02, 2011

Kathryn McAdam
[typed/printed name]

EXHIBIT

101

Timeline Of New Evidence Concerning Duran Bailey's Time of Death And Kirstin Blaise Lobato's Alibi



Relevant times

1) Duran Bailey's body discovered "around 10 pm" on July 8, 2001 at 4240 W Flamingo Rd, Las Vegas, Nevada.

2) Duran Bailey's body examined at crime scene by Clark County Coroner's Investigator Shelley Pierce-Stauffer at 3:50am on July 9, 2001.

3) Kirstin B. Lobato positively placed in Panaca 170 miles north of Las Vegas by non-relative (and relative) alibi witnesses between 11:30 am on July 8 and 1am on July 9.

4) Kirstin Blaise Lobato positively placed in Panaca 170 miles north of Las Vegas by relative alibi witnesses between 10pm on July 7 and 7:15am on July 8.

5) On July 8, 2001 in Las Vegas it was dark until 4:24am and sunrise was at 5:31am. Sunset was at 8:01pm, dusk was at 8:31pm, and it was dark at 9:08pm.

Prosecution's Concession During Closing Arguments of Kirstin Blaise Lobato's Alibi Of Being In Panaca On July 8, 2001

(1) Prosecution conceeded KB Lobato was positively seen by credible non-relative witnesses in Panaca from 11:30 am until after Bailey's body was discovered that night. Trial testimony was the fastest driving time from Panaca to Las Vegas'is 2 hours. So the absolute latest time KB Lobato could have been in Las Vegas was **9:30 am.**

(2) Prosecution conceeded KB Lobato was positively seen by credible non-relative witnesses in Panaca at 11:30 am until after Bailey's body was discovered that night, and that a 10am phone call from the Lobato's Panaca house was probably made by KB Lobato. Trial testimony was the normal driving time from Panaca to Las Vegas is 3 hour So the earliest time KB Lobato could have been in Las Vegas was **7 am.**

Kirstin Blaise Lobato's Alibi Of Being In Panaca On July 8, 2001

Kirstin B. Lobato's alibi of being in Panaca on the entire day of July 8, 2001 was supported by 11 people who saw or talked with her between 10pm on July 7 until after Duran Bailey's body was discovered "around 10pm" on July 8, and two neighbors who didn't see her car moved from in front of her Parent's house on the 8th.

Time of death

	Black — Reasonable Certainty		Grey — Possible time of death	
	Earliest Time	**Latest Time**	**Earliest Time**	**Latest Time**
Simms, 09-20-2006	9:50am (7-8)	3:50pm (7-8)	3:50am (7-8)	7:50pm (7-8)
Anderson, 12-10-2009	8:01pm (7-8)	10:15pm (7-8)		
O'Connor, 02-11-10	8:01pm (7-8)	10:15pm (7-8)		
Goff, 03-12-10	8:01pm (7-8)	10:15pm (7-8)		
Larkin, 01-05-2010	8:15pm (7-8)	10:15pm (7-8)		

Kirstin Blaise Lobato Alibi

Blue

Positively seen in Panaca by non-relatives from 11:30 am to midnight

Crossed lines

Positively seen in Panaca by relatives from 1am to 7:15am (7-8)

Horizontal lines

Travel time from Las Vegas to Panaca.

Vertical lines

Telephone call at 10am by KB Lobato from parent's Panaca house (7-8)

	Reasonable certainty of time of death	Possible time of death
Simms, 09-20-2006	Reasonable medical certainty within 12 to 18 hours of exam by CI Pierce-Stauffer	Possibly within 8 to 24 hours of exam by CI Pierce-Stauffer
Anderson, 12-10-09	"a reasonable scientific certainty … death occurred after sunset (8.01 pm)"	
O'Connor, 02-11-10	estimated postmortem interval is after sunset, which was at 8:01 pm on July 8, 2001."	
Goff, 03-12-10	"a reasonable scientific certainty … death occurred after sunset (8.01 pm)"	
Larkin, 01-05-2010	"reasonable medical and scientific certainty that Bailey was killed … more likely than not within two hours before discovery."	

Expert		Source
Simms, 09-20-2006	Clark County Medical Examiner Lary Simms	*State v Lobato* , No C177394 - Transcript 09-20-2006 (Trial Day 8), VIII-20.
Anderson, 12-10-09	Forensic entomologist Dr. Gail Anderson	Dr. Gail S. Anderson's Report of December 10, 2009
O'Connor, 02-11-10	Forensic Entomologist Dr. Linda-Lou O'Connor	Forensic Entomology Investigation Report (of Dr. Linda-Lou O'Connor), February 11, 2010
Goff, 03-12-10	Forensic Entomologist Dr. M. Lee Goff	Report of Dr. M. Lee Goff, March 12, 2010
Larkin, 01-05-2010	Forensic pathologist Dr. Glenn Larkin	Dr. Glenn M. Larkin's "Affidavit for Petitioner," January 5, 2010

Kirstin Blaise Lobato #95558
In proper person
4370 Smiley Road
Las Vegas, NV 89115
C/O Michelle Ravell, Attorney in Fact
5813 Santa Catalina Ave
Las Vegas, NV 89108
702-321-3277
michelleravell@cox.net

COPY

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MAY 5 1 28 PM '10
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

KIRSTIN BLAISE LOBATO
Petitioner in proper person
v.
Warden of FMWCC and
State of Nevada

Case No. C 177394
Dept. No.
Docket

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, KIRSTIN BLAISE LOBATO say that I am the PETITIONER in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, cost or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present follow: See Petition for Writ of Habeas Corpus and appointment of Attorney.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the writ are true.

1. Are you presently employed? Yes
a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. I am employed by the Department of Corrections. My wages are $30. per month
b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No
a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes
a. If the answer is yes, state the total value of the items owned. Mandatory NDOC savings account $200. Inmate trust account $ 100.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No
a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. N/A

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury. I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF NEVADA AND THE UNITES STATES OF AMERICA THAT THE FORGOING IS TRUE AND CORRECT.

Signed at FMWCC

(signature)

4-29-10
(Date)

Inmate number 95558

Kirstin Blaise Lobato #95558
In proper person
4370 Smiley Road
Las Vegas, NV 89115
C/O Michelle Ravell, Attorney in Fact
5813 Santa Catalina Ave
Las Vegas, NV 89108
702-321-3277
michelleravell@cox.net

COPY

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CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

KIRSTIN BLAISE LOBATO
Petitioner in proper person
v.
Warden of FMWCC and
State of Nevada

Case No C177394
Dept. No. II
Docket

CERTIFICATE OF SERVICE BY MAIL

I, Michelle Ravell as Attorney in Fact for Kirstin Blaise Lobato, hereby certify, pursuant to N.R.C.P. 5(b), that on this ..6.... day of the month of May of the year 2010 I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS and AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS addressed to:

Sheryl Foster, Warden FMWCC
4370 Smiley Road
Las Vegas, NV 89115

Attorney General
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89710

David Roger
Office of the District Attorney
200 Lewis Ave
Las Vegas, NV 89101

Michelle Ravell as attorney in fact for Kirstin Blaise Lobato
.....
Signature of Petitioner

Kirstin Blaise Lobato 95558
FMWCC
c/o Michelle Ravell, Attorney in Fact
5813 Santa Catalina Ave.
Las Vegas, NV 89108
702-321-3277
michelleravell@cox.net

FILED

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CLERK OF COURT

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KIRSTIN BLAISE LOBATO, Petitioner, vs. WARDEN OF FMWCC, and THE STATE OF NEVADA, Respondent.	CASE NO. C177394 DEPT. NO. II AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS - SUPPLEMENTAL

COMES NOW Petitioner, Kirstin Blaise Lobato, and hereby moves this Court to submit the attached FINANCIAL CERTIFICATE AND INMATE TRUST ACCOUNT LEDGER which was unavailable at the time of the filing of the AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS.

The forms were processed by the NDOC and signed on May 19, 2010 and received by me at FMWCC on or about May 28, 2010

Dated this 4th day of June 2010.

Kirstin Blaise Lobato by Michelle Ravell

Kirstin Blaise Lobato 95558
FMWCC
By Michelle Ravell, Attorney in Fact
5813 Santa Catalina Ave.
Las Vegas, NV 89108
702-321-3277
michelleravell@cox.net

FINANCIAL CERTIFICATE

tnwcc

I request that an authorized officer of the institution in which I am confined, or other designated entity, such as Inmate Services for the Nevada Department of Prisons (NDOC), complete the below Financial Certificate.

I understand that:

(1) if I commence a petition for writ of habeas corpus in federal court pursuant to 28 U.S.C. § 2254, the filing fee is $5.00, and that such fee will have to be paid by me if the current account balance (line #1 below), or the average account balance (line #2 below), or the average deposits to my account (line #3), whichever is greater, is $20.00 or more;

(2) if I commence a civil rights action in federal court pursuant to 42 U.S.C. § 1983, the filing fee is $350.00, which I must pay in full; and

(a) if my current account balance (line #1 below) is $350.00 or more, I will not qualify for *in forma pauperis* status and I must pay the full filing fee of $350.00 before I will be allowed to proceed with the action;

(b) if I do **NOT** have $350.00 in my account as reflected on line #1 below, before I will be allowed to proceed with an action I will be required to pay 20% of my average monthly balance (line #2 below), or the average monthly deposits to my account (line #3 below), whichever is greater, and thereafter I must pay installments of 20% of the preceding month' s deposits to my account in months that my account balance exceeds $10.00 (if I am in the custody of the NDOC, I hereby authorize the NDOC to make such deductions from deposits to my account, and I further understand that if I have a prison job, then the 20% of my paycheck that is guaranteed to me as spendable money will be sent to the court for payment of the filing fee); and

(c) I must continue to make installment payments until the $350.00 filing fee is fully paid, without regard to whether my action is closed or my release from confinement.

TYPE OF ACTION (CHECK ONE)>>>> ☐ **CIVIL RIGHTS** ☑ **HABEAS CORPUS**

SOUTHERN NEVADA WOMENS CORRECTIONAL CENTER (SNWCC)

Kirsten Lobato	95558	Kirsten Lobato
INMATE NAME (PRINT)	**INMATE ID NUMBER**	**INMATE SIGNATURE**

1 CURRENT ACCOUNT BALANCE	122.01
2 AVERAGE MONTHLY BALANCE*	90.92
3 AVERAGE MONTHLY DEPOSITS*	113.33
4 FILING FEE (BASED ON #1, #2, OR #3, WHICHEVER IS GREATER)	5.00

*** for the past six (6) months, from all sources, including amount in any savings account that is in excess of minimum amount that must be maintained**

I hereby certify that as of this date, the above financial information is accurate for the above named inmate. (Please sign in ink in a color other than black.)

AUTHORIZED OFFICER	
5/19/2010	AAII
DATE	**TITLE**

PAGE ONE (1) OF ONE(1). **REVISED SEP 01 2006 AD.**

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Nevada Department of Corrections
INMATE FINANCIAL CERTIFICATE
INMATE TRUST ACCOUNT ACTIVITY
2009/11/20 THRU 2010/05/19

KIRSTIN B. LOBATO 95558

DATE	TYPE	FUND	DESCRIPTION	DEPOSIT	WITHDRAWAL	BALANCE
2009/11/20		TRUS2	OPENING BALANCE			.00
2009/12/18	SP	TRUS2	JPAY 12/15/09 GIFT	500.00		500.00
2009/12/23	SP	TRUS2	Store Sale - 000284825		216.19-	283.81
2009/12/28	SP	TRUS2	Store Sale - 000285423		34.50-	249.31
2009/12/30	SP	TRUS2	Store Sale - 000285583		202.01-	47.30
2010/01/05	SP	TRUS2	Store Sale - 000286118		47.30-	.00
2010/05/19		TRUS2	CLOSING BALANCE			.00
2009/11/20		TRUST	OPENING BALANCE			100.65
2009/11/20	DEP	TRUST	LOCKBOX 11/04/09	50.00		150.65
2009/11/21	SP	TRUST	Store Sale - 000281052		73.15-	77.50
2009/11/22	SP	TRUST	Store Sale - 000281163		75.64-	1.86
2009/12/01	DEP	TRUST	JPAY 11/27/09	100.00		101.86
2009/12/02	SP	TRUST	Store Sale - 000282366		99.40-	2.46
2009/12/04	PR	TRUST	PR NOV 09 INST FMWCC	30.00		32.46
2009/12/04	PR	TRUST	PR NOV 09 INST FMWCC		1.50-	30.96
2009/12/04	PR	TRUST	PR NOV 09 INST FMWCC		7.35-	23.61
2009/12/08	DEP	TRUST	LOCKBOX 11/19/09	225.00		248.61
2009/12/10	DEP	TRUST	JPAY 12/07/09	130.00		378.61
2009/12/12	SP	TRUST	Store Sale - 000283558		51.35-	327.26
2009/12/16	SP	TRUST	Store Sale - 000284144		247.53-	79.73
2009/12/18	SP	TRUST	Store Sale - 000284341		50.22-	29.51
2009/12/24	DEP	TRUST	LOCKBOX 12/07/09	60.00		89.51
2009/12/30	DEP	TRUST	JPAY 12/24/09	125.00		214.51
2010/01/05	PR	TRUST	PR DEC 09 INST FMWCC	30.00		244.51
2010/01/05	PR	TRUST	PR DEC 09 INST FMWCC		1.50-	243.01
2010/01/05	PR	TRUST	PR DEC 09 INST FMWCC		7.35-	235.66
2010/01/05	SP	TRUST	Store Sale - 000286118		5.70-	229.96
2010/01/05	DEP	TRUST	JPAY 01/02/10	100.00		329.96
2010/01/06	SP	TRUST	Store Sale - 000286163		146.04-	183.92
2010/01/12	SP	TRUST	Store Sale - 000286716		19.15-	164.77
2010/01/12	DEP	TRUST	LOCKBOX 12/24/09	30.00		194.77
2010/01/13	SP	TRUST	Store Sale - 000286781		177.64-	17.13
2010/01/21	MC	TRUST	Medical Charge		8.00-	9.13
2010/01/22	DEP	TRUST	JPAY 01/19/10	100.00		109.13
2010/01/22	DEP	TRUST	JPAY 01/19/10	125.00		234.13

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Nevada Department of Corrections
INMATE FINANCIAL CERTIFICATE
INMATE TRUST ACCOUNT ACTIVITY
2009/11/20 THRU 2010/05/19

KIRSTIN B. LOBATO 95558

DATE	TYPE	FUND	DESCRIPTION	DEPOSIT	WITHDRAWAL	BALANCE
						334.13
2010/01/26	DEP	TRUST	JPAY 01/22/10	100.00		88.88
2010/01/27	SP	TRUST	Store Sale - 000288097		245.25-	138.88
2010/01/27	DEP	TRUST	LOCKBOX 1/11/10	50.00		47.89
2010/02/03	SP	TRUST	Store Sale - 000288708		90.99-	77.89
2010/02/04	PR	TRUST	PR JAN 10 INST FMWCC	30.00		76.39
2010/02/04	PR	TRUST	PR JAN 10 INST FMWCC		1.50-	69.04
2010/02/04	PR	TRUST	PR JAN 10 INST FMWCC		7.35-	38.16
2010/02/05	SP	TRUST	Store Sale - 000288998		30.88-	34.83
2010/02/08	SP	TRUST	Store Sale - 000289257		3.33-	134.83
2010/02/08	DEP	TRUST	JPAY 02/03/10	100.00		.00
2010/02/10	SP	TRUST	Store Sale - 000289498		134.83-	100.00
2010/02/19	DEP	TRUST	JPAY 02/16/10	100.00		160.00
2010/02/23	DEP	TRUST	LOCKBOX 02/08/2010	60.00		18.29
2010/02/24	SP	TRUST	Store Sale - 000290843		141.71-	118.29
2010/02/25	DEP	TRUST	JPAY 02/22/10	100.00		1.58
2010/03/03	SP	TRUST	Store Sale - 000291610		116.71-	31.58
2010/03/05	PR	TRUST	PR FEB 10 INST FMWCC	30.00		30.08
2010/03/05	PR	TRUST	PR FEB 10 INST FMWCC		1.50-	22.73
2010/03/05	PR	TRUST	PR FEB 10 INST FMWCC		7.35-	122.73
2010/03/08	DEP	TRUST	JPAY 03/03/10	100.00		2.63
2010/03/17	SP	TRUST	Store Sale - 000293232		120.10-	.05
2010/03/19	SP	TRUST	Store Sale - 000293501		2.58-	150.05
2010/03/23	DEP	TRUST	JPAY 03/19/10	150.00		250.05
2010/03/23	DEP	TRUST	JPAY 03/20/10	100.00		310.05
2010/03/23	DEP	TRUST	LOCKBOX 03/08/2010	60.00		130.60
2010/03/24	SP	TRUST	Store Sale - 000294063		179.45-	26.68
2010/03/31	SP	TRUST	Store Sale - 000294737		103.92-	19.75
2010/03/31	PO	TRUST	POSTAGE		6.93-	13.87
2010/04/02	SP	TRUST	Store Sale - 000295006		5.88-	43.87
2010/04/05	PR	TRUST	PR MAR 10 INST FMWCC	30.00		42.37
2010/04/05	PR	TRUST	PR MAR 10 INST FMWCC		1.50-	35.02
2010/04/05	PR	TRUST	PR MAR 10 INST FMWCC		7.35-	.04
2010/04/07	SP	TRUST	Store Sale - 000295531		34.98-	220.04
2010/04/08	DEP	TRUST	JPAY 04/02/10	220.00		1.39
2010/04/14	SP	TRUST	Store Sale - 000296310		218.65-	101.39
2010/04/19	DEP	TRUST	JPAY 04/14/10	100.00		

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Nevada Department of Corrections
INMATE FINANCIAL CERTIFICATE
INMATE TRUST ACCOUNT ACTIVITY
2009/11/20 THRU 2010/05/19

KIRSTIN B. LOBATO 95558

DATE	TYPE	FUND	DESCRIPTION	DEPOSIT	WITHDRAWAL	BALANCE
2010/04/21	SP	TRUST	Store Sale - 000297049		101.17-	.22
2010/04/26	DEP	TRUST	JPAY 04/21/10	100.00		100.22
2010/04/27	DEP	TRUST	LOCKBOX 04/12/2010	60.00		160.22
2010/04/28	SP	TRUST	Store Sale - 000297770		116.95-	43.27
2010/04/30	SP	TRUST	Store Sale - 000298000		43.16-	.11
2010/05/07	DEP	TRUST	JPAY 05/04/10	100.00		100.11
2010/05/10	PR	TRUST	PR APR 10 INST FMWCC	30.00		130.11
2010/05/10	PR	TRUST	PR APR 10 INST FMWCC		1.50-	128.61
2010/05/10	PR	TRUST	PR APR 10 INST FMWCC		7.35-	121.26
2010/05/12	SP	TRUST	Store Sale - 000299093		111.69-	9.57
2010/05/13	DEP	TRUST	JPAY 05/10/10	10.00		19.57
2010/05/14	SP	TRUST	Store Sale - 000299338		7.56-	12.01
2010/05/17	DEP	TRUST	JPAY 05/12/10	110.00		122.01
2010/05/19		TRUST	CLOSING BALANCE			122.01

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Nevada Department of Corrections
INMATE FINANCIAL CERTIFICATE
2009/11/20 THRU 2010/05/19

KIRSTIN B. LOBATO 95558

TRAN DATE	DAILY BALANCE	DAILY DEPOSITS	NUMBER OF DEPOSITS
2009/11/20	150.65	.00	0
2009/11/21	77.50	.00	0
2009/11/22	1.86	.00	0
2009/11/23	1.86	.00	0
2009/11/24	1.86	.00	0
2009/11/25	1.86	.00	0
2009/11/26	1.86	.00	0
2009/11/27	1.86	.00	0
2009/11/28	1.86	.00	0
2009/11/29	1.86	.00	0
2009/11/30	1.86	.00	0
2009/12/01	101.86	.00	0
2009/12/02	2.46	.00	0
2009/12/03	2.46	.00	0
2009/12/04	23.61	30.00	1
2009/12/05	23.61	.00	0
2009/12/06	23.61	.00	0
2009/12/07	23.61	.00	0
2009/12/08	248.61	.00	0
2009/12/09	248.61	.00	0
2009/12/10	378.61	.00	0
2009/12/11	378.61	.00	0
2009/12/12	327.26	.00	0
2009/12/13	327.26	.00	0
2009/12/14	327.26	.00	0
2009/12/15	327.26	.00	0
2009/12/16	79.73	.00	0
2009/12/17	79.73	.00	0
2009/12/18	29.51	500.00	1
2009/12/19	29.51	.00	0
2009/12/20	29.51	.00	0
2009/12/21	29.51	.00	0
2009/12/22	29.51	.00	0
2009/12/23	29.51	.00	0
2009/12/24	89.51	.00	0
2009/12/25	89.51	.00	0

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Nevada Department of Corrections
INMATE FINANCIAL CERTIFICATE
2009/11/20 THRU 2010/05/19

KIRSTIN B. LOBATO 95558

TRAN DATE	DAILY BALANCE	DAILY DEPOSITS	NUMBER OF DEPOSITS
2009/12/26	89.51	.00	0
2009/12/27	89.51	.00	0
2009/12/28	89.51	.00	0
2009/12/29	89.51	.00	0
2009/12/30	214.51	.00	0
2009/12/31	214.51	.00	0
2010/01/01	214.51	.00	0
2010/01/02	214.51	.00	0
2010/01/03	214.51	.00	0
2010/01/04	214.51	.00	0
2010/01/05	329.96	30.00	1
2010/01/06	183.92	.00	0
2010/01/07	183.92	.00	0
2010/01/08	183.92	.00	0
2010/01/09	183.92	.00	0
2010/01/10	183.92	.00	0
2010/01/11	183.92	.00	0
2010/01/12	194.77	.00	0
2010/01/13	17.13	.00	0
2010/01/14	17.13	.00	0
2010/01/15	17.13	.00	0
2010/01/16	17.13	.00	0
2010/01/17	17.13	.00	0
2010/01/18	17.13	.00	0
2010/01/19	17.13	.00	0
2010/01/20	17.13	.00	0
2010/01/21	9.13	.00	0
2010/01/22	234.13	.00	0
2010/01/23	234.13	.00	0
2010/01/24	234.13	.00	0
2010/01/25	234.13	.00	0
2010/01/26	334.13	.00	0
2010/01/27	138.88	.00	0
2010/01/28	138.88	.00	0
2010/01/29	138.88	.00	0
2010/01/30	138.88	.00	0

5/19/10
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Nevada Department of Corrections
INMATE FINANCIAL CERTIFICATE
2009/11/20 THRU 2010/05/19

KIRSTIN B. LOBATO 95558

TRAN DATE	DAILY BALANCE	DAILY DEPOSITS	NUMBER OF DEPOSITS
2010/01/31	138.88	.00	0
2010/02/01	138.88	.00	0
2010/02/02	138.88	.00	0
2010/02/03	47.89	.00	0
2010/02/04	69.04	30.00	1
2010/02/05	38.16	.00	0
2010/02/06	38.16	.00	0
2010/02/07	38.16	.00	0
2010/02/08	134.83	.00	0
2010/02/09	134.83	.00	0
2010/02/10	.00	.00	0
2010/02/11	.00	.00	0
2010/02/12	.00	.00	0
2010/02/13	.00	.00	0
2010/02/14	.00	.00	0
2010/02/15	.00	.00	0
2010/02/16	.00	.00	0
2010/02/17	.00	.00	0
2010/02/18	.00	.00	0
2010/02/19	100.00	.00	0
2010/02/20	100.00	.00	0
2010/02/21	100.00	.00	0
2010/02/22	100.00	.00	0
2010/02/23	160.00	.00	0
2010/02/24	18.29	.00	0
2010/02/25	118.29	.00	0
2010/02/26	118.29	.00	0
2010/02/27	118.29	.00	0
2010/02/28	118.29	.00	0
2010/03/01	118.29	.00	0
2010/03/02	118.29	.00	0
2010/03/03	1.58	.00	0
2010/03/04	1.58	.00	0
2010/03/05	22.73	30.00	1
2010/03/06	22.73	.00	0
2010/03/07	22.73	.00	0

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2009/11/20 THRU 2010/05/19

KIRSTIN B. LOBATO 95558

TRAN DATE	DAILY BALANCE	DAILY DEPOSITS	NUMBER OF DEPOSITS
2010/03/08	122.73	.00	0
2010/03/09	122.73	.00	0
2010/03/10	122.73	.00	0
2010/03/11	122.73	.00	0
2010/03/12	122.73	.00	0
2010/03/13	122.73	.00	0
2010/03/14	122.73	.00	0
2010/03/15	122.73	.00	0
2010/03/16	122.73	.00	0
2010/03/17	2.63	.00	0
2010/03/18	2.63	.00	0
2010/03/19	.05	.00	0
2010/03/20	.05	.00	0
2010/03/21	.05	.00	0
2010/03/22	.05	.00	0
2010/03/23	310.05	.00	0
2010/03/24	130.60	.00	0
2010/03/25	130.60	.00	0
2010/03/26	130.60	.00	0
2010/03/27	130.60	.00	0
2010/03/28	130.60	.00	0
2010/03/29	130.60	.00	0
2010/03/30	130.60	.00	0
2010/03/31	19.75	.00	0
2010/04/01	19.75	.00	0
2010/04/02	13.87	.00	0
2010/04/03	13.87	.00	0
2010/04/04	13.87	.00	0
2010/04/05	35.02	30.00	1
2010/04/06	35.02	.00	0
2010/04/07	.04	.00	0
2010/04/08	220.04	.00	0
2010/04/09	220.04	.00	0
2010/04/10	220.04	.00	0
2010/04/11	220.04	.00	0
2010/04/12	220.04	.00	0

001932

5/19/10
13:18:32

Nevada Department of Corrections
INMATE FINANCIAL CERTIFICATE
2009/11/20 THRU 2010/05/19

KIRSTIN B. LOBATO 95558

TRAN DATE	DAILY BALANCE	DAILY DEPOSITS	NUMBER OF DEPOSITS
2010/04/13	220.04	.00	0
2010/04/14	1.39	.00	0
2010/04/15	1.39	.00	0
2010/04/16	1.39	.00	0
2010/04/17	1.39	.00	0
2010/04/18	1.39	.00	0
2010/04/19	101.39	.00	0
2010/04/20	101.39	.00	0
2010/04/21	.22	.00	0
2010/04/22	.22	.00	0
2010/04/23	.22	.00	0
2010/04/24	.22	.00	0
2010/04/25	.22	.00	0
2010/04/26	100.22	.00	0
2010/04/27	160.22	.00	0
2010/04/28	43.27	.00	0
2010/04/29	43.27	.00	0
2010/04/30	.11	.00	0
2010/05/01	.11	.00	0
2010/05/02	.11	.00	0
2010/05/03	.11	.00	0
2010/05/04	.11	.00	0
2010/05/05	.11	.00	0
2010/05/06	.11	.00	0
2010/05/07	100.11	.00	0
2010/05/08	100.11	.00	0
2010/05/09	100.11	.00	0
2010/05/10	121.26	30.00	1
2010/05/11	121.26	.00	0
2010/05/12	9.57	.00	0
2010/05/13	19.57	.00	0
2010/05/14	12.01	.00	0
2010/05/15	12.01	.00	0
2010/05/16	12.01	.00	0
2010/05/17	122.01	.00	0
2010/05/18	122.01	.00	0

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5/19/10
13:18:32

Nevada Department of Corrections
INMATE FINANCIAL CERTIFICATE
2009/11/20 THRU 2010/05/19

KIRSTIN B. LOBATO 95558

TRAN DATE	DAILY BALANCE	DAILY DEPOSITS	NUMBER OF DEPOSITS
2010/05/19	122.01	.00	0

001934

5/19/10
13:18:32

Nevada Department of Corrections
INMATE FINANCIAL CERTIFICATE
INMATE TRUST ACCOUNT ACTIVITY
2009/11/20 THRU 2010/05/19

KIRSTIN B. LOBATO 95558

DATE	TYPE	FUND	DESCRIPTION	DEPOSIT	WITHDRAWAL	BALANCE
2009/11/20		TRUS2	OPENING BALANCE			.00
2009/12/18	GP	TRUS2	JPAY 12/15/09 GIFT	500.00		500.00
2009/12/23	SP	TRUS2	Store Sale - 000284825		216.19-	283.81
2009/12/28	SP	TRUS2	Store Sale - 000285423		34.50-	249.31
2009/12/30	SP	TRUS2	Store Sale - 000285583		202.01-	47.30
2010/01/05	SP	TRUS2	Store Sale - 000286118		47.30-	.00
2010/05/19		TRUS2	CLOSING BALANCE			.00
2009/11/20		TRUST	OPENING BALANCE			100.65
2009/11/20	DEP	TRUST	LOCKBOX 11/04/09	50.00		150.65
2009/11/21	SP	TRUST	Store Sale - 000281052		73.15-	77.50
2009/11/22	SP	TRUST	Store Sale - 000281163		75.64-	1.86
2009/12/01	DEP	TRUST	JPAY 11/27/09	100.00		101.86
2009/12/02	SP	TRUST	Store Sale - 000282366		99.40-	2.46
2009/12/04	PR	TRUST	PR NOV 09 INST FMWCC	30.00		32.46
2009/12/04	PR	TRUST	PR NOV 09 INST FMWCC		1.50-	30.96
2009/12/04	PR	TRUST	PR NOV 09 INST FMWCC		7.35-	23.61
2009/12/08	DEP	TRUST	LOCKBOX 11/19/09	225.00		248.61
2009/12/10	DEP	TRUST	JPAY 12/07/09	130.00		378.61
2009/12/12	SP	TRUST	Store Sale - 000283558		51.35-	327.26
2009/12/16	SP	TRUST	Store Sale - 000284144		247.53-	79.73
2009/12/18	SP	TRUST	Store Sale - 000284341		50.22-	29.51
2009/12/24	DEP	TRUST	LOCKBOX 12/07/09	60.00		89.51
2009/12/30	DEP	TRUST	JPAY 12/24/09	125.00		214.51
2010/01/05	PR	TRUST	PR DEC 09 INST FMWCC	30.00		244.51
2010/01/05	PR	TRUST	PR DEC 09 INST FMWCC		1.50-	243.01
2010/01/05	PR	TRUST	PR DEC 09 INST FMWCC		7.35-	235.66
2010/01/05	SP	TRUST	Store Sale - 000286118		5.70-	229.96
2010/01/05	DEP	TRUST	JPAY 01/02/10	100.00		329.96
2010/01/06	SP	TRUST	Store Sale - 000286163		146.04-	183.92
2010/01/12	SP	TRUST	Store Sale - 000286716		19.15-	164.77
2010/01/12	DEP	TRUST	LOCKBOX 12/24/09	30.00		194.77
2010/01/13	SP	TRUST	Store Sale - 000286781		177.64-	17.13
2010/01/21	MC	TRUST	Medical Charge		8.00-	9.13
2010/01/22	DEP	TRUST	JPAY 01/19/10	100.00		109.13
2010/01/22	DEP	TRUST	JPAY 01/19/10	125.00		234.13

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CLERK OF THE COURT

RSPN
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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

KIRSTIN BLAISE LOBATO,
#1691351

Defendant.

CASE NO: 01C177394-1

DEPT NO: II

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: 09-30-10
TIME OF HEARING: 10:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through WILLIAM D. KEPHART, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On August 9, 2001, Kirstin Blaise Lobato, hereinafter "Defendant," was charged by way of Information with Murder With Use of a Deadly Weapon (Open Murder) and Sexual Penetration of a Dead Human Body. Defendant's jury trial began on May 7, 2002. On May 18, 2002, Defendant was found guilty of First Degree Murder With Use of a Deadly Weapon and Sexual Penetration of a Dead Human Body. On August 27, 2002, Defendant was sentenced as follows: Count 1 - First Degree Murder With Use of a Deadly Weapon, to a maximum of fifty (50) years and a minimum parole eligibility of twenty (20) years plus and equal and consecutive term for use of a deadly weapon; Count 2 – Sexual Penetration of a Dead Human Body, to a maximum of fifteen (15) years and a minimum parole eligibility of five (5) years, to run concurrently with Count 1; further, a Special Sentence of Lifetime Supervision imposed to commence upon release of any term of probation, parole, or imprisonment; two hundred thirty-three (233) days credit for time served. A Judgment of Conviction (Jury Trial) was filed September 16, 2002.

Defendant filed a Notice of Appeal on October 15, 2002. On September 3, 2004, the Nevada Supreme Court reversed Defendant's conviction and remanded for a new trial. Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004). Remittitur issued on September 24, 2004.

Defendant's second trial began on September 11, 2006. On October 6, 2006, Defendant was found guilty of Voluntary Manslaughter With Use of a Deadly Weapon and Sexual Penetration of a Dead Human Body. On February 2, 2007, Defendant was sentenced as follows: Count 1 – Voluntary Manslaughter With Use of a Deadly Weapon, to a maximum of one hundred twenty (120) months with a minimum parole eligibility of forty-eight (48) months, plus and equal and consecutive term for the use of a deadly weapon; Count 2 – Sexual Penetration of a Dead Human Body, to a maximum of one hundred eighty (180) months with a minimum parole eligibility of sixty (60) months, Count 2 to run consecutive to Count 1, with one thousand five hundred forty-four (1,544) days credit for

time served. It was further ordered that a special sentence of lifetime supervision be imposed upon release from any term of imprisonment, probation, or parole. Additionally, Defendant was ordered to register as a sex offender upon any release from custody.

Defendant filed a Notice of Appeal on March 12, 2007. On February 5, 2009, the Nevada Supreme Court affirmed Defendant's conviction. Defendant filed a petition for rehearing which was denied on March 27, 2009. Defendant filed a petition for en ban reconsideration which was denied on May 19, 2009. Remittitur issued on October 14, 2009. Defendant filed the instant petition on May 5, 2010.

ARGUMENT

I
DEFENDANT'S CLAIMS OF NEWLY DISCOVERED EVIDENCE DO NOT WARRANT RELIEF (GROUNDS 1-21 & 23)

Defendant presents twenty-one (21) separate claims of new evidence. In each separate claim, Defendant infers that she is entitled to a new trial. Defendant also alleges, in Ground 23, this evidence shows she is "actually innocent." As discussed below, Defendant's claims are without merit.

A. Defendant must raise new evidence within two years of verdict.

In so far as Defendant is requesting a new trial based upon newly discovered evidence, such evidence must be raised within two years of verdict. NRS 176.515(3). The verdict in this case was rendered on October 6, 2006. The instant petition was filed on May 5, 2010, over three years later. As such, Defendant's request for a new trial is untimely. While NRS 176.515(3) pertains to motions for a new trial based upon newly discovered evidence, it has been applied by the Nevada Supreme Court to habeas petitions in so much as they request a new trial. See Browning v. State, 120 Nev. 347, 91 P.3d 39 (2004).

Moreover, "to merit a new trial, newly-discovered evidence must be evidence that could not have been discovered through reasonable diligence either before or during trial." D'Agostino v. State, 112 Nev. 417, 423, 915 P.2d 264, 267 (1996) (citing Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991)). The evidence must not be cumulative and

be such that it would render a different result at trial probable. Pacheco v. State, 81 Nev. 639, 408 P.2d 715 (1965). All "new evidence" Defendant has provided in grounds 1-22 could have clearly been discovered through reasonable diligence and raised in a timely manner and/or is cumulative.

B. Defendant has not satisfied the actual innocence standard.

Actual innocence is an extraordinary claim in which the defendant has presented new evidence "that constitutional error has caused the conviction of an innocent person." Schlup v. Delo, 513 U.S. 298, 324, 115 S.Ct. 851, 865 (1995). In Calderon v. Thompson, 523 U.S. 538, 560, 118 S.Ct. 1489, 1503 (1998), the U.S. Supreme Court held that in order for a defendant to obtain a reversal of his conviction based on a claim of actual innocence, he must prove that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence presented in habeas proceedings." (Quoting Schlup v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 867 (1995)); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

The United States Supreme Court has further noted that "actual innocence" means factual innocence and not mere legal insufficiency. See Bousley v. United States, 523 U.S. 614, 623-624 (1998). To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial. Calderon, 523 U.S. at 559 (quoting Shulp, 513 U.S. at 324). True claims of actual innocence are "extremely rare" and found only in the most "extraordinary cases." Schulp v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995).

In its Order of Affirmance, the Nevada Supreme Court determined that there was sufficient evidence to support Defendant's conviction. Order of Affirmance 2/5/09 p. 2. As such, Defendant must present new evidence which would undermine the jury's verdict. As discussed below, Defendant has not made colorable showing of actual innocence.

1. New entomology evidence (Grounds 1-3).

Dr. Simms testified that rigor mortis, a stiffening of the muscles, begins a few hours after death and at twenty-four hours, the body is completely stiff. Then in the next 8 to 12 hours after the body is completely stiff, it will start to become flaccid again. The coroner's

investigator declared the victim, Duran Bailey ("Bailey"), dead at 3:50 a.m. on July 9, 2001. Dr. Simms examined the body 8 hours later. During his examination, there was a complete absence of rigor mortis. Based upon the amount of rigor mortis that was present at the scene and the amount of decomposition, Bailey died within 8 to 24 hours from the time he was examined at the scene. 9/19/06 TT 144-145.

Defendant claims that due to an alleged lack of insect eggs or bites on Bailey's body, he absolutely had to have died after sundown on July 8, 2001. However, these experts are basing their opinions on an examination of photos several years after the fact. Dr. Simms based his opinion on an actual examination of Bailey's body and medical science, as opposed to entomology. Rigor mortis is a biological fact. Bailey's body was completely flaccid during the autopsy, and it takes approximately twenty-four hours for the body to become stiff. Thus, if Bailey had died between 8 p.m. and 10 p.m. on July 8th rigor mortis would have been setting in for 14-16 hours. Bailey's body could not have been completely flaccid by noon on July 9th. Defendant makes no attempt to contradict Dr. Simms' testimony concerning rigor mortis nor does she claim it is inaccurate. She has simply provided expert opinions based upon an examination of photographs years later. This does not undermine the jury's findings.

Furthermore, Defendant's entire argument relies on the State's alleged concession during closing arguments that Defendant was not in Las Vegas by 11:30 a.m. on July 8, 2001. This is the fatal flaw in Defendant's claims. Closing arguments are not evidence. Jury instruction no. 41 states:

> Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, **whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be...**

It is the jury's duty to make the ultimate determination as to what the evidence shows and to judge the credibility of witnesses. Just because the State presents an inference of the evidence does not mean the jury agreed. The State's argument assumed the jury found

Defendant's alibi witnesses which placed her in Panaca at that time credible, which it may not have. Moreover, the State went on to argue that Defendant was back in Las Vegas later that evening (10/5/06 TT 130-131), which is the time frame Defendant claims Bailey was killed.

These experts' declarations do nothing more than rebut the expert testimony of Dr. Simms as to when Bailey died. Post-trial affidavits are "obtained without the benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring). Furthermore, they simply reinforce Defendant's theory of the case and testimony that was already presented at trial that she was not in Las Vegas when the murder occurred. Defendant has not shown that she is actually innocent of the offense, but rather that there are experts who may disagree with the conclusions reached by other experts at trial. It is clear that Defendant has failed to show that it is more likely than not that no reasonable juror would have convicted her in light of this evidence.

2. Dr. Redlich's opinion on Defendant's "false confession" (Ground 4).

Dr. Redlich's opinion that Defendant's statement to the police was not a confession is irrelevant, inadmissible testimony. Post-trial affidavits are "obtained without the benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring).

First, Dr. Redlich simply peruses over the evidence already adduced at trial and relays her subjective opinion that Defendant was "[confessing] to an assault in which she was the alleged victim and in which she defended herself by attempting to cut the penis off of a man who was allegedly sexually assaulting her...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." Dr. Redlich's statement is nothing more than a redundant, subjective opinion which points out the differences between Defendant's statement and the facts of Bailey's murder, which was already done at trial. Clearly, it does not take an expert

witness to perform this function. As such, this is not new evidence, just the same evidence presented in a different form.

Second, as even Dr. Redlich admits[1], Defendant's theory of the case was that her statement pertained to a separate event and was not a "confession." "[C]laiming that one's statements have been misconstrued is not the same as claiming that one made a false statement. Expert testimony about false confessions is only relevant when a party claims that he confessed to something he did not do." In re Detention of Law, 146 Wash.App. 28, 41, 204 P.3d 230, 236 (Wash.App. Div. 1,2008). Defendant does not claim that she confessed to something she did not do; rather that she was discussing a separate event. As such, Dr. Redlich's opinion is irrelevant and clearly does not meet the Calderon standard.

Defendant also attempts to rely on polygraph examinations administered to her and her mother, Rebecca Lobato, in 2001. It is for the jury to determine witness credibility and ultimate issues of fact, i.e. Ms. Lobato's guilt, and not a polygraph examiner. Moreover, polygraph results are inadmissible at trial unless there is a written stipulation signed by the prosecuting attorney, the defendant, and defense counsel. Jackson v. State, 116 Nev. 334, 997 P.2d 121 (2000). Finally, Doug Twinning's voluntary statement is also insufficient to meet the Calderon standard.

3. Cumulative alibi witness evidence (Ground 5).

Defendant has provided several voluntary statements of witnesses who claim that she confided in them about cutting a man's penis prior to Bailey's death. Defendant attempted to have several of the same witnesses testify at trial to this exact issue, and it was precluded by the district court as inadmissible. Defendant challenged this issue on direct appeal and stated that it violated her constitutional rights. Appellant's Opening Brief, p. 24-26. The Nevada Supreme Court rejected this argument and affirmed the district court. Order of Affirmance 2/5/09, p. 2 fn. 1.

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[1] Dr. Redlich states, "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..." (Pet. Ex. 5, p. 2)

The Nevada Supreme Court's ruling on this issue constitutes the law of the case. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hall, 91 Nev. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). As this evidence is clearly inadmissible it cannot satisfy the Calderon standard. While Defendant has provided affidavits from additional witnesses, this is merely cumulative and inadmissible evidence.

4. Cumulative alibi witness evidence (Ground 6).

At trial, Defendant presented a multitude of alibi witnesses, several unrelated to her, who testified that that she and her vehicle were in Panaca on July 6, 7, and 8th. 9/15/06 TT 86; 9/20/06 TT 97; 9/29/06 TT 8, 85-95, 125; 10/2/06 TT 8, 23, 58; 10/3/06 TT 89-93, 113, 129-133, 196; 10/4/06 TT 79-125. Additional alibi witnesses which are merely cumulative do not show she is actually innocent of the offense. The fact that these witnesses are not related to Defendant does not make their testimony unimpeachable or unbiased. Moreover, post-trial affidavits are "obtained without the benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring). Defendant again discusses the results of a polygraph exam in this claim. As discussed above, this is without merit.

5. Evidence that Bailey was allegedly murdered by more than one assailant and who were skilled with medical knowledge or animal husbandry (Ground 7).

Defendant has provided an affidavit from Dr. Larkin which declares his opinion that the murder was committed by more than one perpetrator, and at least one was skilled with medical knowledge or animal husbandry. Post-trial affidavits are "obtained without the

benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring). Defendant again confuses evidence which rebuts the State's theory with evidence of actual innocence. An expert's opinion that the murder was committed by more than one person because of "poor lighting" is, quite frankly, absurd. This is not based upon any sort of medical opinion and not in the purview of expert medical testimony. Moreover, even if there were two separate acts of mutilation, this does not preclude a single perpetrator, and multiple perpetrators does not preclude Defendant from being one of those perpetrators.

Dr. Larkin's opinion that the perpetrator had medical knowledge was also alluded to by Dr. Laufer. Dr. Laufer testified that it was his opinion that the injuries were calculated. This was based on the fact that one of the major vessels in Bailey's neck, the carotid artery, was cut through. He stated, "it certainly appears that it was either a very lucky one or someone knew what they were cutting." In other words, the perpetrator had knowledge of anatomy. As such, the jury was already presented with this type of evidence. To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial. Calderon, 523 U.S. at 559 (quoting Shulp, 513 U.S. at 324).

Dr. Larkin's declaration does nothing more than rebut the expert testimony of Dr. Simms as to when and how Bailey's wounds were inflicted. Defendant has not shown that she is actually innocent of the offense, but rather that there are experts who may disagree with the conclusions reached by other experts at trial. It is clear that Defendant has failed to show that it is more likely than not that no reasonable juror would have convicted her in light of this evidence.

6. Evidence that Bailey was allegedly alive when anally penetrated with the knife.

Dr. Simms testified at trial that Bailey's wounds to his anus were inflicted post-mortem. 9/19/06 TT 86. Defendant has presented an affidavit from Dr. Larkin which disagrees with that conclusion. Post-trial affidavits are "obtained without the benefit of

cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring). Dr. Simms' testimony was based on the fact that Bailey's rectal wound did not have any significant bleeding associated with it. 9/19/06 TT 86. This was based on an actual physical examination of Bailey's body. Dr. Larkin's opinion is based upon an examination of reports and photographs.

Moreover, Dr. Larkin's declaration does nothing more than rebut the expert testimony of Dr. Simms as to when and how Bailey's wounds were inflicted. Defendant has not shown that she is actually innocent of the offense, but rather that there are experts who may disagree with the conclusions reached by other experts at trial. In fact, Defendant's own expert at trial, Dr. Laufer, testified that he believed Bailey's pants were up when he was killed making it impossible for the wound to Bailey's anus to be inflicted while he was alive. 9/26/06 TT 78. It is clear that Defendant has failed to show that it is more likely than not that no reasonable juror would have convicted her in light of this evidence.

7. Possibility of two separate attacks (Ground 9).

Defendant's argument concerning the "possibility" that Bailey was subjected to two separate attacks is insufficient to meet the Calderon standard. Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. First, Defendant fails to explain how or why this amounts to her actual innocence of the crime. Defendant merely states that "if the jury had known that in the last two hours of Bailey's life he experienced two grave injury causing events that could have been separated by his last meal, and that there are reasonable alternate scenarios to Bailey's death supported by evidence that excludes the petitioner, the jury would have had a factual basis to reject the prosecutions argument." Alternate and possible scenarios are insufficient to show actual innocence. Defendant's arguments are merely an attempt to rebut the State's theory and are based upon speculation. "Actual innocence" means factual

innocence and not mere legal insufficiency. See Bousley v. United States, 523 U.S. 614, 623-624 (1998).

8. Dr. Larkin's affidavit does not establish a claim of actual innocence (Ground 10).

Defendant summarizes Dr. Larkin's affidavit in Ground 10. Many of his conclusions have already been discussed above. Post-trial affidavits are "obtained without the benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring). Defendant again confuses evidence which rebuts the State's theory with evidence of actual innocence. Furthermore, many of Dr. Larkin's opinions are not based upon medical science, i.e. one perpetrator held a light while another killed Bailey or Defendant could not have defended herself against the "streetwise" Bailey. As such, this court should view Dr. Larkin's affidavit with an even greater amount of skepticism.

Dr. Larkin's declaration does nothing more than rebut the expert testimony of Dr. Simms as to when and how Bailey's wounds were inflicted. Defendant has not shown that she is actually innocent of the offense, but rather that there are experts who may disagree with the conclusions reached by other experts at trial. This is further demonstrated by the fact that Dr. Larkin states that he believes Bailey's wounds were inflicted with a knife where Defendant's own expert at trial, Dr. Laufer, testified that he believed scissors caused Bailey's injuries. 9/26/06 TT 54-137; 9/28/06 TT 65-149. It is clear that Defendant has failed to show that it is more likely than not that no reasonable juror would have convicted her in light of this evidence.

9. Forensic Shoe evidence (Grounds 11-12).

Defendant argues that George Schiro's conclusions concerning the footwear impression evidence establish her claim of actual innocence. Post-trial affidavits are "obtained without the benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring). Defendant's expert at trial, Brent Turvey,

testified as follows:

> Q: Mr. Turvey, why is or why are the bloody footwear impression so significant in your opinion?
>
> A: Because they are strongly associated with the crime and the actual area of the crime scene.
>
> Q: And are you aware of whether or not those footwear impressions were linked to Ms. Lobato?
>
> A: They were not. They - - there's a report by a former FBI footwear print examiner, and he was very clear in the fact that the footwear patters were much too large to have been let by her and they weren't associated with any of the footwear that was seized from Ms. Lobato. So that's no match for the footwear to the footwear patters found at the scene.

10/2/06 TT 123-124. Mr. Turvey also testified that he was "embarrassed to mention the possibility" that the impressions could have been left by someone other than the person who killed Bailey. 10/2/06 TT 196-197. A new expert testifying to the same ultimate conclusions or opinions is not new evidence. To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial. Calderon, 523 U.S. at 559 (quoting Shulp, 513 U.S. at 324). Even though Mr. Turvey did not specialize in footwear impressions he was still qualified as an expert in forensics, and he specifically mentioned Mr. Schiro's report in his testimony. Despite being presented with this evidence, the jury still found Defendant guilty beyond a reasonable doubt, and the Nevada Supreme Court rejected Defendant's insufficiency of the evidence claim on direct appeal.

10. Neither George Schiro's nor Dr. Lewis's affidavits support a claim of actual innocence (Grounds 13 and 18).

Defendant summarizes Mr. Schiro's affidavit which is nothing more than cumulative evidence that was already presented at trial and rejected by the jury. Every single point summarized by Mr. Schiro is that there was no physical evidence found linking Defendant or her vehicle to the crime scene. Mr. Turvey provided extensive testimony to this effect at trial. 10/2/06 TT 86-191. Dr. Lewis's opinion that he believes more damage would have been caused to victim's mouth and teeth if a bat had been used in the attack is also cumulative as Dr. Laufer provided the same testimony at trial. 9/28/06 TT 127. To be

credible, a claim of actual innocence must be based on reliable evidence not presented at trial. Calderon, 523 U.S. at 559 (quoting Shulp, 513 U.S. at 324). Different experts providing substantially the same testimony is not new evidence.

Moreover, Mr. Schiro's scenario of how he believes the crime occurred is not evidence of who committed the crime but how it was committed and does nothing more than rebut testimony provided by Dr. Simms which indicated the evidence was consistent with Bailey standing or kneeling when he received the injury to his scrotum. 9/19/06 TT 127-128. Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. Defendant also, again, attempts to rely on the State's theory presented during closing argument. This is the fatal flaw in Defendant's claims as closing arguments are not evidence. Defendant has not shown that she is actually innocent of the offense, but rather that there are experts who may disagree with the conclusions reached by other experts at trial. It is clear that Defendant has failed to show that it is more likely than not that no reasonable juror would have convicted her in light of this evidence.

11. Evidence that Bailey did not live in the trash enclosure (Ground 14).

Defendant's claim that Bailey did not live in the trash enclosure does not establish a claim of actual innocence. The State did not argue that Bailey lived in the trash enclosure and that was how Defendant knew where to find him. In reality, the State argued that "She's down there and somehow she comes into contact with Duran Bailey. And somehow they end up back at his place, the trash dumpster where he would stay sometimes on the weekends." 10/5/06 TT 122. Moreover, Defendant's "new evidence" is an affidavit from an individual named Steven King which is nothing more than his belief as to what happened to Duran Bailey, even though he was not a witness to the crime and his entire affidavit is speculative at best. To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial. Calderon, 523 U.S. at 559 (quoting Shulp, 513 U.S. at 324). Post-trial

affidavits are "obtained without the benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring). Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.

Even if Bailey did not live in the trash enclosure, substantial evidence was presented which showed he frequently spent time there. 9/14/06 TT 61, 68; 9/28/06 TT 24. Moreover, Defendant fails to present a cogent argument as to how or why the possibility that Bailey did not actually live in the trash enclosure presents a colorable claim of actual innocence. Defendant simply alleges that the jury would have a factual basis to have a reasonable doubt. This is an argument of legal insufficiency and not actual innocence. As such, Defendant's claim must fail.

12. The availability of methamphetamine in Panaca (Ground 15).

Whether or not methamphetamine is available in Panaca is not new evidence which would undermine the jury's verdict. It is highly likely that the jury was already aware that illegal narcotics are available in Lincoln County, Nevada. Defendant's argument merely attacks the State's theory of the case and is tenuous at best. As such, this is an argument of legal insufficiency and Defendant has failed to satisfy the Calderon standard.

13. New third party culprit evidence (Grounds 16-17).

Defendant presented evidence at trial in an attempt to implicate several Hispanic individuals as those responsible for Bailey's murder. 9/28/06 TT 7-62. Defendant's new evidence is the affidavit of Steven King in which he declares his belief that the Hispanic males were responsible for Bailey's murder and that Defendant is innocent. Post-trial affidavits are "obtained without the benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring).

Moreover, even if Mr. King had testified at trial, his belief as to what occurred would be irrelevant, speculative, and inadmissible evidence. He was not a witness to Bailey's murder and the ultimate conclusions laid out in his affidavit are based on hearsay. Mr. King's testimony is also cumulative and simply repeats much of the testimony of Diann Parker. Defendant also presents a scenario of what "could have happened," as she does throughout her petition. This does not support a claim of actual innocence. Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.

Defendant has also provided an excerpt from an "injustice blog" which outlines an anonymous individual's belief as to how Duran Bailey was murdered and provides a borderline racist essay of Hispanic culture. Obviously, this is irrelevant, inadmissible, and speculative evidence which does not support a claim of actual innocence. Defendant has also provided an affidavit of a Mr. Martin Yant in support of her arguments. Mr. Yant alleges he has access to an online database which allows him to look up any individual's social security number. This is also irrelevant evidence which does not present a claim of actual innocence.

Finally, Defendant claims that evidence which shows that checks which were written from Bailey's bank account were cashed after his death proves her innocence. However, there is no evidence presented which shows who cashed those particular checks, who they were written to, or when they were written. The argument that it must have been the perpetrator of the crime is speculative and tenuous at best.

14. NRS 201.450 (Ground 19).

In Defendant's direct appeal after her first trial she challenged NRS 201.450 as overly broad, void for vagueness as applied and/or should be narrowly construed. Defendant has done nothing more than rehashed her arguments from her previous direct appeal. The Nevada Supreme Court found these arguments to be without merit. Lobato, 120 Nev. at 522, 96 P.3d at 772. The Nevada Supreme Court's ruling on this issue constitutes the law of the

case per Hall and it may not be revisited. Moreover, Defendant's "new evidence" is not evidence of factual innocence but an allegation of legal insufficiency. As such, it does not satisfy the Calderon standard.

15. Juror misconduct (Ground 20).

Defendant's allegation of juror misconduct is not evidence of factual innocence but an allegation of legal insufficiency. As such, it does not satisfy the Calderon standard.

16. Witness perjury (Ground 21).

Defendant presents allegations and "new evidence" that Detective Thowsen committed perjury concerning his search for NRS 629.041 reports, contacting hospitals, contacting urologists, investigating the Budget Suites Hotel, and his investigation of the Hispanic men. These are bare allegations which do not entitled Defendant to relief per Hargrove.

Furthermore, Defendant challenged Detective Thowsen's testimony concerning these issues on direct appeal under hearsay grounds. The Nevada Supreme Court agreed with Defendant, however, it also determined that any error was harmless due to her admissions. Order of Affirmance 2/5/09, p. 2-5. The Court's ruling on this issue constitutes the law of the case per Hall. As such, the admission of this testimony was harmless beyond a reasonable doubt no matter what theory Defendant uses to make her argument.

II

DEFENDANT'S ALLEGATIONS IN CLAIMS 22 & 24 ARE WITHOUT MERIT

Defendant claims she is the victim of a conspiracy between the Clark County District Attorney's Office and the Las Vegas Metropolitan Police Department to convict her despite a belief in her innocence and that she was convicted based on false evidence. Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. Defendant has provided no support for these claims, and they are nothing more than accusations extrapolated from the evidence discussed in

Section I. As such, it is a bare allegation which is also belied by the record.

III
DEFENDANT'S BRADY CLAIMS ARE WITHOUT MERIT (GROUNDS 25 & 26)

In Brady v. Maryland, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. 1194. The duty to disclose such evidence is applicable even though there has been no request by the accused, United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392 (1976); and the duty encompasses impeachment evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682, 105 S.Ct. 3375; see also Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S.Ct. 1555 (1995).

Because Brady does not require bad faith on the part of the prosecution for a violation of due process, the rule encompasses evidence "known only to police investigators and not to the prosecutor." Kyles, 514 U.S. at 438, 115 S.Ct. 1555. In order to comply with Brady, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Id. at 437, 115 S.Ct. 1555.

The United States Supreme Court uses a three-part test to measure whether a failure to disclose amounts to a Brady violation: (1) the evidence at issue must be "favorable" to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the suppressed evidence must be "material" under state law to the accused's guilt or punishment—e.g., prejudice must have ensued. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936 (1999); see also United States v. Cooper, 173 F.3d 1192, 1202 (9th Cir.1999).

First, Defendant provides a convoluted analysis as to her belief that Duran Bailey was a confidential informant. The only support provided for this claim is a telephone number found on Bailey's person with the letter "D" next to it, which may have meant detective, and a an affidavit which states it belongs to a law enforcement officer. This is a bare allegation with no factual basis for support, which is insufficient for relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Moreover, Defendant has failed to demonstrate how such information, if true, would have rendered a more favorable out come at trial. Defendant presented ample evidence which alleged that Bailey was killed by someone other than her, and she was still found guilty beyond a reasonable doubt. Providing the jury with the tenuous possibility that Bailey was killed by someone angry at him for working with law enforcement with no evidence to support such a claim is highly unlikely to have altered the outcome of the trial.

Second, Defendant claims that the State failed to disclose that there was "no such person as Daniel Martinez." The only evidence provided in support of this is Defendant's claims of a private investigator having access to any social security number in the United States and sheer speculation. Moreover, the fact that the Hispanic individuals, now claimed by Defendant to be "the real killers," may or may not have been in this country illegally is irrelevant as to whether or not they were likely to have attacked Bailey. As such, this alleged evidence is neither favorable nor material.

IV

DEFENDANT'S COUNSEL PROVIDED EFFECTIVE ASSISTANCE

In order to assert a claim for ineffective assistance of counsel a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). See also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the Defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432,

683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

In considering whether trial counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once such a reasonable inquiry has been made by counsel, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280, citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

Based on the above law, the court begins with the presumption of effectiveness and then must determine whether or not the defendant has demonstrated by "strong and convincing proof" that counsel was ineffective. Homick v State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996), citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981); Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991). The role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977).

This analysis does not mean that the court "should second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the

possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S.Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992), citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2066; see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), citing Strickland, 466 U.S. at 687. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., citing Strickland, 466 U.S. at 687-89, 694.

A. Counsel's Failure to Investigate (Grounds 27-31).

A defendant who contends that her attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533, 538 (2004). Also, "[w]here counsel and the client in a criminal case clearly understands the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources." Id. 120 Nev. at 192, 87 P.3d at 538.

Defendant has listed several areas where she claims her counsel should have investigated: 1) the Hispanic individuals Diann Parker testified about, 2) phone numbers found on Bailey's person, 3) Bailey's bank records, 4) Diann Parker's fingerprints and DNA, and 5) reports filed under NRS 629.041. Several of these claims have been discussed in Section I, and Defendant's bare assertions do not show how an investigation into these areas would have

rendered a more favorable outcome or led to any useful information. Defendant's claims are supported by nothing more than speculation and must be rejected.

B. Counsel's Failure to Call Witnesses and Subpoena Records in Order to Impeach Detective Thowsen (Grounds 32-34).

Defendant claims her counsel should have called Detective La Rochelle and Detective Thowsen's secretary and subpoenaed LVMPD documents in order to impeach his testimony. However, it is defense counsel's ultimate responsibility of deciding if and when to object and which witnesses to call, if any. Rhyne, 118 Nev. 1, 9, 38 P.3d 163, 168. Moreover, Defendant has not provided anything which would suggest how either witness would have testified if called. Defendant has also not provided anything which would suggest exactly what records were to be subpoenaed or what information they would have provided. As such, she has failed to show how such an action would have rendered a more favorable outcome. Molina, 120 Nev. at 192, 87 P.3d at 538. In so far as Defendant complains of Detective Thowsen's testimony concerning reports of other stabbings or conversations with urologists and medical providers, the Nevada Supreme Court has already determined that this testimony was harmless beyond a reasonable doubt, and this constitutes the law of the case per Hall.

C. Counsels Failure to Object to or Move to Exclude Evidence of Defendant's Drug Use (Ground 35).

Evidence was presented that Bailey was a drug dealer and would often trade narcotics for sexual intercourse. 9/28/06 TT 34. Evidence was also presented that he would be the one to acquire the drugs. Id. As such, he at least knew where to buy drugs, and a reasonable inference can be made that if he knew where to acquire crack cocaine he would also know where to acquire methamphetamine. Defendant's methamphetamine habit was relevant to show why she went back to Las Vegas and the circumstances of her encounter with Bailey. If Bailey was to trade narcotics for sexual intercourse with Defendant, he likely would have traded the specific drugs she used. The specific type of drugs Bailey used was irrelevant. As such, filing any motion to preclude or objection to evidence of Defendant's drug use would

have been futile since that was highly relevant to the State's theory of the case. See NRS 48.025. Counsel cannot be deemed ineffective for failing to make futile objections. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

D. Counsel's Failure to File a Motion for Discovery (Ground 36).

Defendant argues that her trial counsel was ineffective for failing to file a motion for all discoverable materials. However, there was no need to file such a motion. The Clark County District Attorney's Office has an open file policy. As such, defense counsel already had access to all discoverable materials. Thus, this claim is moot.

E. Counsel's Failure to File a Motion to Dismiss Count 2 (Ground 37).

Defendant claims her counsel was ineffective for failing to move to dismiss her charge of violating NRS 201.450 and recycles her previous arguments concerning this issue. As discussed above, the Nevada Supreme Court rejected her claims concerning NRS 201.450 on direct appeal. As such, any such motion would have been futile, and counsel cannot be deemed ineffective per Ennis.

F. Counsel's Failure to Present Expert Witnesses (Grounds 38-41).

Defendant argues her counsel should have called 1) a forensic entomologist, 2) a psychologist, 3) a forensic pathologist, and 4) a forensic scientist. It is defense counsel's ultimate responsibility of deciding if and when to object and which witnesses to call, if any. Rhyne, 118 Nev. 1, 9, 38 P.3d 163, 168. "An attorney representing a criminal defendant has the authority to control the presentation of the defense." Id. (quoting People v. Alcala, 4 Cal.4th 742, 15 Ca.Rptr.2d 432, 842 P.2d 1192, 1232 (1992)).

Furthermore, even if defense counsel fell below an objective standard of reasonableness, Defendant cannot show prejudice. Each claim addressed in grounds 38-41 pertains to the new evidence Defendant raises in the instant petition. As discussed in section I, this evidence is either inadmissible or would not have led to a different outcome at trial.

G. Counsel's Cross-Examination of Dr. Simms (Ground 42).

Defendant claims defense counsel should have cross-examined Dr. Simms concerning his preliminary hearing testimony. First, Dr. Simms testimony at the preliminary hearing was

not substantially different than his testimony during trial. He stated he believed Bailey was likely killed within 12 hours of his discovery, which comports with the 8-24 hour window he testified to at trial. Second, the manner of cross-examination is for defense counsel to determine and is an unchallengeable strategic decision. Rhyne, 118 Nev. 1, 38 P.3d 163; Strickland, 466 U.S. 668, 104 S.Ct. 2052.

H. Counsel's Failure to Object to State's Expert Witnesses (Ground 43).

Defendant claims that the State's witnesses Wahl, Ford, Renhard, or Paulette were not properly noticed as experts in luminol and/or phenolphthalein testing. However, this claim is inaccurate. All witnesses were noticed as experts in the field of crime scene analysis which includes luminol and/or phenolphthalein testing. As such, any such objection would have been futile, and counsel cannot be deemed ineffective per Ennis. Moreover, all reports concerning such testing were provided to the defense through discovery, and these witnesses clearly qualify as experts in this field.

I. Counsel's Failure to Enter Defendant's Shoes into Evidence (Ground 44).

Defendant's allegation that her attorney was ineffective for failing to enter her black shoes into evidence at trial is without merit. The jury was presented evidence concerning these shoes through witness testimony. Moreover, Defendant's arguments concerning this evidence goes towards the issue that no physical evidence was presented which connected her to the scene. Ample evidence and arguments of this fact was already presented at trial, and this would have merely been cumulative. Furthermore, defense counsel has the ultimate authority to control the presentation of defense. Rhyne, 118 Nev. 1, 9, 38 P.3d 163, 168.

J. Counsel's Failure to Object to Butterfly Knife Evidence (Ground 45).

Defense counsel's "insistence" on the entry of the butterfly knife into evidence was a strategic decision per Strickland and unchallengeable. Defendant presented evidence that the murder weapon was scissors instead of a knife. 9/28/06 TT 65-149. Defense counsel was allowing the jury to view the knife in an attempt to lead them to that same determination. Moreover, Defendant's argument that Detective Thowsen should have been noticed as an expert witness is misplaced, as he did not provide expert testimony. As such, any such

objection would have been futile, and counsel cannot be deemed ineffective per Ennis.

K. Defense Counsel's Failure to Vouch for Alibi Witness's Credibility and Failure to Argue for the Admission of Hearsay Testimony (Ground 46).

Defendant's arguments in Ground 46 are clearly without merit. First, Defendant claims her counsel should have argued that her alibi witness was credible. This type of argument would have been improper as counsel may not vouch for the veracity of a witness. See Rowland v. State, 118 Nev. 31, 39 P.3d 114 (2002). Moreover, Defendants arguments concerning the preclusion of the offered hearsay evidence were addressed and rejected by the Nevada Supreme Court in her direct appeal. Order of Affirmance 2/5/09, p.2 fn. 1. The Court's ruling on this issue constitutes the law of the case per Hall and may not be revisited. As such, any such objection would have been futile, and counsel cannot be deemed ineffective per Ennis.

L. Defense Counsel's Failure to Object to Detective Thowsen's testimony (Grounds 47-48).

Defendant claims that Detective Thowsen should have been noticed as an expert witness, and that his testimony was improper opinion testimony. First, defense counsel objected to this testimony as outside the scope of the detective's expertise and it was overruled. 9/27/06 TT 70-71. Defendant also raised this issue on Direct Appeal, and it was rejected by the Nevada Supreme Court. Order of Affirmance 2/5/09, p.2 fn. 1. The Nevada Supreme Court's ruling on this issue constitutes the law of the case. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hall, 91 Nev. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). As such, even if defense counsel

fell below an objective standard of reasonableness Defendant was not prejudiced.

Defendant also claims her counsel was ineffective for failing to object to Detective Thowsen's testimony that he did not do further investigation at the Budget Suites because he knew "it happened on West Flamingo." Defendant fails to provide a basis upon which to object to this answer. Detective Thowsen was simply stating there was no reason to search for a witness to Bailey's murder at the Budget Suites since it was absolutely clear from the evidence that Bailey was killed in the trash enclosure. As such, any such objection or motion for mistrial would have been futile, and counsel cannot be deemed ineffective per Ennis. Moreover, even if this answer was objectionable, any such error is harmless since the detective's disbelief in Defendant's statement concerning her alleged attack at the Budget Suites was abundantly clear to the jury as Defendant was arrested and charged with Bailey's murder. Defendant's claims regarding Dr. Redlich's affidavit are without merit as discussed above.

M. Failure to Object to Prosecutorial Misconduct (Ground 49).

When questioning Detective Thowsen, the State referred to Defendant's statement as a confession. Defendant argues that this constituted misconduct, however she fails to explain how or why. Moreover, the standard of review for prosecutorial misconduct rests upon Defendant showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)).

A prosecutor's statement alone cannot be a basis for overturning a criminal conviction.

> [A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statement or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial.' In addition, should this court determine that improper comments were made by the prosecutor, 'it must be...determined whether the errors were harmless beyond a reasonable doubt. The constitution guarantees a fair trial, not necessarily a perfect trial. It is not enough that the prosecutor's remarks are undesirable. Thus, the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process.

Green v. State, 113 Nev. 157, 169-170, 931 P.2d 54, 62 (1997) (modified on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 200 (2000) (internal citations omitted)). Defendant must show that the statements violated a clear and unequivocal rule of law, she was denied a substantial right, and as a result, she was materially prejudiced. Libby, 109 Nev. at 911, 859 P.2d at 1054. In this instance Defendant cannot make the requisite showing.

The prosecutor's reference to Defendant's statement as a "confession" is clearly not improper. Under State v. Green, 81 Nev. 173, 400 P.2d 766 (1965), the prosecutor has the right to comment on testimony, to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows. Id. at 176. The prosecutor was merely asking the jury to draw an inference from the evidence that Defendant's statement was indeed an admission to Bailey's murder, as opposed to a description of a different event. This is not improper, and any objection by defense counsel would have been futile. As such, defense counsel was not ineffective per Ennis.

N. Counsel's Failure to Impeach Detective Thowsen (Ground 50).

Defense counsel cross-examined Detective Thowsen on his investigation pertaining to the Budget Suites and any reports or incidents of injuries to an individual's groin or penis. Defense counsel elicited testimony from the detective concerning the fact that he had no record of those actions. 9/27/06 TT 83-139. Defendant is focusing on one line of testimony in her first trial that "everything that was done in the case" was contained in the detectives "homicide book." Defendant is playing with semantics, and has done nothing more than attempt to turn a general statement into a "gotcha" moment. As such, any such attempt would likely have been unsuccessful. Furthermore, the manner of cross-examination is for defense counsel to determine and is an unchallengeable strategic decision. See Rhyne, 118 Nev. 1, 38 P.3d 163; Strickland, 466 U.S. 668, 104 S.Ct. 2052.

O. Counsel's Failure to Object to Detective Thowsen's Hearsay Testimony (Ground 51).

Defendant challenged Detective Thowsen's testimony pertaining to his investigation of other reports of incidents of a severed or slashed penis on direct appeal. The Nevada

Supreme Court agreed. However, it concluded that any such error in admitting the testimony was harmless and/or invited error. Order of Affirmance 2/5/09 p. 3-5. The Court's ruling on this issue constitutes the law of the case per Hall and it may not be revisited. As such, even if defense counsel's failure to object fell below an objective standard of reasonableness Defendant cannot show prejudice.

P. Counsel's Failure to Object and Move for a Mistrial (Ground 52).

Defendant basically charges Deputy District Attorney William Kephart, Deputy District Attorney Sandra DiGiacomo, Detective Thowsen, and the Honorable Valorie J. Vega, District Court Judge, of engaging in a conspiracy to suborn perjury. These are nothing more than bare, unfounded, and false allegations which are insufficient for relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Any such motion for a mistrial would have been futile, and counsel cannot be deemed ineffective per Ennis. Moreover, Detective Thowsen's testimony concerning the "629.041 searches" was deemed harmless by the Nevada Supreme Court on direct appeal. Order of Affirmance 2/5/09 p. 3-5. The Court's ruling on this issue constitutes the law of the case per Hall and it may not be revisited. As such, even if defense counsel's failure to object fell below an objective standard of reasonableness Defendant cannot show prejudice.

Q. Counsel's Failure to Impeach Detective Thowsen (Ground 53).

Defendant provides a lengthy and incomprehensible analysis as to her belief that, again, Detective Thowsen committed perjury and that her attorney was ineffective in impeaching him. First, Defendant fails to explain how counsel was to have impeached Detective Thowsen. See Molina v. State, 120 Nev. 185, 87 P.3d 533, 538 (2004). She again plays with semantics and apparently believes that testimony which relays the same information as prior testimony must use identical words, otherwise it is evidence of perjury. Moreover, Defendant's discussion of the differences between the trash enclosure and the holding cell is inconsequential and irrelevant. The jury was provided with photographs of both and could make its own determination of the evidence.

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R. Counsel's Failure to File a Pre-Trial Motion or Cross-Examine Detective Thowsen to Learn of How He Became Aware of Defendant's Prior Sexual Abuse (Ground 54).

Defendant argues that her counsel was ineffective for failing to make efforts to determine the source of his information concerning her prior sexual abuse. Defendant further claims this would have somehow rendered her waiver of her *Miranda* rights involuntary. The manner of cross-examination is for defense counsel to determine and is an unchallengeable strategic decision. See Rhyne, 118 Nev. 1, 38 P.3d 163; Strickland, 466 U.S. 668, 104 S.Ct. 2052. Defendant also states that the records **may** have been sealed, and Detective Thowsen **may** have obtained the information illegally. Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. Defendant also fails to present a cogent argument as to how the manner in which Detective Thowsen acquired the information makes her *Miranda* waiver involuntary.

Moreover, Defendant challenged the admission of her statement as involuntary based upon this exact same argument that the psychological tactic rendered her statement involuntary, and it was rejected by the Nevada Supreme Court. Lobato, 120 Nev. at 522, 96 P.3d at 772. The Court's ruling on this issue constitutes the law of the case per Hall, and it may not be revisited. Any attempt by defense counsel to preclude her statement would have been futile. As such, defense counsel was not ineffective per Ennis, and defendant cannot show prejudice.

S. Defense Counsel's Failure to Impeach Laura Johnson's Credibility (Ground 55).

Defendant claims her counsel should have cross-examined Laura Johnson on the inconsistencies between her statement/testimony and the statements of Dixie Tienken and Defendant. The manner of cross-examination is for defense counsel to determine and is an unchallengeable strategic decision. See Rhyne, 118 Nev. 1, 38 P.3d 163; Strickland, 466 U.S. 668, 104 S.Ct. 2052. Moreover, the jury was made aware of any such inconsistencies in

witness testimony through direct examination of each witness and the admission of Defendant's statement into evidence. Defendant also claims that her counsel should have inquired as to Johnson's disbelief in her guilt. Johnson's opinion was irrelevant, and would have been improper testimony, thus any motion to elicit such testimony would have been futile, and counsel cannot be deemed ineffective per Ennis.

T. Counsel's Failure to Investigate the Availability of Methamphetamine in Las Vegas (Ground 56).

A defendant who contends that her attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533, 538 (2004). Defendant has failed to show how a better investigation by her attorney as to where methamphetamine was available in Las Vegas would have rendered a more favorable outcome at trial. The supposition that methamphetamine was only available in "Naked City" and that anyone attempting to acquire the drug would always acquire it in that particular location is absurd. Moreover, the fact that methamphetamine was available in other areas of Las Vegas is an obvious fact and is unlikely to have rendered a more favorable outcome reasonably probable.

U. Counsel's Failure to Object to Zachary Robinson's Testimony (Ground 57).

Zachary Robinson testified that after reviewing the security records of the Budget Suites Hotel there was an absence of any reports of an occurrence similar to Bailey's murder. 9/28/06 TT 159-203. Defendant claims her counsel should have objected on hearsay grounds. However, this testimony was clearly admissible under NRS 51.135 and NRS 51.145. As such, any such objection would have been futile, and counsel cannot be deemed ineffective per Ennis.

V. Counsel's Failure to Obtain the State's "Liar's List" (Ground 58).

Defendant presents a bare allegation that the State keeps records pertaining to the veracity of police officers, which she dubs a "liar's list," and all documents pertaining to any disciplinary actions or mental health issues he may have had. Claims asserted in a petition

for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. As such, Defendant is not entitled to relief.

W. Counsel's Failure to Move for a Directed Acquittal per NRS 175.381 (Ground 59).

Any motion for a directed acquittal per NRS 175.381 would have clearly been futile. Moreover, Defendant challenged her conviction on the basis of insufficient evidence on direct appeal which was rejected by the Nevada Supreme Court. Order of Affirmance 2/5/09 p. 2 fn. 1. As such, defense counsel cannot be cannot be deemed ineffective per Ennis.

X. Counsel's Failure to Object to Jury Instructions 26 and 33 (Ground 60).

Defendant claims counsel should have objected to jury instruction no. 26 because it shifted the burden of proof. The instruction reads as follows:

> 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. Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your deliberation.

Pet. Ex. 78. Identical instructions have been upheld by the Nevada Supreme Court. See Weber v. State, 121 Nev. 554, 119 P.3d 107 (2005); see also Walker v. State, 113 Nev. 853, 944 P.2d 762 (1997). As such, any such objection would have been futile, and defense counsel cannot be deemed ineffective per Ennis.

Defendant also alleges her counsel should have objected to instruction no. 33 for the same reasons. The instruction reads as follows:

> You are here to determine the guilt or innocence of the Defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more persons are also guilty.

Pet. Ex. 80. Identical instructions have been upheld by the Nevada Supreme Court. See Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992). As such, any such objection would have been futile, and defense counsel cannot be deemed ineffective per Ennis. Moreover, even if defense counsel was ineffective for failing to object to these instructions Defendant was not prejudiced since the jury was given proper instructions on reasonable doubt and the State's burden. Pet. Ex. 79.

Y. Defense Counsel's Failure to Object to Instruction No. 31 (Ground 61).

Defendant provides a convoluted analysis as to her belief that jury instruction no. 31 was deficient and her counsel was ineffective for failing to object to it. Instruction no. 31 reads as follows:

> The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense. 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. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation. If you have a reasonable doubt as to the guilt of the Defendant, she is entitled to a verdict of not guilty.

Pet. Ex. 79. This exact instruction has been repeatedly upheld by the Nevada Supreme Court. See Cutler v. State, 93 Nev. 329, 337, 566 P.2d 809, 813-14 (1977); see also Bollinger v. State, 111 Nev. 1110, 1114-15, 901 P.2d 671, 674 (1995); Lord v. State, 107 Nev. 28, 38-40, 806 P.2d 548, 554-56 (1991). Moreover, NRS 175.221 mandates that no other definition of reasonable may be given. As such, any such objection would have been futile, and defense counsel cannot be deemed ineffective per Ennis.

Z. Defense Counsel's Failure to Submit an Alternative Instruction on NRS 201.450 (Grounds 62-63).

Jury instruction no. 24 reads as follows:

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> 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.

Pet. Ex. 77. This instruction comports word for word with NRS 201.450. Defendant's argument that sexual intent is an element of the crime and that the perpetrator must "rape" a dead body crime is erroneous. The Nevada Supreme Court has already held that the plain meaning of NRS 201.450 was to punish the act of sexual penetration of a dead human body regardless of motive.

> We also do not believe that NRS 201.450-which is popularly known as the "necrophilia" statute, although that term appears nowhere in the text of the statute-is intended only to apply to medically classifiable "necrophiles." The plain meaning of the statute is to punish the act of sexual penetration of a dead human body, regardless of motive.

Doyle v. State, 112 Nev. 879, 899 fn. 8, 921 P.2d 901, 914 fn. 8 (1996) (overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004)).

More importantly, during Defendant's first trial, she proposed jury instructions which added the element of sexual gratification to the offense. The district court rejected the instruction. On direct appeal, the Nevada Supreme Court rejected the same arguments on this issue Defendant has presented in the instant petition. Lobato, 120 Nev. 512, 522, 96 P.3d 765, 772 (citing Doyle, supra). The instruction was proper, and any objection or alternative instruction lodged by defense counsel would have been futile. As such, he cannot be deemed ineffective per Ennis.

AA. Defense Counsel Failed to Argue That the State had not Proven Each Essential Element of the Charge in Closing (Ground 64).

The United States Supreme Court has held that ineffective assistance of counsel claims may be extended to closing arguments. See Bell v. Cone, 535 U.S. 685, 701-702, 122 S.Ct. 1843 (2002). However, "counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly

important because of the broad range of legitimate defense strategy at that stage." Yarborough v. Gentry, 540 U.S. 1, 5-6, 124 S.Ct. 1, 4 (2003). As such, "judicial review of a defense attorney's summation is therefore highly deferential." Id. Moreover, defense counsel's decisions as to what to emphasize in his closing argument is a strategic decision per Strickland. See also Rhyne, supra.

Defendant claims her counsel was ineffective for failing to argue that the State had to prove Defendant was at the scene of the murder at the time it occurred. However, this is an obvious fact which is not outside the jury's common sense. Furthermore, defense counsel spent ample time arguing Defendant was not in Las Vegas at the time of the murder due to her alibi witnesses. 10/5/06 TT 150-185. As such, counsel was not ineffective.

BB. Counsel's Failure to Object During State's Opening (Ground 65).

A prosecutor may not make statements in opening arguments which cannot be proved at trial. Rice v. State, 113 Nev. 1300, 1312, 949 P.2d 262, 270 (1997) (modified on other grounds by Richmond v. State, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002)). However, misconduct does not lie unless such a statement is made in bad faith. Id. at 1312-1313, 949 P.2d at 270. Defendant presents a myriad of what she claims are "falsehoods" in Pet. Ex. 79. Many are simply an attempt at playing with semantics, the rest are the State's interpretation of what the evidence will show. The fact that Defendant may have a different interpretation of the evidence and what she believes was proved at trial is immaterial. As such, any objections to the State's opening statement would have been improper per Ennis. Furthermore, it is a sound defense strategy to wait until the end of trial and hold the State to account for proving matters presented in its opening and is unchallengeable per Strickland. Finally, Defendant has failed to show any statements which are even remotely questionable were made in bad faith.

CC. Defense Counsel's Failure to Object to State's Argument Concerning Bailey's Head Wounds During Closing Arguments (Ground 66).

Defendant obviously disagrees with the State's interpretation of the evidence presented at trial. However, this is not grounds for an objection. As such, any such objection

would have been futile per Ennis, and counsel could not be deemed ineffective. Moreover, defense counsel may argue his interpretation of the evidence during his own closing argument, and the resolution of the different interpretations is for the jury.

DD. Defense Counsel's Failure to Object to Alleged Prosecutorial Misconduct (Ground 67).

Defendant claims the prosecutor committed misconduct by expressing his personal opinion and her counsel was ineffective for failing to object. During rebuttal, the prosecutor urged the jury to convict Defendant of First Degree Murder. "Statements by the prosecutor, in argument, indicative of his opinion, belief, or knowledge as to the guilt of the accused, when made as a deduction or conclusion from the evidence introduced in the trial, are permissible and unobjectionable." Domingues v. State, 112 Nev. 683, 696, 917 P.2d 1364, 1373 (Nev.,1996) (citing Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971)).

Here, the prosecutor was simply providing his belief in Defendant's guilt as a conclusion from the evidence presented. In fact, immediately following this statement the prosecutor explained how Defendant's confession was corroborated. 10/5/06 TT 213-214. As such, no misconduct occurred, and any such objection by defense counsel would have been futile, and counsel cannot be deemed ineffective per Ennis. Moreover, even if the court should find that statement constituted misconduct it constitutes harmless error. The fact that the prosecutor had a belief in Defendant's guilt was already apparent to the jury.

EE. Defense Counsel's Failure to Object to Alleged Prosecutorial Misconduct (Ground 68).

During closing arguments, the prosecutor referenced the fact that several alibi witnesses had not testified before. Defendant claims this constituted misconduct and her counsel was ineffective for failing to object. It is improper for a prosecutor to call a witness or the defendant a liar. See Ross v. State, 106 Nev. 924, 927-928, 803 P.2d 1104, 1106 (1990); see also Skiba v. State, 114 Nev. 612, 614, 959 P.2d 959, 960 (1998). However, "when a case involves numerous material witnesses and the outcome depends on which witnesses are telling the truth, reasonable latitude should be given to the prosecutor to argue

the credibility of the witness-even if this means occasionally stating in argument that a witness is lying." Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002).

This case is a prime example, as Defendant admits in her petition repeatedly, of a case which depends on the credibility of the witnesses. Moreover, the prosecutors did not call Defendant's alibi witnesses liars but merely brought the jury's attention to the fact that their testimony was new. 10/5/06 TT 137, 190. There is nothing wrong with these arguments in the context of arguing the credibility of these witnesses. See Id. As such, no misconduct occurred, and any such objection by defense counsel would have been futile. Defense counsel cannot be deemed ineffective for failing to make futile objections per Ennis.

FF. Defense Counsel's Failure to Object to Alleged Prosecutorial Misconduct (Ground 69).

The State argued in closing that the positive presumptive tests for blood in Defendant's car were physical evidence linking her to the crime scene. Defendant claims that this was a false argument amounting to prosecutorial misconduct and her counsel was ineffective for failing to object. Under State v. Green, 81 Nev. 173, 400 P.2d 766 (1965), the prosecutor has the right to comment on testimony, to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows. Id. at 176. The prosecutor was simply asking the jury to draw the inference that even though the substance which reacted to the presumptive tests could not be confirmed as blood that it was indeed blood. This is not a false argument as testimony was provided that even though the confirmatory test is negative it doesn't necessarily mean the substance is not blood. 9/25/06 TT 167. As such, any objection would have been futile, and counsel cannot be deemed ineffective per Ennis.

GG. Defense Counsel's Failure to Object to Alleged False Arguments Made by the State (Ground 70).

Defendant has provided a series of baseless, bare allegations that the State made over 250 improper or false arguments. Many of these claims have already been discussed above. Claims asserted in a petition for post-conviction relief must be supported with specific

factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. All of Defendant's claims are without merit. As such, defense counsel cannot be deemed ineffective for failing to make futile objections or motions. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

HH. Defense Counsel's Failure to Retain a Dental Expert (Ground 71).

Dr. Simms testified at trial that he would have expected more injures to Bailey's face had he been struck with a bat, however it was conceivable that Bailey was hit with a bat. 9/19/06 TT 132. Defense witness Dr. Laufer testified that he also believed that more damage would have been caused and that "if you happen to hit the person when his mouth is open and his lips are out of the way and you only hit the teeth, the teeth would fracture." 9/28/06 TT 127-128. As such, Dr. Lewis's opinion is cumulative. He simply states it is his opinion that a baseball bat was not used, not that it wasn't possible. Pet. Ex. 100. Post-trial affidavits are "obtained without the benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring). As such, defense counsel was not ineffective. Moreover, it is defense counsel's ultimate responsibility of deciding which witnesses to call, if any. Rhyne, 118 Nev. 1, 9, 38 P.3d 163, 168.

II. Defense Counsel's Failure to File a Motion for Judgment of Acquittal per NRS 175.381(2) (Ground 72).

Defendant argues that her counsel was ineffective for failing to file a motion for judgment of acquittal per NRS 175.381(2) due to insufficient evidence. However, any such motion would have been futile, and counsel cannot be deemed ineffective per Ennis. Moreover, it should be noted that Defendant raised the issue of insufficiency of the evidence on appeal, and the Nevada Supreme Court rejected that claim. Order of Affirmance 2/5/09 p. 2 fn. 1.

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JJ. Failure to Conduct Post-Trial DNA Testing (Ground 73).

Defendant seems to have alleged that her counsel conducted an inadequate post-trial investigation. Defendant must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533, 538 (2004). Also, "[w]here counsel and the client in a criminal case clearly understands the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources." Id. 120 Nev. at 192, 87 P.3d at 538. Defendant has failed to show how this investigation would have benefited her. As such, counsel was not ineffective.

KK. Ineffective Assistance of Appellate Counsel (Grounds 74-76).

The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S.Ct. 830, 836-837 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim ineffective assistance of appellate counsel the defendant must satisfy the two-prong test set forth by Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

Further, there is a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See, United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. The Nevada Supreme Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). Finally, in order to prove that appellate counsel's alleged error was prejudicial; the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

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The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). However, the defendant does not have a constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion the Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751 -752, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. 753, 103 S.Ct. at 3313. The Court also held that, "for judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S.Ct. at 3314.

First, Defendant claims that her appellate counsel was ineffective for failing to argue that there was insufficient evidence to support her conviction. However, counsel did indeed raise this claim, and it was rejected by the Nevada Supreme Court. Order of Affirmance 2/5/09 p. 2 fn. 1. As such, this claim is belied by the record.

Second, Defendant claims her appellate counsel was ineffective for failing to argue on appeal that the district court abused its discretion in denying her motion to suppress her statements to police. However, counsel did indeed raise this claim, and it was rejected by the Nevada Supreme Court. Order of Affirmance 2/5/09 p. 2 fn. 1. As such, this claim is belied by the record. Defendant's arguments regarding the law of the case doctrine are nonsensical and must be rejected.

Finally, Defendant claims her appellate counsel was ineffective for failing to argue in her petition for rehearing that the Nevada Supreme Court's ruling was based upon a false assumption of fact. This is a frivolous argument which would not have had a reasonable probability of success.

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V

THERE IS NO CUMULATIVE ERROR AS TO WARRANT RELIEF (GROUND 77)

Defendant argues that the series of alleged errors amounts to reversible error. However, Defendant has failed to make out a valid claim or present any cogent arguments for any of the issues she has raised. Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854 - 855 (2000); see also Big Pond v. State, 101 Nev. 1, 692 P.2d 1288 (1985).

Defendant is unable to satisfy the test laid out in Mulder. She has not shown that any errors actually occurred throughout the adjudication of this case. She has only made bare allegations, and there is no reasonable question of Defendant's guilt. A defendant "is not entitled to a perfect trial, but only a fair trial..." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975), *citing* Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974). Here, Defendant received a fair trial, and all errors alleged are without merit. Therefore, her claim of cumulative error must fail.

VI

DEFENDANT'S CLAIMS OF NEW EVIDENCE DO NOT WARRANT RELIEF (GROUND 78)

As discussed in Section I, Defendant's claims of new evidence are untimely per NRS 176.515(3) and insufficient to satisfy the Calderon standard. As such, she is not entitled to relief. Moreover, Defendant is unable to satisfy the test laid out in Mulder. She has not shown that any errors actually occurred throughout the adjudication of this case or that her claims of new evidence entitle her to relief. She has only made bare allegations, and there is no reasonable question of Defendant's guilt. A defendant "is not entitled to a perfect trial, but only a fair trial..." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975), *citing* Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974). Here, Defendant received a fair trial, and all errors and claims of new evidence alleged are without merit.

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VII

DEFENDANT'S VAGUE ALLEGATIONS DO NOT WARRANT RELIEF (GROUND 79).

Defendant makes a series of vague and unsupported charges against her counsel, going so far as to infer the possibility of some sort of a conspiracy on the part of her counsel to convict her. Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. Moreover, NRS 34.735(6) states:

> You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

Defendant clearly has done nothing more, throughout her entire petition, than provide conclusory statements and allegations. This is insufficient to entitle her to relief, and her petition must be denied.

VIII

THE APPOINTMENT OF COUNSEL IS IN THE DISCRETION OF THE COURT

In Coleman v. Thompson, 501 U.S. 722 (1991), the United States Supreme Court ruled that the Sixth Amendment provides no right to counsel in post-conviction proceedings. In McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996). The Nevada Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution."

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NRS 34.750 provides, in pertinent part:

> "[a] petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
> (a) The issues are difficult;
> (b) The Defendant is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery." (emphasis added).

Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel. McKague specifically held that with the exception of cases in which appointment of counsel is mandated by statute[2], one does not have "[a]ny constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164.

The Nevada Supreme Court has observed that a petitioner "must show that the requested review is not frivolous before he may have an attorney appointed." Peterson v. Warden, Nevada State Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS 177.345(2)). As such, it is within the discretion of this court to grant or deny Defendant's request for the appointment of counsel.

IX

AN EVIDENTIARY HEARING IS NOT REQUIRED

Defendant's motion for an evidentiary hearing should be denied since Defendant has not proven she is entitled to an evidentiary hearing and no such hearing has been granted. Defendant desires an evidentiary hearing to use as a discovery tool so that she may develop information to support her Petition for Writ of Habeas Corpus (Post-Conviction). However, this is contrary to the purpose of an evidentiary hearing.

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[2] See NRS 34.820(1)(a) [entitling appointed counsel when petition is under a sentence of death].

NRS 34.770 provides the manner in which the district court decides a post conviction proceeding:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.

As argued above, Defendant has set forth only bare allegations. That does not warrant an evidentiary haring. See Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994). As such, Defendant's request should be denied.

CONCLUSION

Based on the foregoing arguments, Defendant's petition must be denied.

DATED this 20th day of August, 2010.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ William D. Kephart
WILLIAM D. KEPHART
Chief Deputy District Attorney
Nevada Bar #003649

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 20th day of August, 2010, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

KIRSTIN LOBATO, #95558
FMWCC
4370 Smiley Road
N. Las Vegas, NV 89115

BY: /s/ J. Georges
Secretary for the District Attorney's Office

"Well -- and then his pants are down around his ankles, and the blood stops after she gets down to the point"
(9 App. 1742; Trans. XIX 196 (10-5-06))
Misstates two facts not in evidence. Bailey's pants were not around his ankles, and blood was on the waistband of his pants.

"How else do you smell that unless you're right next to the person"?
(9 App. 1742; Trans. XIX 196 (10-5-06))
States facts not in evidence. No expert testified how close you must be to a person to smell them.

"She says in her statement the man's towering over me. Well, if she's on her knees he would be towering over her".
(9 App. 1742; Trans. XIX 197 (10-5-06))
States two facts not in evidence. Blaise said in her statement that she was knocked to the ground and her attacker was on top of her. Blaise does not state in her statement that her attacker was "towering over me," or that she was on her knees at any time.

"You know, no one is gonna do this to me. No one"
(9 App. 1742; Trans. XIX 197 (10-5-06))
Two statements of facts not in evidence. There is nothing in Blaise's statement or testimony that says this and no expert or witness testified to this.

"It's happened to me before, that's why I have a knife."
(9 App. 1742; Trans. XIX 197 (10-5-06))
Two statements of facts not in evidence. There is nothing in Blaise's statement or testimony that Blaise had ever "before" been bum rushed in a parking lot by a man who smelled like dirty diapers. There is nothing in her statement that says she had ever "before" willingly entered a trash enclosure with a man for any purpose. There is nothing that says that this has happened to her before. The testimony was the knife was given to her as a present by her father.

"She walked away and she looked back and saw him crying. Well, you know what's interesting about that, is she wasn't concerned about anything but her car because she went back and killed him. She got her bat and she went back in there."
(9 App. 1742; Trans. XIX 197 (10-5-06))
Five statements of facts not in evidence and one statement that conflicts with the evidence. There is no testimony by anyone that the Blaise "went back" "killed him" 'got her bat" or that she "went back in there". The prosecution is misleading the jury by falsely claiming that Dixie or anyone else testified to these things. These statements are not in Dixie's statement. There was no testimony by Dixie or by a psychology expert that Blaise wasn't concerned about anything but her car. This argument conflicts with the testimony that the trash enclosure was cross-ways across the trash enclosure's opening and that a person could only get in by going around the narrow opening on the north side. It would not have been possible for a person outside the dark trash enclosure to look inside it and see Bailey.

"He never said that. He said that it was consistent with getting hit in the mouth that a bat would bust your teeth out".

(9 App. 1742; Trans. XIX 197 (10-5-06))
Two misstatements of the facts in evidence. Simms never said "consistent with" or 'teeth out".

"she goes back -- and this is where you get to the first degree murder. She had that opportunity to leave, she had that opportunity to go for help, and she didn't exercise that opportunity. She went back 'cause no one's gonna do this to her, no one."
(9 App. 1743; Trans. XIX 198 (10-5-06))
Four statements of facts not in evidence. There is no evidence or testimony that Blaise went back once she escaped her attacker. There is no testimony that Blaise ever said 'no one is going to do this to her. There is no expert psychology testimony about what her frame of mind was. There is only her statement and the testimony of Dixie and others that she immediately left in her car after getting away from her attacker.

"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))
Two misstatements of the facts in evidence and four statements of facts not in evidences. Simms testimony Page (VII-132 and 133) says that he would expect a crush kind of injury if the teeth had been knocked out by a bat. Simms also testified that the skull fracture happened approximately 2 hours prior to death. Simms never testified that Bailey's skull was busted, it was "fractured". The prosecution's theory is physically impossible because the crime scene notes and testimony of CSA Louise Renhard from Blaise's first trial, and the photographic evidence of the trash enclosure show Bailey's teeth were found in the southwest corner immediately to the west (closest to the outside wall) of where the blood from his carotid artery (neck) wound is concentrated.

"then, ladies and gentlemen, she cuts his penis off and she cuts into his rectum, because no one's gonna do that "
(9 App. 1743; Trans. XIX 198 (10-5-06))
Three statements of facts not in evidence. There is no testimony or evidence presented at trial that Blaise cut off Bailey's penis. There is no testimony or evidence presented at trial that Blaise cut into Bailey's rectum. There is no testimony, and no expert psychological testimony that she said or thought "no one's gonna do that".

"She's not gonna accept that."
(9 App. 1743; Trans. XIX 199 (10-5-06))
States facts not in evidence. There is no testimony that Blaise said that, and there were no expert psychological testimony concerning this.

"So what happens? An alibi starts getting created about the 21st by her mom."
(9 App. 1743; Trans. XIX 199 (10-5-06))
States two facts not in evidence, misstates the evidence and improper argument. There is no testimony that her mom created an alibi. The argument also attacks the credibility and honesty of Blaise's "mom"- which isn't true – Becky Lobato is her "stepmother".

And it's interesting, why does she tell her parents on a recorded statement -- don't say anything because we're getting recorded, snap at your father, we're getting recorded -- if she didn't do anything wrong?
(9 App. 1743; Trans. XIX 199 (10-5-06))
States facts not in evidence. Standard advice of counsel would be not to talk about the case especially on the telephone.

"And it's interesting, is the only people that came in here and talked about anything happening in this area, especially on the 7th, were family members, except for Chris"
(9 App. 1743; Trans. XIX 199 (10-5-06))
Misstates the facts in evidence. Michele Austria testified she saw Blaise on the 7th and she initialed the defense's calendar that was in evidence.

"And if she did exactly what she told Dixie, that all she wanted to do was get cleaned up and get the hell back to her dad's house, that's exactly what she did. And that puts her right back here on the 8th where you see all these people that are seeing her on the 8th coming back. And who's house did she go clean up at? Doug's?"
(9 App. 1743; Trans. XIX 200 (10-5-06))
States four facts not in evidence. There is nothing in evidence and no testimony at trial that Blaise told Dixie that she was in Las Vegas on the 8th, that Blaise told Dixie she was coming back from Las Vegas on the 8th, no testimony Blaise told Dixie that she went to Doug's house on the 8th to clean up. There is no testimony presented at trial that anyone saw the Blaise on the 8th coming back from Las Vegas. The prosecution is trying to have their cake and eat it too. Either Dixie is credible or she isn't. The prosecution is also putting words in her mouth and using this testimony to prove their case even though she did not say these things.

"They talk about the lack of physical evidence of her at the scene, yet there's so much evidence with regards to what had occurred."
(9 App. 1743; Trans. XIX 200 (10-5-06))
Conflates and confuses the facts in evidence. There was no evidence of Blaise being at the trash enclosure or inflicting Bailey's 42 separate injuries, but there was evidence Bailey had been murdered. Combining the lack of evidence against the Blaise with Bailey's murder equals zero culpability for the Blaise.

"probably dead,"
(9 App. 1743; Trans. XIX 200 (10-5-06))
Contrary theory of the crime. Either Blaise knew she killed him as the prosecution argued in closing and rebuttal, or she didn't. Here the prosecution concedes that Blaise knows the man she defended herself against is not dead when she left the scene of her attack.

"knows that she cut a man's penis off,"
(9 App. 1743; Trans. XIX 200 (10-5-06))
States facts not in evidence. There is no statement or testimony presented at trial that says Blaise knows she cut a man's penis off. Dixie testified that the man may not have been injured enough to require medical attention.

"I mean she said in her statement she got her car bloody"
(9 App. 1744; Trans. XIX 202 (10-5-06))
States facts not in evidence. There is no where in her statement that she says she got her car bloody, or used the words blood, bleed, bled, bleeding or bloody anywhere in her statement. No witness testified that Blaise said she got in her car bloody.

"She talked about taking her clothes off in the car because they were bloody"
(9 App. 1744; Trans. XIX 202 (10-5-06))
States facts not in evidence. There is no where in her statement that she says her clothes were bloody and the words bloody, blood, bled, bleed or bleeding do not appear in her statement, and no witness testified that she took her clothes off in her car because they were bloody.

"Her dad kind of admitted that he wiped the car out."
(9 App. 1744; Trans. XIX 202 (10-5-06))
Misstates the evidence. Larry Lobato never said he "wiped the car out". His testimony was that "we cleaned it out a little bit" (PG 1638 XVIII-31 line 6-19)

"And she tells Dixie, she's up there hiding her car, her parents are gonna help her get it cleaned or maybe paint it and get rid of it. Dixie wouldn't tell you that. Dixie kept I didn't say that, I didn't say that, I didn't say that. When Laura came in, she said no, that's what she told me."
(9 App. 1744; Trans. XIX 203 (10-5-06))
Misstates the evidence. Dixie testified that she didn't say it to Laura, it isn't in her statement to the police, and Blaise never said it in any of her statements to anyone. Laura Johnson testified that Dixie told her that Blaise told her these things.

"Are we just to ignore what's on these freshly laundered seat covers as the crime scene investigator talked about?"
(9 App. 1744; Trans. XIX 204 (10-5-06))
Misstates the evidence. Louise Renhard did not testify that they were "freshly laundered", she testified they were clean. (PG 1240 XI-95A line 1-1)

"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."
(9 App. 1744; Trans. XIX 204 (10-5-06))
Two misstatements of the evidence. The officer's report didn't say she said "looked like" - in the officers report by LaRochelle it reads "While at CCDC, Lobato told Detective Thowsen and I that the incident occurred in a enclosed area similar to the jail cell, but smaller". Later added to the report were the words 'did not have covering". That excluded the trash enclosure from being where Blaise was assaulted because on of it's most distinctive features is the wire mesh "covering" that is directly above a persons head in the trash enclosure. (see Exhibit ___ photo of trash enclosure)

"…Budget Suites. Which, you know, the detective did go over there and tried to see whether or not -- you know, how do you investigate something that didn't happen? How do you do that?"
(9 App. 1744; Trans. XIX 204 (10-5-06))

Misstates evidence and states facts not in evidence. Thowsen testified that he had investigated, but was unable to produce any type of report that showed he investigated. The statement that 'it didn't happen" was in Thowsen's testimony but this was a conclusion of the detective and was not a fact in evidence. There is no evidence it didn't happen because Thowsen admitted he didn't look for any witnesses.

"He talks about how he could look out of the inside of something that looked like the inside of the jail cell and see the carport next door next to it."
(9 App. 1744; Trans. XIX 204 (10-5-06))
States facts not in evidence. Thowsen did not testify to this.

"it's a pretty good imagination that you're making it up. It fits perfectly in the crime."
(9 App. 1744; Trans. XIX 205 (10-5-06))
States facts not in evidence. Draws a conclusion from inference not fact.

"You know what's interesting as well is that what she does say in her statement as we're talking about the past tense, how she talks about I didn't think anybody would miss him, I don't -- I didn't think I could put him in -- I didn't put him in and I don't think I could have, she's talking about the dumpster."
(9 App. 1744; Trans. XIX 205 (10-5-06))
States facts not in evidence and draws a conclusion from inference not in evidence. Blaise did not say in her statement "I didn't put him in" a dumpster. The attack that Blaise described in her statement happened "over a month ago" so she logically and properly referred to it in the past tense.

"Why do you need to say I don't think I could put him in it if he was alive? If he's dead, it'd be maybe throwing him in the garbage can, just throw him away."
(9 App. 1744; Trans. XIX 205 (10-5-06))
Misstates the evidence. Blaise never said anything about throwing him in the garbage can, throwing him away. The prosecutor runs this together as if it were her words. It is preposterous to even suggest a 100 pound 18 year old female could have even thought to pick up a man weighing almost 140 pounds and life him up 5 feet and 'throw" him in a dumpster.

"But you know, when I was on my flutters of the third day of my meth binge, everything went black."
(9 App. 1744; Trans. XIX 205 (10-5-06))
Three misstatements of the evidence. Blaise says in her statement that after using meth for seven days and being up for three consecutive days "everything starts to flutter. In a complete different part of her Statement she describes that when she got her knife out of her pocket and she was trying to cut her attacker's penis "everything goes black."

"She tells Dixie that it was on north of I — I mean west of east of I-15, and she gives hotel names of the streets, Flamingo and Tropicana. "
(9 App. 1744; Trans. XIX 205 (10-5-06))
Misstates the evidence. Dixie says in her statement that she does not recall the name of the street but that Blaise said a hotel street. Dixie also corrects in her trial testimony that she is not sure if

Blaise said west or east, that she could have assumed that because that is where she lived when she lived in Las Vegas.

"about her car being seen. A little red car. You'd have to disregard what Michele says, you'd have to disregard what Paul Rusty — Rusty Brown says."
(9 App. 1745; Trans. XIX 207 (10-5-06))
Two misstatements of the evidence and casting aspersions on the credibility of truthfulness of witnesses. There is no testimony from Michele Austria or Rusty Brown that Blaise was hiding her car. It is up to the jury to decide the credibility of the witnesses.

"talking about when the phone calls are going from the mom to Doug's house or to Doug's cell, and when Doug is returning those calls."
(9 App. 1745; Trans. XIX 207 (10-5-06))
Two misstatements of the evidence. There is no testimony that those calls were made by Becky (mom), and that Doug was "returning" her calls.

And then at a point in time when they know where she's at, when she's in Las Vegas, there's no phone calls going on anymore.
(9 App. 1745; Trans. XIX 207 (10-5-06))
Misstates the evidence. There were phone calls regularly from Doug to Panaca from July 3rd to July 8th.

"And you don't see Doug really picking up on the phone calls again until after about 9 o'clock in the morning on the 8 th."
(9 App. 1745; Trans. XIX 207 (10-5-06))
Misstates the evidence. Doug called Panaca 4 times on the 7th and 3 times on the 8th

"The doc says that it's more reasonable -- I mean it's more probable that it happened in the 24 hour span."
(9 App. 1745; Trans. XIX 207 (10-5-06))
Misstates the evidence. Simms did not testify it was more probable. He testified to a high degree of probability Bailey died within 8-24 hours of being examined by Shelley Pierce-Stauffer, but to reasonable medical certainty 12-18 hours. (VII-20-21 9/20/06)

"And it's interesting that the defense is arguing that that's where we want it to be, when often times you find bodies in that interval and they want the doctors to spread it out to the outside of that time frame."
(9 App. 1745; Trans. XIX 208 (10-5-06))
States multiple facts not in evidence. There is no testimony regarding this rambling argument. Only one doctor, Simms testified about Bailey's time of death – not doctors.

"And part of that tells us that we want people that are -- have a stake in the community, people that have been around, people that care what happens in their community, people that care what the prosecutions are doing or what the defendants are doing."
(9 App. 1745; Trans. XIX 208 (10-5-06))

Improper argument for the prosecutor to vest the jury with the duty to find the defendant guilty because they care what happens in their community.

"And I ask you, using your commonsense, is it reasonable to believe that we have a pure coincidence here? Is that reasonable to believe? And that's that step you have to get over as to reasonable doubt."
(9 App. 1745; Trans. XIX 208 (10-5-06))
Improper argument about what constitutes explanation of reasonable doubt and does not conform to what is in the jury instruction. The prosecution is arguing that if the jury decides the single fact of Bailey's penis amputation and Blaise trying to cut her would be rapists penis is too coincidental, they should find her guilty – to the exclusion of all other evidence.

"that's because you, the jury, are the ones that make the reasonable inference and draw those inferences to determine the guilt or innocence of the defendant. You do that. You make that decision"
(9 App. 1745; Trans. XIX 209 (10-5-06))
Misstates the role of the jury. The jury can decide based on the evidence and reasonable inference they draw from it, but not decide based on the prosecution's speculations and inferences drawn from their speculation.

"Is that something that you're really gonna pick up from that statement? I suggest that you won't."
(9 App. 1745; Trans. XIX 209 (10-5-06))
States his personal opinion about the weight to be given evidence, and instructs the jury he would disregard the evidence in her statement

In this case, ladies and gentlemen, there's nothing to support a self defense. And the reason why, as I explained earlier, is because there was a cooling down period. There was a point in time where the defendant had to make a choice as to whether or not to walk away from what she started or to finish it. She decided to finish it because she was gonna be identified.
(9 App. 1745; Trans. XIX 209 (10-5-06))
States at least seven facts not in evidence. None of the above statements has any basis in fact or testimony. There was no testimony or evidence presented to support this scenario.

"It went to a point where there was a directed wound to the carotid artery. There was a blunt force trauma to the head that knocks him down. Directed wound to the liver area."
(9 App. 1746; Trans. XIX 210 (10-5-06))
Misstates the evidence and conflicting theory of crime. Simms testified that the blunt force trauma to the back of Bailey's skull happened approx 2 hours prior to death. There was no testimony that Blaise had medical training or advanced anatomy classes or even knew where the liver or the carotid artery is. This argument conflicts with DiGiacomo's closing argument that Blaise knocked him down by punching him in the face, and then stabbing his neck.

"But then there's arguments talking about at a point where she has an opportunity to abandon that and didn't do that."
(9 App. 1746; Trans. XIX 210 (10-5-06))

Misstates the role of the jury and misstates law regarding what constitutes proof of a defendant's guilt beyond a reasonable doubt. Improper for jury to consider prosecution arguments as "evidence" upon which to base their verdict.

"I mean there's certainly evidence that she's guilty of sexual penetration of a dead human body by the injury to his rectum."
(9 App. 1746; Trans. XIX 211 (10-5-06))
Improper argument, states his opinion as fact, usurps the fact finding role of the jury and misstates what constitutes proof of guilt beyond a reasonable doubt. It is the jury's job to determine the facts and it is not proper for prosecutor to voice his opinion as the only conclusion the jury could come to. The injury to Bailey's rectum is not the only element the prosecution must prove by evidence beyond a reasonable doubt.

"And you heard to McCroskeys talk about how they -- they may not even have been there. But they do know when they were there and they saw the car that it hadn't been moved. And that's highly consistent with her coming up there after the --after the 8th , 'cause they were gone potentially the 4th of July where they drive to Fallon, Nevada and stay for just a couple days. They go there for a period of time and spend time with their family."
(9 App. 1746; Trans. XIX 212 (10-5-06))
Misstates the evidence. The McCrosky's testified that they were home the 6th 7th, and 8th, and saw Blaise's car in front of her parents' house, and they didn't see it moved during that period of time.

"when she killed Duran Bailey. When she was the meth addict, when she was the knife toting individual"
(9 App. 1746; Trans. XIX 213 (10-5-06))
States opinion as fact, misstates the evidence. There is no evidence she killed Duran Bailey. There was no evidence presented and no expert testimony that she was a "meth addict". There was testimony that Blaise was known for toting a knife for a long time, not just during the time frame when Duran Bailey was killed. Witnesses living in Panaca testified it was common for women to carry a knife.

"when she's the one that would do anything for methamphetamine."
(9 App. 1746; Trans. XIX 213 (10-5-06))
States facts not in evidence. There is no testimony or evidence presented at trial regarding this.

"We're here because of what she did in July of 2001, what she did to Duran Bailey."
(9 App. 1746; Trans. XIX 213 (10-5-06))
States facts not in evidence. There is no testimony regarding this. There is no testimony or evidence presented at trial that Blaise did anything to Duran Bailey.

"now, and 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))

Improper argument states the prosecutor's personal opinion and misstates the role of the prosecutor. Kephart states that he personally found Blaise guilty and that the jurors should find her guilty as he personally did.

"Look and see if there's any stab wounds to the pants."
(9 App. 1747; Trans. XIX 214 (10-5-06))
Misstates evidence and States facts not in evidence. There was no testimony that there were "stab wounds to the pants". Blaise said in her statement that her attacker's penis was exposed.

"She said it was on West Tropicana or Flamingo. Corroborated. "
(9 App. 1747; Trans. XIX 214 (10-5-06))
Misstates the evidence. Blaise specifically states in her statement that she was assaulted at the Budget Suites on Boulder Highway which is on the East side of Las Vegas.

"She said it was near a dumpster. Corroborated."
(9 App. 1747; Trans. XIX 214 (10-5-06))
Misstates the evidence and her statement. Blaise specifically states in her statement that she was assaulted in the parking lot at the Budget Suites on Boulder Highway and that there was a dumpster not too far away.

"She said she couldn't put him in the dumpster. Corroborated."
(9 App. 1747; Trans. XIX 214 (10-5-06))
Misstates the evidence. Blaise said in her statement "I don't think I could have". Blaise was an 18 year old female, about 100 pounds and she described her attacker as "huge". She could not have lifted a huge man up 4 feet under any circumstances.

"Said that she was bloody and got in her car, Corroborated."
(9 App. 1747; Trans. XIX 214 (10-5-06))
States facts not in evidence. There is no testimony during the trial that Blaise got any blood on her when she was assaulted. In her statement she doesn't mention the words blood, bloody, bleed, bled or bleeding a single time.

'Said she wanted to leave and get back — her car back to her dad's house. Corroborated."
(9 App. 1747; Trans. XIX 214 (10-5-06))
States facts not in evidence and two misstatements of the evidence. There was no evidence that she wanted to get her car back to her dad's house. The evidence from her statement was she drove her car to her ex-boyfriend Jeremy Davis' house and left her car for some days. Jeremy Davis' testimony corroborated that she left her car at his house for several days around Memorial Day 2001.

EXHIBIT 77

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

KIRSTIN BLAISE LOBATO,	)	Case No. 49087
	)	
Appellant,	)	District Court No. C 177394
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S APPENDIX

VOLUME 4

APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE
IN THE EIGHTH JUDICIAL DISTRICT COURT

DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER
JONELL THOMAS
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CARSON CITY, NV 89701

ATTORNEYS FOR RESPONDENT

INST

FILED IN OPEN COURT
OCT 06 2006 3:03 P
SHIRLEY B. PARRAGUIRRE, CLERK
BY BILLIE JO CRAIG DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
KIRSTIN BLAISE LOBATO,
Defendant.

CASE NO: C177394
DEPT NO: II

INSTRUCTIONS TO THE JURY (INSTRUCTION NO. I)

MEMBERS OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

INSTRUCTION NO. 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.

EXHIBIT 78

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

KIRSTIN BLAISE LOBATO,	)	Case No. 49087
	)	
Appellant,	)	District Court No. C 177394
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THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
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MEMBERS OF THE JURY:

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You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

INSTRUCTION NO. 26

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. Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your deliberation.

EXHIBIT 79

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

KIRSTIN BLAISE LOBATO,	)	Case No. 49087
	)	
Appellant,	)	District Court No. C 177394
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S APPENDIX

VOLUME 4

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IN THE EIGHTH JUDICIAL DISTRICT COURT

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THE STATE OF NEVADA,
Plaintiff,
-vs-
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Defendant.

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DEPT NO: II

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It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

INSTRUCTION NO. 31

The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

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. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the Defendant, she is entitled to a verdict of not guilty.

EXHIBIT 80

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

KIRSTIN BLAISE LOBATO,	)	Case No. 49087
	)	
Appellant,	)	District Court No. C 177394
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S APPENDIX

VOLUME 4

APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE
IN THE EIGHTH JUDICIAL DISTRICT COURT

DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER
JONELL THOMAS
DEPUTY SPECIAL PUBLIC DEFENDER
330 S. THIRD STREET, 8TH FLOOR
LAS VEGAS, NEVADA 89155

ATTORNEYS FOR APPELLANT

DAVID ROGER
DISTRICT ATTORNEY
200 LEWIS AVE., 3RD FLOOR
LAS VEGAS NV 89155

CATHERINE CORTEZ-MASTO
NEVADA ATTORNEY GENERAL
100 N. CARSON STREET
CARSON CITY, NV 89701

ATTORNEYS FOR RESPONDENT

INST

FILED IN OPEN COURT
OCT 06 2006 3:03 P
SHIRLEY B. PARRAGUIRRE, CLERK
BY BILLIE JO CRAIG DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
KIRSTIN BLAISE LOBATO,
Defendant.

CASE NO: C177394
DEPT NO: II

INSTRUCTIONS TO THE JURY (INSTRUCTION NO. I)

MEMBERS OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

INSTRUCTION NO. 33

You are here to determine the guilt or innocence of the Defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more persons are also guilty.

EXHIBIT 81

Ninth Circuit Model Criminal Jury Instructions (02-08-2010)

3.5 REASONABLE DOUBT—DEFINED

Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Comment

The Committee strongly recommends that the jury be provided with a definition of reasonable doubt.

The Ninth Circuit has expressly approved a reasonable doubt instruction that informs the jury that the jury must be "firmly convinced" of the defendant's guilt. *United States v. Velasquez*, 980 F.2d 1275, 1278 (9th Cir. 1992).

In *Victor v. Nebraska*, 511 U.S. 1, 5 (1994), the Court held that any reasonable doubt instruction must (1) convey to the jury that it must consider only the evidence, and (2) properly state the government's burden of proof. *See also Lisenbee v. Henry*, 166 F.3d 997, 999 (9th Cir. 1999), *cert.denied*, 120 S. Ct. 82 (1999).

Earlier model instructions instructed the jury 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." NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS 3.04 (1984); NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS 3.04 (1985). The Committee rejected this analogy because 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 United States v. Ramirez*, 136 F.3d 1209, 1213-14 (9th Cir.), *cert. denied*, 119 S. Ct. 415 (1998).

EXHIBIT 82

Petitioner’s car on Street

EXHIBIT 83

NORTH LAS VEGAS

POLICE

JOSEPH K. FORTI
CHIEF OF POLICE

January 27, 2010

Justice Denied
P.O. Box 68911
Seattle, WA 98168

Dear Hans Sherrer, Editor:

Re: Records Request; dated November 2, 2009

Attached please find redacted copies of police reports that involved a knife wound that occurred in the months of May, June and July 2001.

Respectfully,

JOSEPH K. FORTI
CHIEF OF POLICE

Barbara Telles

by: Barbara Telles, Records Manager
North Las Vegas Police Department

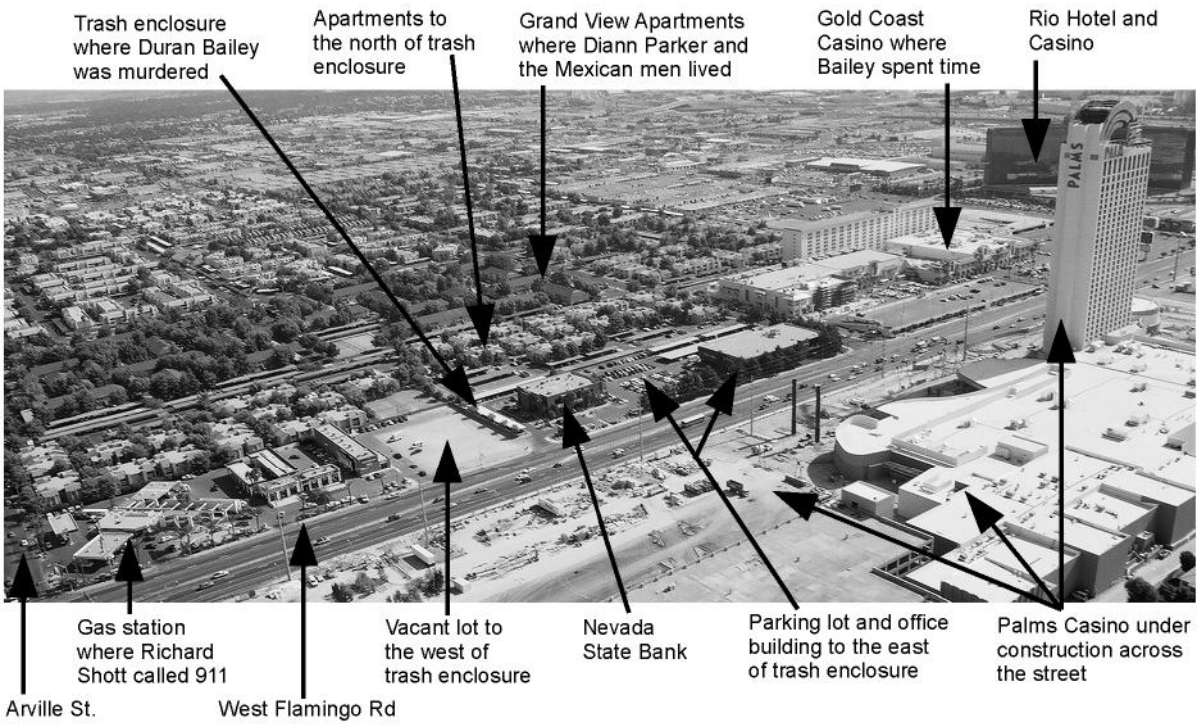
6 Attachments

EXHIBIT 84

Physical landmarks identified by Blaise in her statement as being near the scene of the attempted rape of her

Blaise's statement did not have any reference to any landmark near the scene of Duran Bailey's murder

Physical landmarks near the scene of Duran Bailey's murder



Kirstin Blaise Lobato's Unreasonable Conviction

Possibility Of Guilt Replaces Proof Beyond A Reasonable Doubt

001872

By Hans Sherrer

Second Edition Published April 2010 by:

The Justice Institute
PO Box 68911
Seattle, WA 98168

http://justicedenied.org
info@justicedenied.org

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First printing

EXHIBIT 85

Table 1
26 Significant Differences Between Bailey's Death and Blaise's Statement Known to the LVMPD at the Time of Her Arrest on July 20, 2001 [59]

Difference	Bailey	Blaise
Date	Bailey was murdered on July 8, 2001.	Blaise specifically described the attack occurred "over a month ago," from the date of the July 20 interrogation – or prior to June 20. [60] Other details she and Jeremy Davis provided pinpoint it to on or about May 25, 2001.
Location	Bailey's murder occurred on the west side of Las Vegas – on West Flamingo Road several blocks west of the Vegas strip that demarcates east and west Las Vegas.	Blaise described a rape attempt that occurred on the far east side of Las Vegas on East Boulder Hwy. near the intersection of East Boulder Hwy and S. Nellis Blvd. (Eight miles east of Bailey's murder.) Consistent with that location is Blaise said she immediately went to her friend Jeremy Davis' house and cleaned herself up. Davis' house is about 1 mile from the Budget Suites Hotel, and about 8 miles southeast of the Nevada State Bank. Boulder Highway was mentioned five times in Blaise's statement, and Flamingo Road was never mentioned.
Place	Bailey was murdered inside of the trash enclosure for a Nevada State Bank.	Blaise described being assaulted in the parking lot of a Budget Suites Hotel.
Geography	There was no shopping center across the street from where Bailey was murdered, there was no fountain visible from the Bank's parking lot, and there was no Sam's Town casino nearby.	Blaise provided specific details about the area around where she was assaulted, including the shopping center across the street, the Budget Suites' fountain, and that it was near Sam's Town casino.
Physique	Bailey was 5′-10″ and weighed 133 lbs. (at time of autopsy). (Bailey lost approximately 40% of his blood (two quarts), which would have weighed approx. 4 lbs. So his pre-death weight was about 137 lbs.) [61]	The 5′-6″ Blaise described her assailant as "really big," and "he seemed like a giant compared to me" when she was standing next to him before he threw her on the ground. (Consistent with her initial description, Blaise's assailant was later described as over 6′ and 200 lbs.[62])
Attack	Bailey's head was hit, his face was pummeled, his neck and face were stabbed, his stomach was stabbed, and after dying his abdomen was repeatedly stabbed, his penis was severed at its base, and his rectum was cut with an unidentified sharp object.	Blaise described trying a single time to cut at her attacker's exposed penis with a pocket butterfly knife when she was on her back and he was above her. After that she was able to escape and she heard him "crying" (She later said the knife was given to her by her father for self-defense.)
Injuries	Bailey's Autopsy Report lists 31 separate external injuries – including his post-mortem penis amputation.	Blaise described trying a single time to cut at her attacker's exposed penis with a pocket butterfly knife when she was on her back and he was above her.
Condition	Bailey was dead when his attacker(s) left.	Blaise described her attacker as "crying" when she got away from him.
Circumstances	Bailey was killed in an altercation that occurred entirely in the back of the trash enclosure.	Blaise described being bum rushed when she got out of her car in the Budget Suites parking lot. At no time did she describe that the ensuing struggle occurred inside a trash enclosure.
Mode of Attack	Bailey was killed by one or more intruders who *entered* the trash enclosure.	Blaise described that she was getting in her car to *leave* the Budget Suites Hotel when she was assaulted.
Drugs	Bailey had cocaine in his system at the time of his death, and no methamphetamine was present.	Blaise described using methamphetamine for a week before and after being attacked. She did mention cocaine or the use of cocaine a single time in her statement. [63] No witness testified she used cocaine.

Table 1 (Continued)

Difference	Bailey	Blaise
Striking	Bailey's cause of death was "blunt head trauma," according to the autopsy performed on July 9, 2001, and he had numerous pummeling type injuries.	Blaise said, "No," she didn't remember hitting her assailant a single time. (Consistent with that is Blaise had no bruises, cuts, broken bones or any other injuries to either of her hands.)
Dumpster	Bailey was murdered inside of a trash enclosure directly next to a dumpster.	Blaise described being assaulted in an open "parking lot" and "there was a dumpster not far from where it happened." There are dumpsters at the Budget Suites.
Curb	The car that left the tire tracks next to the trash enclosure drove over a planter median.	Blaise stated she didn't drive over "anything" when she drove away.
Body Position	Bailey was found face-up. So after his anus was sliced (based on ME's testimony) with him facedown, his body was turned over.	Blaise stated "No," she didn't move her assailant at all.
Covered Body	Bailey's groin area was wrapped with plastic sheeting, his upper body was covered by a piece of cardboard with bloody shoeprints imprinted on it, and then a large quantity of trash was heaped around and on him.	Blaise stated "No," she didn't cover her assailant with anything, she immediately got in her car and drove away while he was "crying."
Unknown Person Lying in Enclosure	There was no evidence found at the crime scene that an unknown person had lain in Bailey's blood or anywhere in the trash enclosure at the time he was killed.	Blaise stated she was lying on her back with her assailant above her when she attempted to cut his penis.
Blood	Bailey bled at least a half-gallon of blood, his upper body and shirt were soaked in blood and there was blood on his pants, and there was blood on the concrete floor, cardboard, the block walls, and other items in the enclosure.	Blaise described herself as lying down as her assailant knelt on top of her when she tried to cut him, but there is not a single mention in Blaise's statement that either she or her attacker bled, or that she had any blood on her or her clothes. (Consistent with this, lab tests later confirmed no blood was founding in her car.)
Cigarettes	Three cigarettes were recovered underneath the plastic that covered Bailey's groin area.	Blaise made no mention about the smoking of a cigarette at the scene before or after being attacked.
Beer	There was a partially filled can of beer found near Bailey's body.	Blaise made no mention about the drinking of beer at the scene before or after being attacked.
Moving Body	Bailey's upper body was moved about 3′ from the left rear corner of the trash enclosure toward the front of the enclosure.	Blaise stated "No," she didn't move her assailant at all.
Turn Body Over	Bailey's body was turned over at some point so his rectum could be cut.	Blaise stated "No," she didn't move her assailant at all.
Silver Fragments	"Silver" coated pliable paper-like fragments were recovered from Bailey's rectum during his autopsy.	Blaise made no mention about inserting anything into her assailant's rectum, or that she had any "silver" substance with her.
Behavior	Bailey was known, from the interview with Diann Parker, to exchange crack cocaine for sex.	Blaise did not describe exchanging sex for methamphetamine. (And no evidence has been presented that she ever did so, or that at any time she used crack cocaine.)

Table 1 (Continued)

Difference	Bailey	Blaise
Hygiene	Bailey's aunt who positively identified his body, described him as fastidiously clean, and his shoes were found neatly arranged in an undisturbed part of the trash enclosure. He frequented the nearby Nevada State Bank daily, and no prosecution witness familiar with Bailey described him as unclean or "smelly." The Crime Scene Analysts who processed the crime scene and the Coroner's Investigator did not make any mention in their reports or testimony that Bailey was "very smelly" or that he emitted any unusual odor.	Blaise described her assailant as "very smelly, …Like old alcohol and dirty diapers almost." [64]
Hang Out	Bailey was known from interview with Diann Parker and items found on his body, to mainly "hang out" at locations on the westside of Las Vegas.	Blaise described living and spending time with people on the eastside of Las Vegas.

Table 2
14 Significant Differences Between Bailey's Death and Blaise's Statement Learned by the LVMPD and the Clark County D.A.'s Office After July 20, 2001

(Due to forensic testing, expert evidence analysis, or a witness interview after Blaise's arrest.)

Difference	Bailey	Blaise
Sexual Component	A prosecution and defense expert agreed that Bailey's assault and sexual mutilation had a distinct homosexual component.	Blaise is a woman and she was alone when assaulted. Yet, the prosecution has never alleged that anyone other than Blaise was involved in Bailey's death.
Object	Bailey was murdered by an unknown object that experts have variously described as possibly scissors, or a knife able to inflict a nearly 6″ wound on Bailey. (ME Simms' estimate).	The pocket butterfly knife had a 3-1/2″ - 4″ blade, [65] that Blaise said she used to fend off her attacker.
Shoe Size	The shoeprints imprinted in blood leading away from Bailey's body were made by a U.S. man's size 9 athletic shoe, [66] which equals a woman's size 10-1/2.	Blaise wears a woman's size 7-1/2 that equates to a U.S. man's size 6, which is 3 sizes smaller than the bloody shoeprints. [67] The black high-heel shoes that Blaise said she was wearing when assaulted tested negative for the presence of blood on their soles.
Shoe Type	The shoeprints imprinted in blood leading away from Bailey's body were made by a man's size 9 athletic shoe. [68]	Blaise described wearing "black high heels." [69] Those black high heels were seized at the time of Blaise's arrest. The heels neither matched the bloody shoeprints, nor did they have blood on their sole. That Blaise was wearing high heels is consistent with her statement that when she was attacked, "I was getting ready to go out." [70]
Bat	ME Simms and a defense expert determined it was not probable that any of Bailey's injuries were caused by a baseball bat.	Blaise described keeping a baseball bat in her car for self-defense, which later tested negative for the presence of blood or other biological material.
Blood Pool	Bailey had numerous bleeding wounds and there was a pool of blood where his stabbing wounds were inflicted.	Blaise described herself as lying down as her assailant knelt on top of her. If he had been profusely bleeding, or she had been laying in a pool of his blood, she would have been bathed in his blood and transferred it to numerous areas of her car, including the exterior driver's side door handle, the steering wheel, head rest, floor board, foot pedals, seat, seat back, etc. Scientific confirmatory tests were negative for the presence of any blood on the interior or exterior of her car.
Tire Tracks	The tire tread design of the undisturbed tire tracks near the trash enclosure were identified.	Blaise described driving away from her assailant in her car, which had a different tread design than the tire tracks found at the scene of Bailey's murder. That is consistent with the numerous people who testified about their personal observation that Blaise's car had not been driven from where it was parked in front of her parents Panaca home from July 2, 2001, to the time it was seized by the LVMPD on July 20, 2001.
Drug Use	Bailey had cocaine in his system when he died, but no methamphetamine, and Diann Parker verified his crack cocaine use.	Blaise only described using methamphetamine and her use of methamphetamine was later verified by acquaintances and family members.
Semen	Semen was recovered from Bailey's rectum.	Blaise described an attempted sexual assault against her that did not involve any sexual activity between her attacker and another man.
Blood Dripping	Bailey's blood did not drip vertically from his wounds in the opinion of two experts – so he was stabbed while lying down.	Blaise only described stabbing once at her assailant as he was above her while *she* was lying on the ground.

Table 2 (Continued)

Difference	Bailey	Blaise
Red Hat	Bailey always wore a "red hat."	Blaise did not mention her assailant wearing any kind of hat, and no "red hat" was found during the search of her car or belongings.
Date Mismatch	Bailed was killed on July 8, 2001.	Blaise said that she was assaulted more than a month before the July 20 interrogation, and that for a week before and a week after the assault "I was out of my mind on drugs." [71] She also said that the attack on her was at the end of being up for "three days" continuously. [72] Which means that for her to have been assaulted by Bailey, she had been doing meth since July 1 and had not had any sleep since the night of Wednesday, July 4. Blaise returned to Panaca from Las Vegas on July 2, 2001. After her arrest, people who saw her described her as lethargic and sleeping a lot – including during the Fourth of July gathering of family and friends at her parent's house. On July 5, three days before Bailey's death, Blaise's mom took her to the Caliente Clinic where a blood sample was drawn at 5:15 p.m. The lab test showed there was no methamphetamines in her system. [73] The doctor requested that Blaise provide a 24-hour urine sample, which was collected by her mom on the morning of the 7th. The lab test showed she had no methamphetamine in her system. Blaise's mom stayed home from work to be with her on the 6th. On July 8, at least eleven people (have testified they) saw Blaise in Panaca between 12:30 a.m. and midnight (23-1/2 hours), and none reported (testified) that she either had the appearance of being under the influence of any drugs or of having been awake for days on end. In addition to the negative tests for drugs on the 5th and 7th, not a single witness testified to seeing Blaise use, or exhibit any signs of using any drugs of any kind from the time of her arrival in Panaca on July 2 to the time she left on July 9.
Likely Time of Death	ME Simms testified at Blaise's August 2001 preliminary hearing that it was "more likely than not" his death occurred within 12 hours from when Bailey's body was discovered – or between about 10:15 p.m. and 10:15 a.m. on Sunday, July 8. Darkness on July 8 was 9:06 p.m. Thus Simms' estimate encompassed the daylight hours from 10:15 a.m. to 9:06 p.m., and an hour of darkness. During Blaise's retrial Simms testified that to a "medical certainty" Bailey died between 9:50 a.m. and 3:50 p.m. – all daylight hours.	Blaise described twice in her statement being attacked when it was dark, "late at night like probably more into early morning." [74] Since she said she "was getting ready to go out," it could have been from around midnight to 1 a.m., give or take possibly an hour – which would have been 2 a.m. at the outside. Because it was dark, she could only describe her assailant as "black," "big," and "smelly."
Most Remote Time of Death Bailey's Discovery or Examination at Crime Scene	ME Simms testified at Blaise's August 2001 preliminary hearing that it was "more likely than not" Bailey's death occurred within 12 hours from when the first officer arrived at the scene. That was about 10:50 p.m., so Bailey's most remote time of death was 10:50 a.m. At Blaise's May 2002 trial Simms testified the earliest time of Bailey's death was 4:50 a.m., and at her retrial he testified it was 3:50 a.m., although to a "medical certainty" it was 9:50 a.m. Dawn on July 8 was 4:24 a.m., so Simms' estimates during the preliminary hearing and Blaise's first trial were Bailey's most remote possible time of death was after dawn, while at Blaise's retrial it was 34 minutes before dawn.	Blaise described twice in her statement being attacked when it was dark, "late at night like probably more into early morning." [75] Since she said she "was getting ready to go out," it could have been from around midnight to 1 a.m., give or take possibly an hour – which would have been 2 a.m. at the outside.

Kirstin Blaise Lobato's Unreasonable Conviction

Possibility Of Guilt Replaces Proof Beyond A Reasonable Doubt

001880

By Hans Sherrer

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EXHIBIT 86

From: shariatty1@aol.com [mailto:shariatty1@aol.com]
Sent: Wednesday, August 16, 2006 6:14 PM
To: michelleravell@cox.net
Subject:

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 acquiesence 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 contraints 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 equipt 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 Haveseau 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 alot 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.

EXHIBIT 87

From: shariatty1@aol.com [mailto:shariatty1@aol.com]
Sent: Thursday, October 13, 2005 11:12 PM
To: wbodziak@earthlink.net
Subject: Re: Lobato case

I am sending you one copy of everything I have in my file.
The special defender has not yet made a committment for us to retain you so I am working on it. 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 authorizse 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 committment to this.
I know time is quickly ticking away and your schedule is busy so I will do my best to get you all of the material and confirm funding quickly.
Very Truly,
Shari

-----Original Message-----
From: Bill Bodziak <wbodziak@earthlink.net>
To: shariatty1@aol.com
Sent: Sun, 9 Oct 2005 17:17:16 -0400
Subject: Lobato case

Shari

Attached is my CV and Fee Schedule. I will need a letter requesting my assistance in this case so I will know to whom to address reports, if needed and to whom to submit the invoice to.

Regarding my Document examination, I would like you to re-submit all of the items you have. If the Q1-4 items described in my May 16 report were copies or faxes and you have the originals (preferred) or 1st generation copies, please submit them. Also, additional known handwriting of KORINDA MARTIN might enable a more positive conclusion.

Regarding my Shoe / Foot examination, report dated 3/27/05, please resubmit all of those items.

Regarding the tire impression evidence, it in normally critical to have the "best evidence" so that the maximum amount of detail is able to be used in the examination. By 'best evidence" I mean if a photograph was taken, then the negative (or 4000dpi scan of the negative on a CD) is the best evidence. I think it would be best to ascertain a list of the tire evidence and call me to further discuss this.

Bill Bodziak
wbodziak@earthlink.net

Bodziak Forensics
90 Point Pleasant Drive
Palm Coast, FL 32164
Office 386-437-8170
Cell 904-545-9399

EXHIBIT 88

From: shariatty1@aol.com [mailto:shariatty1@aol.com]
Sent: Wednesday, October 05, 2005 11:06 PM
To: sara@mail.pier5law.com
Subject: Fwd: David Schieck exchange

-----Original Message-----
From: Brent Turvey <bturvey@corpus-delicti.com>
To: Shari Greenberger <shariatty1@aol.com>
Sent: Wed, 5 Oct 2005 20:58:44 -0800
Subject: Re: David Schieck exchange

Shari;

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.

I hope that this helps,

Brent
Brent E. Turvey, MS
Forensic Solutions, LLC
bturvey@forensic-science.com
http://www.corpus-delicti.com
http://www.forensic-science.com

Author of:
Turvey, B. (2002) Criminal Profiling, 2nd Ed., Elsevier Science
http://www.corpus-delicti.com/fs_bookstore/cp/cp_index.html

Savino J. & Turvey B. (2004) Rape Investigation Handbook, Elsevier Science
http://www.corpus-delicti.com/fs_bookstore/rih/rih_index.html

EXHIBIT 89

Concrete Bloody Shoeprint

EXHIBIT 90

Cardboard Bloody Shoeprints

EXHIBIT 91

Cardboard non-bloody shoe imprint

EXHIBIT 92

40400002_Bailey_as_found a jpg

Bailey as found

EXHIBIT 93

40420014_Rectum Wound

Bailey’s Rectum wound

EXHIBIT 94

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 9

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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EXHIBIT 70

CASE NO. C177394

FILED

AUG 31 9 39 AM '01

IN THE JUSTICE COURT OF LAS VEGAS TOWNSHIP

COUNTY OF CLARK, STATE OF NEVADA

Shirley B. Parraguirre
CLERK

ORIGINAL

THE STATE OF NEVADA,)
Plaintiff,)
vs.) CASE NO. 01F12209X
KIRSTIN BLAISE LOBATO,)
Defendant.)
)

REPORTER'S TRANSCRIPT OF
PRELIMINARY HEARING

BEFORE THE HONORABLE MICHAEL VAN,
~~PRO TEMPORE~~
JUSTICE OF THE PEACE

TUESDAY, AUGUST 7, 2001
1:00 P.M.

APPEARANCES:

For the State: ERIC JORGENSEN, ESQ.
DEPUTY DISTRICT ATTORNEY

For the Defendant: PHILIP KOHN, ESQ.
DEPUTY PUBLIC DEFENDER

Reported by: CHRISTA BROKA, CCR. No. 574

CE45

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excused.

THE COURT: You can go home if you want.

MR. JORGENSEN: Can I interrupt if Dr. Sims shows up?

THE COURT: Absolutely.

MR. JORGENSEN: Also for the purposes of preliminary hearing, I believe counsel will stipulate that the victim was Duran Bailey; is that correct?

MR. KOHN: For the purpose of preliminary hearing. I explained what we're doing.

(Whereupon Larry Sims was duly sworn.)

THE CLERK: Please be seated. State your name and spell your last for the record.

THE WITNESS: Larry Sims, L-A-R-R-Y, S-I-M-S.

THE COURT: Have you had testimony elicited in a preliminary hearing before?

THE WITNESS: Yes.

THE COURT: In Clark County?

THE WITNESS: Yes, a number of times.

THE COURT: All right.

/ / /

/ / /

/ / /

stab wound for instance would have killed him.

Q. But it's clear to you every one of the stab wounds was post mortem; is that right?

A. Not every one of the stab wounds, for instance, in the rectum was ante-mortem, several were ante-mortem. The ones I saw on the abdomen, were post mortem stab wounds.

Q. And your testimony was that the penis was severed post mortem?

A. It is my opinion that that trauma occurred post mortem.

Q. Now, you did this autopsy around noon on July 9th?

A. Correct.

Q. Do you have opinion when this person died?

A. No. And I think the subject was brought up that wasn't an issue at the time of the case. I may be able to do some testing and come up with a broad window, if that's an issue that will serve the court. I don't have any opinion as of right now.

Q. Could it have been 48 hours?

A. No, sir.

Q. What window are we talking about?

A. The body wasn't manifesting any significant

degree of decomposition, so I would say he had died a lot closer to the time he was discovered than not. So it was definitely within 24 hours. And probably more likely than not some time within 12 hours of when he was discovered.

Q. You indicated there's some tests you could have done with the fluid in the eyes; is that correct?

A. That is correct.

Q. Is that test still available to us?

A. Yes, sir.

Q. You indicated also that there was some silver particles found within the body; is that correct?

A. Yes, sir.

Q. One was taken by the Metropolitan Police Department?

A. As I recall I didn't note that in my report, if my memory serves me since it just happened a few weeks ago, I thought because I remember -- I do remember drawing their attention and I thought they did take some of those in evidence and some were left and would have stayed with the body.

Q. Have you had a chance to review the toxicology report that is part of the autopsy

EXHIBIT 71

The Justice Institute
PO Box 68911
Seattle, WA 98168

JUSTICE DENIED
The Magazine for the Wrongly Convicted

January 19, 2009

Mr. David Schieck
Clark County Special Public Defender
330 S. Third St. 8th Floor
Las Vegas, NV 89101-6032

RE: Post-trial DNA testing of evidence in the case of Kirstin Blaise Lobato

Dear David Schieck,

As you are aware *Justice:Denied* magazine has published several articles about the case of Kirstin Blaise Lobato, and I have written the book, *Kirstin Blaise Lobato's Unreasonable Conviction.* Consequently I have a keen interest in anything that may aid in disclosure of the truth about Duran Bailey's murder on July 8, 2001, and Ms. Lobato's lack of involvement in it.

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.

Thomas Wahl was a Las Vegas Metropolitan Police Department crime lab technician who performed forensic tests in the summer of 2001 on evidence related to the investigation of Mr. Bailey's murder. During Ms. Lobato's trial he testified on September 15, 2006 concerning "the swabbings of the penis of Duran Bailey and swabbings of the rectal or rectum of Duran Bailey at the time of autopsy to determine if any evidence of semen was present." (*State v. Kirstin Blaise Lobato*, Case Number C177394, Transcript, September 15, 2006, V. 173) In preparation for Ms. Lobato's trial that commenced in September 2006 the prosecution contracted with a private forensic laboratory, Myriad Genetic Laboratories, to examine evidence in Mr. Bailey's rape kit. The rape kit

evidence includes Bailey's rectal and penis swabbings. Myriad issued a report of its findings dated February 13, 2006. On direct examination Wahl read from the report's "Results and Conclusions": ""Semen was detected on Items 1B," which were penile swabs, "and Item 2A," rectal swabs." (*Ibid.* at 174) The following exchange then took place between Assistant District Attorney William Kephart and Mr. Wahl:

> By Mr. Kephart:
> Q. "Okay. Did it go further as to identifying whose semen it is?"
> A. Well, in order to do a DNA analysis, the next step would be to determine if any sperm cells were identified on the smears that are prepared by the medical examiner from the swabs. … And so Myriad, it appears that they had examined the slides made from the penile swabs and the rectal swabs and the oral swabs. …
> …
> Q. Okay. Were they able to determine the source of the semen.
> A. They then examined the penile smears and the rectal smears and they did not identify sperm, so they went no further. There was no sperm to identify. There's no sperm cells to get a DNA profile from so they didn't proceed any further at that point. (*Ibid.* at 174-5) (See Exhibit B)

Mr. Wahl's testimony was accurate in September 2006, but there are now techniques to identify the DNA profile of the male who is the source of the semen present on Mr. Bailey's penile and rectal swabs.

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 E)

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.

Why DNA testing should be promptly pursued

To my knowledge in all states the trial court retains jurisdiction to consider post-trial matters until the verdict of conviction becomes final by an order of the state's highest court. I perused the Rules of the District Courts of the State of Nevada on the Nevada Legislature's website, and I was unable to see any bar to the filing of a motion for post-trial DNA testing – particularly a motion based on state of the art testing techniques unavailable prior to trial, and which even now may not be performed by the LVMPD crime lab.

Because new DNA testing technology has the ability to provide evidence favorable to Ms. Lobato that could support a compelling motion for dismissal of her indictment and her immediate release, I am requesting that you give the most serious consideration to the prompt filing of a motion for DNA testing of all the items set forth in this letter. Regardless of how the Nevada Supreme Court

rules on her case, the testing outlined in this letter needs to be conducted. However, filing the DNA testing motion now would accomplish at least the following:

1. The quicker the DNA testing is accomplished the quicker the results will be known, and the quicker action can be taken on those results. Since the DNA test results could support Ms. Lobato's actual innocence and immediate release, it is almost criminal not to pursue conducting the tests in the most expeditious manner possible.
2. The District Court would order a freeze of the case evidence to ensure it is preserved and not "accidentally" destroyed or otherwise disappears.
3. The motion would send the unmistakable signal to the Nevada Supreme Court that there is a plethora of DNA testable evidence in Ms. Lobato's case that may prove to be exculpatory, and thus lend support to any leanings the judges may have to remand her case back for a retrial.
4. If the Nevada Supreme Court issues an adverse ruling in Ms. Lobato's appeal the DNA motion would remain pending. Subsequent favorable DNA test results could provide new scientific evidence supporting dismissal of Ms. Lobato's indictment, or at a minimum support a new trial.
5. DNA testing of the evidence by today's sophisticated techniques could result in a DNA profile of the person or person's identified that is complete enough to be uploaded to the FBI's CODIS database. The profile(s) could then be compared for a match to the millions of DNA profiles of known felons that are in the CODIS database. To date the valuable investigative tool of the FBI's CODIS database has not been used in Mr. Bailey's murder case. The DNA profile(s) could also be compared with the profiles in Nevada's DNA database.

Although Ms. Lobato's conviction is not finalized, I think the unusual circumstances of her case may interest the Innocence Project and other organizations to support a motion for post-trial DNA testing of the evidence in her case. The support of the Innocence Project could only contribute to the likelihood of the motion's success.

Please don't hesitate to contact me if you have any questions.

Sincerely,

Hans Sherrer
President, The Justice Institute
Publisher, *Justice:Denied – the magazine for the wrongly convicted*
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cc: JoNell Thomas
cc: Michelle Ravell

EXHIBIT "A"

Rapists snared by sperm-free semen

07 March 2007 by Linda Geddes
Magazine issue 2594. Subscribe and get 4 free issues.
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Police investigating sexual assaults could be aided by a new technique that allows DNA to be collected from semen samples even when no sperm are present.

A common problem for forensic scientists hoping to use DNA fingerprinting to identify assailants in sexual assault cases is that the quantity of male DNA in swabs taken from the woman is often tiny compared to the amount of hers present. "The female DNA profile is so strong in the analysed sample that the male DNA is swamped," says Andy Hopwood of the Forensic Science Service in Birmingham, UK. This means that conventional methods of amplifying small amounts of DNA don't work, because the female DNA would be amplified as well. "We're looking for ways to isolate out the male component," Hopwood says.

One way of doing this is using a method called preferential lysis, in which enzymes are used to destroy the membranes of ordinary cells, leaving only the more robust sperm cells behind. However, in some cases the assailant may not produce any sperm - either because of a medical condition or because he has had a vasectomy.

"It is surprisingly common," says Hopwood. "The semen may have come from a vasectomised male in around 10 to 15 per cent of the cases we deal with. We got to thinking: 'What else is there in this sample that we could look for?'"

> The semen may have come from a vasectomised male in around 10 to 15 per cent of the cases we deal with

Semen doesn't only contain sperm, but often immune and epithelial cells as well. Until recently, these would have been virtually impossible to distinguish from female cells present in a swab. Now Hopwood's team has done just that by combining a technique called laser microdissection (LMD), which enables single cells to be extracted from a microscope slide, with fluorescence in-situ hybridisation (FISH), a method that can be used to highlight chromosomes carrying a particular DNA sequence.

Hopwood's team used fluorescent tags specific to repetitive areas of DNA on the X and Y chromosomes. When added to cells and viewed under a fluorescence microscope, these tags made the X chromosomes glow red and the Y chromosomes green. This made it possible to distinguish between male cells containing an X and a Y chromosome, and female cells containing two X chromosomes.

The team then used LMD to mark the coordinates of male cells on a microscope slide and cut them out from the plastic membrane they were sitting on. The researchers transferred the cells to a collecting tube and used DNA amplification to increase the amount of male DNA. They were then able to compare the DNA against a database of DNA profiles in order to search for the assailant.

Using this technique, full male DNA profiles have so far been obtained from vaginal swabs taken up to 24 hours after sexual intercourse, even when no sperm were present.

The FSS gets around 90 cases a year in which the new technique could be useful, says Keith Elliott, one of Hopwood's team. "These are really difficult cases where you have a sample that's semen positive, but sperm negative," he says. In January, the technique was put into practice for the first time, helping UK police to charge a suspected rapist when his DNA profile was found to match the male DNA recovered from the victim. The case is currently going through the UK courts.

Dividing the sexes
Enlarge image

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EXHIBIT "B"

EIGHTH JUDICIAL DISTRICT COURT
CIVIL/CRIMINAL DIVISION
CLARK COUNTY, NEVADA

COPY

THE STATE OF NEVADA, Plaintiff, vs. KIRSTIN BLAISE LOBATO, Defendant.	CASE NO. C177394 DEPT. NO. II Transcripts of Proceedings

BEFORE THE HONORABLE VALORIE J. VEGA, DISTRICT COURT JUDGE

"ROUGH DRAFT"

JURY TRIAL - DAY 5
VOLUME V

FRIDAY, SEPTEMBER 15, 2006

COURT RECORDER:

LISA LIZOTTE
District Court

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you don't know?
A I'm not an expert in that, but I do know that they can be fairly effective. Sure.
Q Okay. And so with regards to this particular car, with the items that we'd shown you that you -- that you've actually examined, is it your testimony today that you just -- you can't say it's blood but you can't say it's not blood?
A That'd be -- that would be an accurate statement. I can't confirm that what gave a positive chemiluminescent reaction with luminol and a weak positive with phenolphthalein is blood to any absolute certainty. It's one of the possibilities.
Q Okay. Were you also asked to conduct various tests with regards to -- let me turn you, go forward now to -- well, let me back up. I'm sorry. I'll stay where we were. Just so we know, the type of tests that you're talking about, the luminol test and the phenolphthalein test, they also may cause a -- happen from a false positive, is that correct?
A Yes. A false positive would be any substances that would give a positive result but are not blood, not due to blood.
Q Okay. And do the -- each test, is there any significance between the two tests, the effect they may have on each other or the effect they may have on their result if you do them together? Do you understand my question?

A I think I understand what you're saying. There are certain substances that are known to give false positive results with luminol and they also can give false positive presumptive with phenolphthalein testing. There are some substances that give false positives with one and not the other. So when you use them in conjunction, you may eliminate some -- when you use the phenolphthalein and luminol in conjunction with each other as a presumptive test, you may eliminate some things as being false positives but still include others.
Q Okay. And what's the general literature that you're aware of that talks about false positives with both substances?
A What is it?
Q Mm-hmm.
A Copper salts, metallic salts are, like bronze, copper, are known to give false positives with both luminol and phenolphthalein. And some plants that contain peroxidase, plant peroxidase, enzymes, have been known to give false positives, both.
Q Okay. Now I'm gonna jump ahead now. October 15th, 2001, did you do a -- perform a test on certain items on that day as well or draft a report at least as of October 15th, 2001?
A Yes, I did.
Q And what were you asked to do there?

A I was requested to examine the left and right fingernail clippings of the victim, Duran Bailey, and the left and right hand swabbings of Duran Bailey, and these items were collected at time of autopsy by the Medical Examiner's Office, and the purpose was to determine if there was any foreign DNA on the clippings or the swabbings.
Q Okay. And were you able to -- did you come to a conclusion with that?
A I did not detect any foreign DNA. The DNA profile I obtained was consistent with Duran Bailey and he, Duran Bailey, was identified as the source of the DNA in those items.
Q Okay. So he didn't have anything under his fingernails like he scratched somebody or something that got in his fingernails?
A There was blood there but it was Duran Bailey's blood.
Q Now I asked you earlier about a lab by the name of Myriad.
A Yes.
Q Okay. And were you able to -- did you have an opportunity to look over Myriad's report and what was conducted and what they were asked to do?
A Yes. I was requested -- I was requested to look at the report last night in my hotel room.

Q Okay. And what were they doing?
A I don't have the actual request that was submitted to Myriad, but looking at the evidence I could surmise that they were -- Myriad was asked to examine the penile swabs, and these are swabbings of the penis of Duran Bailey and swabbings of the rectal or rectum of Duran Bailey at the time of autopsy to determine if any evidence of semen was present.
Q Okay. And this would have been part of the sexual assault kit?
A The medical examiner's kit, which the medical examiner usually or may collect these swabs. I don't know what their policies are on all deceased individuals but --
Q Okay. And this is something that you have done before yourself in your lab?
A Examined medical examiner's kits?
Q Yes.
A Hundreds and hundreds of times, yes.
Q Okay. So you're familiar with what they're talking about here. And the lab actually sent these out to Myriad?
A That's correct. I'm very familiar with this. This is a typical analysis that crime labs all over the country and the world would do on medical examiner's kits.
Q Okay. Can you tell me what the results and conclusions are of what they did?

WAHL - DIRECT

A I'll just read verbatim from their report. "On the results and" --

MR. SCHIECK: Can we identify the date of the report, Your Honor, to make sure I have the same one?

THE COURT: Yes.

THE WITNESS: Okay. The report is dated February 13th, 2006.

MR. SCHIECK: Thank you.

THE WITNESS: On the second page of the report under "Results and Conclusions," the first statement is, "Semen was detected on Items 1B," which were penile swabs, "and Item 2A," rectal swabs, "as evidenced by the detection of protein P30."

BY MR. KEPHART:

Q Okay. Did it go further as to identifying whose semen it is?

A Well, in order to do a DNA analysis, the next step would be to determine if any sperm cells were identified on the smears that are prepared by the medical examiner from the swabs. The medical examiner or an assistant would swab the surface of the penis or swab the anal cavity or the rectum of the victim, and then they will take the swab and roll it over a clean microscope slide, and then the swab is air dried, the slide is air dried, and then you can stain the slide and look at it

WAHL - DIRECT

for the presence of sperm cells. And so Myriad, it appears that they had examined the slides made from the penile swabs and the rectal swabs and the oral swabs. There were oral swabs collected as well.

Q Were they able to come to any conclusion with regards to that?

A No semen was detected on one of -- there was more than one penile swab. And it says here, "No semen was detected on penile swab A." But they did detect semen on penile swab B. And there was no semen detected on the oral swabs. And it appears that there was only one -- I can't tell from the report whether there was more than one rectal swab. They do cite "rectal swabs" in the plural so --

Q Okay. Were they able to determine the source of the semen?

A They then examined the penile smears and the rectal smears and they did not identify sperm, so they went no further. There was no sperm to identify. There's no sperm cells to get a DNA profile from so they didn't proceed any further at that point.

Q Okay. And you wouldn't be the one to talk to with regards to the presence or lack of presence of semen in a man's penis, would you? Would that be the medical examiner?

A Well, I do know that there was -- there are

WAHL - DIRECT

reservoirs of semen in the testicles, I do believe, and that that's about all I know. That might be better offer of pathologist. But, yes, there are reservoirs of semen in every male here and it stays there until ejaculation occurs.

Q Was there also a request you know of that they -- in the sexual assault kit they did pubic hair combings and pulled pubic hairs?

A Yes. Those were apparently collected by the medical examiner at time of autopsy.

Q Okay. And were you aware that those weren't analyzed by Myriad but analyzed by another portion of your lab?

A I'm reading from Myriad's report, and it appears that they opened up the packaging from a debris -- an envelope labeled "Debris Collection." They state that, "Four apparent hairs were collected from the debris collection envelope. All apparent hairs were mounted on a hair collection card and repackaged with the evidence." My understanding is that Myriad does not do hair comparisons and they may not have been requested to do DNA in any hairs if they were found.

Q Okay. Do you have any independent knowledge of whether or not the lab that you used to work with -- what's her name? Kristina Paulette, do you know her?

A Yes, I do.

WAHL - DIRECT

Q Were you aware that she had actually done testing with regards to that, what you just talked about?

A Yes. I was aware when they contacted me regarding the upcoming trial and then they happened to mention that. In fact I talked to Kristina and she was mentioning that she was in the middle of DNA analysis of, I do believe, a pubic hair, apparent pubic hair.

Q And you were also asked and you gave a report on the August 6, 2001 in reference to a small piece of apparent plastic with silver-colored paper recovered from the rectum of Duran Bailey at autopsy.

A Yes.

Q Did you look at that?

A I did examine it both with the naked eye and under a stereo microscope.

Q Were you able to determine what it was?

A All I could say, that it appeared to be composed of wax. And I say appear to be composed of wax, not plastic. And I do believe in my, sorry, in my report I did say that on one side of each piece there is a silver-colored coating which may, and I stress the word "may," be paint, vinyl or foil of some kind and no further examinations were performed by myself.

Q So you couldn't determine what that was?

EXHIBIT "C"

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Touch DNA - Overview

- Touch DNA - Overview
- Touch DNA Technical Note

Touch DNA Evidence - Overview

As forensic DNA technology has become a common tool in criminal investigations, scientists have attempted to obtain DNA evidence from what were once considered unlikely sources. "Touch DNA" refers to the DNA that is left behind from skin cells when a person touches or comes into contact with an item.

Bode's recent success of using a Touch DNA collection method to obtain a DNA profile from the long johns worn by JonBenet Ramsey has created an increased interest in better understanding Touch DNA methods.

What is Touch DNA?

• Touch DNA **is not** Low Copy Number (LCN) DNA. LCN DNA profiling allows a very small amount of DNA to be analyzed, from as little as 5 to 20 cells. Because of the small amount of starting DNA in LCN samples, many more cycles of amplification are necessary.

• Touch DNA samples at Bode are processed/amplified exactly the same way as blood, semen, saliva etc, and are therefore admissible in court.

Humans shed tens of thousands of skin cells each day, and these cells are transferred to every surface our skin contacts. When a crime is committed, if the perpetrator deposits a sufficient number of skin cells on an item at the scene, and that item is collected as possible evidence, touch DNA analysis may be able to link the perpetrator to the crime scene. Touch DNA has been successfully sampled from countless items including gun grips, steering wheels, eating utensils, and luggage handles, just to name a few.

However, since Touch DNA is usually deposited in smaller amounts than the DNA found in bloodstains or other body fluids, it is more difficult to obtain DNA profiles from touch DNA samples. The key to obtaining

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successful Touch DNA results depends on recognizing items which may be suitable for Touch DNA analysis and using the sampling technique that will recover the highest number of skin cells.
Many labs test for Touch DNA using either the swabbing or cutting method. In the "swabbing method", the surface of the item is rubbed with a cotton swab to collect possible cells. This method is preferred for hard items such as glass or plastic. The "cutting method" may be used for soft items, such as clothing, in which fabric from areas of interest is cut to collect possible cells. These two approaches can be successful on many items of evidence and both are used by Bode Technology; however they both have the limitation of placing unnecessary substrate (the cotton swab itself or the fabric cuttings) into the small DNA processing tube. There is a limited amount of substrate that can be placed in a tube, and the substrate itself may "trap" some cells during processing, which would decrease the likelihood of obtaining results.

In addition to the commonly used swabbing and cutting methods, Bode has recently started using the "Scraping" and "Tape Lift" methods, in which the surface of soft items (such as clothing) are either scraped with a blade, or sampled with a small piece of tape, to collect possible cells. Due to the lack of unnecessary substrate generated by these methods (scraping produces a small "pile" of fiber, cells, and debris that can easily be placed in the DNA processing tube), a larger surface area can be sampled. An increase in surface area increases the number of possible cells recovered; therefore, increasing the chances of obtaining a DNA profile.

The scraping/tape lift methods are ideal in situations where the scientist can locate areas on the item which are most likely to contain the perpetrator's skin cells. If clothing were left at the crime scene by the perpetrator, pressure points on the clothing such as the interior neck of a shirt or the band inside a hat, are excellent candidates for these sampling methods. In addition, in a sexual assault 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.

Through improvements in sampling methods corresponding to increasingly sensitive DNA testing methods, and through continual education of the criminal justice community regarding the testing possibilities, Touch DNA is enabling forensic scientists to provide information in cases which were once unsolvable.

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  - Child Identification
  - Research and Development
  - Training and Workshops
  - Consulting and Validation
  - LIMS and IT Solutions
- Technologies
  - DNA Typing
  - Touch DNA
    - Touch DNA - Overview
    - Touch DNA Technical Note
  - Serology/ Screening
  - Quantitation
- Customers
- FAQ / Glossary

Accreditations

EXHIBIT "D"

INSIDE INDIANA BUSINESS WITH GERRY DICK
INDIANA'S BUSINESS NEWS LEADER

Beech Grove is serving as a pilot city for the DNA device.

updated: 11/1/2007 1:47:21 PM

Beech Grove is First in Nation to Use New DNA Technology

InsideINdianaBusiness.com Report

The City of Beech Grove will the first in the nation to use a new method of "touch" DNA collection. The city is partnering with Indianapolis-based Forensic ID. The technology allows police to collect DNA from surfaces that someone may have touched, leaving behind skin cells, oils or perspiration.

Source: Inside INdiana Business

Continued Below...

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BEECH GROVE, IN – November 1, 2007 – As the first city in the nation to serve as a pilot site to use a new method of "touch" DNA collection, the City of Beech Grove announced its partnership with Indianapolis-based Forensic ID today.

The Beech Grove Police Department, will utilize Forensic ID's new device in the collection of DNA evidence at crime scenes. The self-contained device gathers DNA left after someone touches an object or surface, leaving behind skin cells, oils or perspiration. In the case of use by narcotics agents, DNA can be collected from a plastic bag of confiscated drugs, for example.

Kits will be available, allowing police/narcotics officers, who often are first on the scene, to swab the "touch" or "contact" DNA into a cylinder type device for later analysis. The innovative element of the Forensic ID device is that, unlike traditional DNA collection, it eliminates the drying process, thereby simplifying and expediting the analysis of evidence from a crime.

According to Beech Grove Police Chief Rich Witmer, the device has the potential to help his department solve crimes faster.

"We now have an additional tool in our crime fighting arsenal. With this new device, it is possible that a crime that could not have been solved before may be able to be resolved now.

"Quick turnaround on evidence analysis is a challenge faced by many law enforcement agencies. We have a great relationship with the Marion County crime lab and foresee using Forensic ID's DNA collection device as a supplement to the services provided by the crime lab," Witmer said.

According to Mayor Joe Wright, the city agreed to serve as a pilot site because of the potential value of the device in continuing to keep Beech Grove's crime rate low.

"By giving our police department all the necessary tools available, our officers are empowered to do the best job possible. Public safety is our

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top priority. The more tools we have, the greater deterrent to criminal activity in our community; an outcome we all want," Wright said.

Marion County Prosecutor Carl Brizzi applauded the partnership between Beech Grove and Forensic ID.

"DNA is often the most compelling evidence a jury will hear. Expanding its use means that our prosecutors will have an important tool in the fight against crime. Beech Grove's decision to use this innovative approach will mean that more criminals will be put behind bars," Brizzi said.

According to Forensic ID Senior Vice President and General Counsel Vincent Perez, his company's innovative device takes collection of evidence to a new level of sophistication.

"Fingerprints have become nearly impossible to collect from crime scenes, especially weapons. With our TriggerPro ID® or NarcoticsPro ID® devices, officers can collect evidence in a timely manner so the integrity of the crime scene is further protected, while time potentially is saved on the analysis side.

"With Beech Grove as our pilot community and with other devices being validated, we are confident we will discover even more uses for our products in the future that will benefit everyone involved," Perez said.

Source: City of Beech Grove

EXHIBIT "E"

Attorney general to take over Hettrick case

BY TREVOR HUGHES • TREVORHUGHES@COLORADOAN.COM • JANUARY 30, 2008

The state's top prosecutor is opening a murder investigation into the fatal 1987 stabbing and mutilation of Fort Collins resident Peggy Hettrick after a judge last week set free the man convicted for her death.

Gov. Bill Ritter on Tuesday appointed Attorney General John Suthers to conduct a full investigation, and, if necessary, prosecute any suspects.

There is no timetable for the investigation, and many details about how many investigators and prosecutors will work on the case are still being resolved. The cost is being covered from Suthers' regular budget.

The rare move to have the Attorney General's Office investigate the case came a week after a special judge overturned Tim Masters' conviction for Hettrick's murder and vacated his life sentence after nearly nine years in prison.

The AG's office has previously reviewed the JonBenet murder case and rape allegations at the University of Colorado-Boulder. Those were not full investigations, however.

"This is going to be a full investigation," Nate Strauch, a spokesman for Suthers, said Tuesday. "This is not something where we simply review what other agencies have done. We'll look at all the evidence. We start with a clean slate. We take a fresh look at the evidence."

A jury in 1999 convicted Masters of killing Hettrick when he was 15, based largely on his violent drawings and the fact that he saw the body on his way to school but didn't report it to police.

Legal experts say Suthers' office will likely have a hard time with the investigation because Hettrick was killed 21 years ago, on Feb. 11, 1987.

Larimer County District Attorney Larry Abrahamson on Friday dropped a murder charge against Masters after special prosecutors concluded that DNA found on Hettrick's clothing pointed to another suspect, one who was cleared by Fort Collins police during their initial investigation.

Masters has not been officially cleared, however, which several people close to the case said helps show the AG's review will look at everyone. In announcing his decision to drop the charges against Masters, Abrahamson noted that no one had been exonerated.

The decision to not officially exonerate Masters has infuriated his extensive local family.

Abrahamson said he called for Suthers to review the case to ensure the public can feel confident about the justice system. Through a spokeswoman, he declined to comment today.

"In order to avoid any perceived appearance of bias or conflict, I have requested that Governor Ritter appoint the Attorney General to conduct the investigation and subsequent prosecution, if necessary," Abrahamson

SPECIAL REPORT
Visit www.coloradoan.com/masters to view a special report chronicling the Coloradoan's coverage since 1987 in the case of Timothy Masters.

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said in a statement Friday. "The goal of our criminal justice process is to ensure, as best as humanly possible, that everyone will be treated fairly. I will do whatever it takes to ensure that standard is met."

Abrahamson has already sought an independent investigation into whether Jim Broderick, the lead investigator on the case when Masters was convicted, lied on the stand and illegally recorded a conversation between Masters and his father in 1987.

Fort Collins police are also reviewing those allegations made by Masters' original defense team during hearings late last year.

Special prosecutors appointed to review Masters' case have already acknowledged that police failed to turn over four pieces of information that could have helped Masters' original defense team win his acquittal.

"It's better to resolve this situation with an outside agency," said former Fort Collins mayor and police sergeant Ray Martinez. "I think that the perception is that the AG's office would handle this without any bias. I think for the public ... it's important to instill that trust."

Fort Collins police Chief Dennis Harrison said last week he believes an outside review will benefit the one person whose voice doesn't get heard: Peggy Hettrick.

"I think the reality is that people want someone who is not attached to Fort Collins police service to do this," Harrison said. "If it's clearer and cleaner that it goes to the AG, I'm good with that."

He added: "Peggy and her family need to have a decision that they can rely on."

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EXHIBIT "F"

DNA clears Ramsey family in JonBenet's death

Updated 7/10/2008 8:21 AM | Comments 238 | Recommend 49 E-mail | Save | Print | RSS

Enlarge By Gregory Smith, AP

Patsy Ramsey, shown here with her husband John Ramsey in 2000, speaks at a news conference in Atlanta. Prosecutors say new DNA tests have cleared JonBenet Ramsey's family in her 1996 killing.

By Kevin Johnson, USA TODAY

The family of JonBenet Ramsey has been formally cleared of any role in the 6-year-old's 1996 murder, a Colorado prosecutor announced Wednesday, citing newly discovered DNA evidence.

The Christmastime slaying triggered a global news media frenzy and a controversial investigation that long focused on the child's parents, John and Patsy Ramsey, and JonBenet's brother, Burke.

Boulder, Colo., District Attorney Mary Lacy said in a statement on Wednesday that DNA evidence recovered from the child's clothing pointed to an "unexplained third party." Lacy apologized to the family for the suspicions that made their lives "an ongoing living hell."

VIDEO: Ramsey family cleared
JONBENET UPDATE: Prosecutors now closing in on killer's DNA

"The Boulder district attorney's office does not consider any member of the Ramsey family, including John, Patsy or Burke Ramsey, as suspects in this case," Lacy said in a public statement. "To the extent that this office has added to the distress suffered by the Ramsey family at any time or to any degree, I offer my deepest apology."

FIND MORE STORIES IN: Colorado | Christmas | Thailand | Boulder | JonBenet Ramsey | Ramseys | Patsy Ramsey | Lin Wood | District Attorney Mary Lacy

The decision comes 12 years after the murder, a period that spanned the 2006 death of Patsy Ramsey, 49, and the arrest of a teacher in Thailand, who was quickly cleared and released. John Ramsey found his daughter beaten and strangled in the basement of the family's Boulder home on Dec. 26, 1996. Patsy Ramsey said she discovered a ransom note demanding $118,000 for her daughter.

John Ramsey was not available for comment Wednesday. The family's longtime attorney, Lin Wood, said the district attorney's decision marked a welcome milestone in the family's "long and lonely journey" that continues along with the search for the child's killer.

"I'm just sorry that Patsy Ramsey is not here to read the (district attorney's) letter," Wood said.

The new DNA evidence was recovered in March, using a relatively new technique known as "touch DNA," in which genetic material was obtained from cell scrapings on long johns the child was wearing at the time of her death, Lacy said. That material matched an unknown male profile previously identified from two sites on the inside area of the child's underwear.

"The unexplained third-party DNA on the clothing of the victim is very significant and powerful evidence," Lacy said. "It is very unlikely that there would be an innocent explanation for DNA found at three different locations on two separate items of clothing worn by the victim at the time of her murder."

Wood said the new evidence, which he described as "irrefutable" in clearing the Ramseys, would be checked against other profiles in the national DNA database managed by the FBI.

"The potential for this to be resolved is there," Wood says, adding that he plans to meet with Ramsey next week.

"I've never seen John exhibit bitterness or anger," Wood said. "These people had a dignity about them, an unusual grace under fire."

Posted 7/9/2008 8:09 PM

001806

EXHIBIT "G"

Friday, Feb. 16 2007

Applied Biosystems introduces new DNA technologies

Applied Biosystems today announced the first commercial reagent kit for analyzing degraded or limited DNA; a system with new software for automating DNA testing processes to streamline forensic laboratory workflow; and a new software application for expediting the process of laboratory validation.

The company said that it expects the AmpF?STR MiniFiler PCR Amplification Kit for degraded DNA, the HID EVOlution System and VALID Software will help the more than 10,000 forensic laboratories around the world maximize the use of DNA in human identification.

DNA contained within biological evidence found at a crime scene is a powerful tool for identifying and excluding potential contributors. Similar to fingerprinting, DNA testing can identify and differentiate between individuals. Because DNA can be the ultimate proof of identity, DNA analysis systems have become a significant part of the investigative

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process.

Forensic laboratories use an integrated suite of DNA analysis technologies, instrumentation and human identification analysis software to effectively process DNA collected at crime scenes. Each of these products and technologies are designed to work in unison to strengthen a crime laboratory's capacity to process reproducible and defensible DNA samples and eliminate sample backlogs. These technologies were developed to enable forensic technicians to more efficiently use DNA in solving crimes, exonerating the wrongly accused and identifying missing persons.

"Because DNA can be found virtually everywhere, it has become a great resource in providing information that aids the investigative process, and there are great demands on forensic labs to process samples in a quality, timely manner that meets regulatory requirements," said Kevin Lothridge, executive director of the National Forensic Science Technology Center (NFSTC). "With tools that expedite and expand the forensic laboratory's capacity to make positive identification, we can better support law enforcement and public safety professionals in their efforts to prosecute the guilty and exonerate the innocent."

The forensic tools announced by Applied Biosystems include:

- AmpF?STR MiniFiler PCR Amplification Kit - The MiniFiler kit is the first commercially available DNA testing kit that enables forensic DNA analysts to generate more useful information from degraded DNA as well as from samples that are limited by an impurity - also known as inhibited DNA samples. The genetic information obtained can then be used in criminal, missing persons and mass disaster cases. The MiniFiler kit is expected to be available in March 2007.
- HID EVOlution System - Applied Biosystems has formed a collaboration with Tecan, a manufacturer of advanced automation solutions, to co-develop and co-market the new HID EVOlution System, an automated DNA workstation with new software designed to streamline routine casework sample workflow for human identification applications. The HID EVOlution System integrates the Tecan Freedom EVO liquid handling workstation with the Applied Biosystems 7500 Real-Time PCR System, 3130xl Genetic Analyzer and AmpF?STR DNA testing kits. By incorporating automated liquid handling and data transfer into forensic DNA testing laboratories, the HID EVOlution System reduces the labor required to process casework samples while decreasing the turnaround time. The system is expected to be available in March 2007.
- VALID Software - Applied Biosystems is also delivering a new software application for forensic DNA laboratories that is expected to reduce the amount of labor associated with conducting validation studies

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required to implement new forensic DNA technology, such as the MiniFiler kit. VALID Software is designed to help support, simplify and standardize validation studies, while meeting government guidelines, which oversee the standards for forensic DNA lab operation. VALID Software is expected to be available in early summer 2007.

Applied Biosystems will be demonstrating these new technologies at the 59th Annual Meeting of the American Academy of Forensic Sciences in San Antonio, Texas.

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EXHIBIT 72

AFFIDAVIT OF HANS SHERRER

State of Washington)
) SS:
County of King)

I, Hans Sherrer, first duly sworn, depose and say that the foregoing is true and correct to the best of my knowledge and belief:

1) The **AFFIDAVIT OF HANS SHERRER** attached to this AFFIDAVIT is a true and accurate copy of the Affidavit that was notarized on November 9, 2006, and mailed that day to Clark County Special Public Defender Mr. David Schieck.

BY: _____
Hans Sherrer

Subscribed and sworn to before me, this 5th day of March, ~~2009~~. 2010

_____
Notary Public

Lacey Gillmore
Printed name

LACEY GILLMORE
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
DEC. 15, 2010

Notary Public for Washington

My Commission expires: Dec. 15, 2010

AFFIDAVIT OF HANS SHERRER

State of Washington)
) SS:
County of King)

I, Hans Sherrer, first duly sworn, depose and say that the foregoing is true and correct to the best of my knowledge and belief:

1) On Friday, September 29, 2006, I was a spectator at the trial of Kirstin Blaise Lobato in the courtroom of Judge Valorie Vega on the 16th floor of the Clark County Courthouse in Las Vegas, Nevada.

2) At about 1 p.m. that afternoon the prosecution rested its case in chief and the defense began presenting its case.

3) At about 3:30 p.m., during the trial's afternoon "stretch" break, I was in the men's public bathroom on the 16th floor.

4) My attention was drawn to two men in the bathroom, when one referred to "differences of opinion."

5) The other man responded to the first man's comment by saying, "Deliberations are going to take a long time."

6) I noticed that both men were jurors in the Kirstin Lobato trial.

7) I recognized the man who made the response about "deliberations" was the same juror I had observed dozing (or actually sleeping) in the courtroom for about fifteen minutes on the afternoon of Tuesday, September 26, 2006, during the testimony out of turn by defense witness Dr. Michael Laufer.

8) In regards to the September 26 incident involving that juror, on the morning of Wednesday, September 27, 2006, I informed Clark County Deputy District Attorney William Kephart that I had something I wanted to jointly inform the prosecution and defense attorneys about, and later that morning I jointly informed them what I had observed the juror doing, and showed Mr. Kephart the written note I had made about the incident the preceding day at the time of the incident.

9) Based on the comments of the two jurors on the afternoon of September 29, 2006, I had reason to believe that after complete presentation of the prosecution's case, but after only partial presentation of the defense's case, the jurors were deeply divided in their opinion about the impact of the evidence presented as it affected Ms. Lobato's conviction or acquittal.

10) After Ms. Lobato's conviction on the afternoon of October 6, 2006, I read an article on Court TV's website about the trial's outcome, and that story included the analysis by both Ms. Lobato's attorney David Schieck and Deputy DA Kephart that the verdict was a "compromise" by jurors divided between wanting to acquit her, and wanting to convict her of more than voluntary manslaughter.

11) After reading the news reports about the verdict, I knew that the jurors' conversation concerning the differing opinions formed by the jurors that I overhead in the bathroom six days before the jury began deliberating accurately reflected that the jurors were sharply divided about the case, and that they had resolved being a "hung jury" by settling on what both the defense and prosecution attorneys recognize was a compromise verdict.

12) While attending the trial I witnessed that prior to an adjournment for lunch, a "stretch break," or after a day's proceedings, Judge Vega admonished the jury with words to the effect that jurors were not to talk amongst themselves about the trial or form or express any opinion on any subject related to the trial until the case was submitted to them.

13) On the morning of October 9, 2006, the Monday after the Friday afternoon verdict in Ms. Lobato's case, I called the office of the Clark County Special Public Defender and asked for Mr. Schieck, whereupon the woman answering the telephone informed me that he was in Carson City, Nevada, and would return the following day.

14) On Tuesday, October 10, 2006, at about 10 a.m., I called the office of the Clark County Special Public Defender and asked for Mr. Schieck, whereupon the woman answering the telephone informed me he wasn't available but I could leave a message on his voice mail.

15) After being transferred to Mr. Schieck's voice mail, I left a message that I had information concerning juror conduct during Ms. Lobato's case, and that I would be sending him an affidavit.

BY: _____
Hans Sherrer

Subscribed and sworn to before me, this 9th day of November, 2006.

EXHIBIT 73

AFFIDAVIT OF HANS SHERRER

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, Hans Sherrer, first duly sworn, depose and say that the foregoing is true and correct to the best of my knowledge and belief:

1) On or about November 12, 2009, I became aware there are seven unique telephone numbers handwritten on items recovered from the pants pockets of Mr. Duran Bailey by the Las Vegas Metropolitan Police Department, and those items are included in the Evidence Impound Report dated July 9, 2001 in Event Number 010708-2410, which became the case of *The State of Nevada vs. Kirstin Blaise Lobato*.
2) On or about November 12, 2009, I became aware that three of the seven unique telephone numbers were handwritten on two separate items.
3) On or about November 12, 2009, I also became aware that one of the three unique telephone numbers handwritten on two separate items has the letter "D" beside it.
4) On or about November 13, 2009, I became aware that the telephone number with the letter "D" beside it is a law enforcement officer's telephone number.
5) I am aware that July 18, 2001, Mr. William Gazza, Investigative Staff Supervisor of the Clark County Coroner's Office, called one of the telephone numbers that was handwritten once, and a woman named Vivian answered the telephone and told Mr. Gazza that she knew Mr. Bailey for four years. I am aware this is documented in "Follow-Up Notes" by William Gazza, Clark County Coroner Case Number 01-04231.

BY: _____
Hans Sherrer

Subscribed and sworn to before me, this 8th day of March, 2010.

LACEY GILLMORE NOTARY PUBLIC COMMISSION EXPIRES DEC. 15, 2010 STATE OF WASHINGTON

_____
Notary Public

Lacey Gillmore
Printed name

Notary Public for Washington

My Commission expires: Dec. 15. 2010

EXHIBIT 74

NRS 629.031 "Provider of health care" defined. Except as otherwise provided by specific statute:

1. "Provider of health care" means a physician licensed pursuant to chapter 630, 630A or 633 of NRS, physician assistant, dentist, licensed nurse, dispensing optician, optometrist, practitioner of respiratory care, registered physical therapist, podiatric physician, licensed psychologist, licensed marriage and family therapist, licensed clinical professional counselor, chiropractor, athletic trainer, doctor of Oriental medicine in any form, medical laboratory director or technician, pharmacist or a licensed hospital as the employer of any such person.

2. For the purposes of NRS 629.051, 629.061 and 629.065, the term includes a facility that maintains the health care records of patients.

(Added to NRS by 1977, 1313; A 1983, 1492; 1987, 2123; 1991, 1126; 1993, 2217; 1995, 1792; 1997, 679; 2003, 904; 2005, 69; 2007, 3041, 3050)

NRS 629.041 Provider of health care to report persons having certain injuries. Every provider of health care to whom any person comes or is brought for treatment of an injury which appears to have been inflicted by means of a firearm or knife, not under accidental circumstances, shall promptly report the person's name, if known, his location and the character and extent of the injury to an appropriate law enforcement agency.

(Added to NRS by 1977, 239)

EXHIBIT 75

Twenty-nine Prosecution Opening Statement Falsehoods About Evidence That Petitioner's Counsel Knew Would Not Be Introduced During Trial, And That Petitioner's Counsel Should Have Objected To.
***State of Nevada v. Kirstin Blaise Lobato,* C177394, District Court Clark County, Nevada**

"The doctor will tell you that was sexually motivated."
(6 App. 988; Trans. IV-9 (9-14-06))
Truth: ME Simms was not noticed by the prosecution as a psychology expert, and he is not a psychologist, so he could not provide expert opinion testimony about the motivation of Bailey's murderer. (Simms did not testify that Bailey's murder was "sexually motivated")

"And you'll also hear that in the past he had actually provided drugs to individuals and he actually traded sex for drugs."
(6 App. 988; Trans. IV-9 (9-14-06))
Truth: No scheduled witness provided a statement detailing that Bailey "provided drugs to individuals," so there was testimony expected about that, which the prosecution clearly differentiated from trading "sex for drugs."

"Well, she ended up telling the police that what she believed was either the 11th or the 18th of July of 2001."
(6 App. 989; Trans. IV-10 (9-14-06))
Truth: Dixie Tienken did not state in her statement that "she believed she talked with Petitioner on the 11th or the 18th of July of 2001."

"man, which she describes to Dixie as an old, smelly, black man"
(6 App. 989; Trans. IV-10 (9-14-06))
Truth: Dixie Tienken did not state in her statement that Petitioner told her the man who attacked Petitioner was black.

"butterfly knife is, and that she whipped that out of her skirt"
(6 App. 989; Trans. IV-11 (9-14-06))
Truth: The Petitioner did not state in her Statement of July 20, 2001, and no scheduled witness provided a statement that Petitioner told them that "she whipped" her butterfly knife "out of her skirt."

"she reached down, grabbed the man's penis and cut it off."
(6 App. 989; Trans. IV-11 (9-14-06))
Truth: The Petitioner did not state in her Statement of July 20, 2001, and no scheduled witness provided a statement that Petitioner told them that "she reached down, grabbed the man's penis and cut it off." To the contrary, the Petitioner specifically states in her Statement that her attacker threw her to the ground and she was on her back with him above her.

"Dixie says that before she did this, the defendant says that before she cut this man's penis off is the man tried to put it in her mouth."
(6 App. 989; Trans. IV-12 (9-14-06))

Truth: Dixie Tienken did not state in her statement that the Petitioner told her the man tried to put it in her mouth. This is not in the Petitioner's statement or the statement of anyone the Petitioner told about the attack.

"She tells Dixie that when she cuts the man's penis off, Dixie's words that she said, "She got ick on her," meaning that she got blood on her."
(6 App. 989; Trans. IV-12 (9-14-06))
Truth: Dixie did not say, nor did she infer that the Petition got blood on her. She made it perfectly clear in her statement that she did not know what the Petitioner was referring to when she said "ick" and there was no expert in any field that was scheduled to testify that the Petitioner meant blood when she said "ick". Since the man smelled dirty, he could have been a street person whose hands and clothes were covered with grime that rubbed off on her dress and the parts of her body that he touched. That would be "ick."

"They tell her that they're from homicide and they tell her why they're there."
(6 App. 989; Trans. IV-12 (9-14-06))
Truth: The detectives do not tell the Petitioner that they are there to investigate a homicide that occurred on July 8, 2001 at the Nevada State Bank. There is no scheduled witness that provided any information that the detectives told the Petitioner what crime they were investigating, and in fact when the Petitoner stated that the incident that she was speaking to the detectives about happened on the other side of Las Vegas at a Budget Suites Hotel "over a month ago," the detectives did not ask any additional questions to clarify when the incident occurred.

"After they show her a picture of the man, she says she was trying to put him out of her mind."
(6 App. 989; Trans. IV-13 (9-14-06))
Truth: The Petitioner did not make this statement to the police, and there is no scheduled witness that provided this information. The Petitioner stated that "she had put him out of her mind".

"This looks just like the place or similar to the place that this happened.""
(6 App. 990; Trans. IV-14 (9-14-06))
Truth: The Petitioner did not make this statement to the police and there is no scheduled witness that provided this information. What the Petitioner told the detectives after her arrest was changed during the prosecution's opening from the word "reminds", to "looks like." The prosecution's false characterization has the effect of insinuating to the jury that the Petitioner had knowledge of the way the crime scene "looked," when there is no evidence to support that.

"And she describes, she describes it as the only difference is that she could see out, as she's looking up, and she says, "I could see the parking structure from inside.""\ (6 App. 990; Trans. IV-14 (9-14-06))
Truth: The Petitioner did not make this statement to the police and there is no scheduled witness that provided this information. The words "parking structure" do not appear in the Petitioners statement, or in the record of what she told the detectives after her arrest. And there is no "parking structure" at the Nevada State Bank where Bailey was murdered. A common feature of both locations, as at locations all over Las Vegas, but that isn't what the prosecution said it would prove, is they had carports for some parking spaces. This statement is again an

insinuation to the jury that the Petitioner described the crime scene where Duran Bailey was murdered and there was no scheduled witness that would provide any information that the Petitioner had ever been to the crime scene or knew what it looked like. There is no record of this in the arrest report written hours after the Petitioner is alleged to have said this.

"she threw away the knife,"
(6 App. 990; Trans. IV-14 (9-14-06))
Truth: The Petitioner did not say in her statement of July 20, 2001, that "she threw away the knife," and Steve Pyszkowski was a scheduled witness and he stated in his Statement that he saw her knife when she was living at his house in June 2001.

"told Dixie that she was concerned that somebody would have seen her red Fiero."
(6 App. 990; Trans. IV-15 (9-14-06))
Truth: Dixie did not state this in her statement. Laura Johnson who did not speak with the Petitioner, said this in her statement that Dixie said the Petitioner said this.

"Now Laura will tell you Dixie told her that the defendant told Dixie that she went back to Panaca because she needed to hide her car, needed to hide out, and there's a possibility her parents would even help her get it painted."
(6 App. 990; Trans. IV-15 (9-14-06))
Truth: Laura Johnson's statement on July 20, 2001 does not state that the defendant told Dixie this. Johnson's statements regarding the car were what she said Dixie told her.

"You're gonna hear testimony from the medical examiner about the extent of the injuries that Mr. Bailey received and to the degree of the injury that would be consistent with the use of that bat."
(6 App. 990; Trans. IV-15 (9-14-06))
Truth: There was no expected testimony from ME Lary Simms, based on his testimony at the preliminary hearing and at the first trial, that any of Bailey's injuries were "consistent with the use of that bat." – that is, the Petitioner's bat.

"she tells the police on the taped statement, that it happened on the 20th of July, that it happened a couple of weeks ago in Las Vegas."
(6 App. 990; Trans. IV-16 (9-14-06))
Truth: The Petitioner does not state in her statement of July 20, 2001 that "it happened on the 20th of July," or that "it happened a couple of weeks ago in Vegas." The petitioner specifically states that 'this was already over a month ago" that the attack had occurred, and she had talked with a woman who may have been attacked by the same man.

And she said, "There is one near but I didn't put him in it. I don't think I could have."
(6 App. 990; Trans. IV-16 (9-14-06))
Truth: The Petitioner does not state this in her statement of July 20, 2001, and no scheduled witness provides this information. Reference to a dumpster in her statement is brought up by the police detective, not the Petitioner.

"You're gonna hear from her friends that tell you that whenever they were together she would bring methamphetamine to the table."
(6 App. 990; Trans. IV-16 (9-14-06))
Truth: No scheduled witness says this in their statemen.

"And they'd also tell you that she would do anything she could do to get her hands on methamphetamine."
(6 App. 990; Trans. IV-16 (9-14-06))
Truth: No scheduled witness says this in their statement.

"Interestingly, in her statement, she tells the police,"I didn't tell anybody about this."
(6 App. 990; Trans. IV-16 (9-14-06))
Truth: The Petitioner did not state this in her statement of July 20, 2001 and ADA William Kephart not only knew this was false, but he was completely disingenuous, because the prosecution's trial strategy was to block the Petitioner's alibi witnesses who she told "about this," from testifying as to what she told them.

"her friends, Dixie, all seem to be consistent about her cutting a man's penis off."
(6 App. 990; Trans. IV-17 (9-14-06))
Truth: Dixie told the detectives in her statement that the man may not have been injured enough to require medical attention, and his biggest problem could be explaining what happened to his wife or girlfriend. The statements of the scheduled witnesses who talked with the Petitioner are consistent that Petitioner said she used her knife to defend herself against an attacker in Las Vegas, but they are not consistent about the injury.

and that shortly after she moved in with her new boyfriend, who you'll hear that she and he did methamphetamine quite often together
(6 App. 990; Trans. IV-17 (9-14-06))
Truth: The Petitioner did not state in her statement of July 20, 2001, nor did any scheduled witnesses provide information that the Petitioner did methamphetamine with her new boyfriend shortly after she moved in with him. The Petitioner did not move in with any new boyfriend until she left Panaca on July 9, 2001, and in his statement Doug Twining says they only smoked marijuana while Petitioner was in Las Vegas from July 9 to July 13.

"Keep in mind she's got a new boyfriend, she's doing methamphetamine, she's up in Panaca with her -- and she's fighting with her mom."
(6 App. 990; Trans. IV-17 (9-14-06))
Truth: The Petitioner does not state in her statement, and there is no scheduled witness who states in their statement that the Petitioner was doing methamphetamine when she was up in Panaca or at any time from when the Petitioner returned home from Las Vegas on July 2, 2001 until her arrest on July 20, 2001. Medical records of lab tests of her blood drawn on July 5 and her urine collected on July 7 were negative for methamphetamine.

Dixie will tell you that her family covers for each other.
(6 App. 991; Trans. IV-18 (9-14-06))
Truth: Dixie Tienken did not state this in her statement.

"she told Dixie she had gotten in her car bloody."
(6 App. 991; Trans. IV-19 (9-14-06))
Truth: Dixie Tienken did not say this in her statement.

"Well, I'm not telling you anything other than what you're gonna hear from the evidence, what you're gonna hear from the stand, what people are gonna tell you, what they saw, what they heard when they testify to you."
(6 App. 991; Trans. IV-21 (9-14-06))
Truth: This statement is patently false because the prosecution and defense know that no scheduled witnesses were going to provide the information supporting more than two dozen opening statement claims by the prosecution, and that in some cases the expected testimony was contrary to the prosecution's claims. Many of the prosecution's opening statement claims were contrived out of thin air.

tells Dixie that she was concerned about her vehicle being seen to the point where she wanted to leave it in Panaca, hide it, clean it up, possibly get it painted.
(6 App. 991; Trans. IV-21 (9-14-06))
Truth: Dixie never says this in her statement, and denies during her testimony that she ever said these words to Laura Johnson. These words belong to Laura Johnson, and are hearsay within hearsay. The Petitioner does not state this in her statement of July 20, 2001 and no scheduled witness provides this information other than Laura Johnson including any of the witnesses that the Petitioner spoke to about the incident in which she defended herself against an attempted rape. The Petitioner was not trying to "hide" her car as it was parked in front of her parents' home and could easily be seen by anyone driving by.

EXHIBIT 76

More Than 250 Improper Prosecution Closing And Rebuttal Arguments That Kirstin Blaise Lobato's Counsel Did Not Object To.
***State of Nevada v. Kirstin Blaise Lobato*, C177394, District Court Clark County, Nevada**

The improper arguments 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 Kirstin Blaise Lobato 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 Kirstin Blaise Lobato is guilty and the jurors should mark their ballots to convict her as he did. (When there is more than improper argument in a sentence, each error is underlined.) Because the Petitioner is referred to in the prosecution's closing and rebuttal arguments as "Blaise," for consistency that is how she is referred to throughout the document.

ADA Sandra DiGiacomo improper closing arguments (123 total)

"If you look at the phone records for Friday afternoon, it could also be that mom is home and she's looking for Blaise calling Doug, calling the police, calling her father at work. Looking not for Doug, looking for her daughter."
(9 App. 1723; Trans. XIX 119 (10-5-06))
States four facts not in evidence and one speculation. There was no testimony that Becky Lobato called Doug on Friday, 7/6/01, or that she called anyone looking for the Blaise.

"On July 7, 2007 the defendant's down in Las Vegas and mom doesn't know where she's at, so mom goes back to work on that Saturday".
(9 App. 1723; Trans. XIX 119-XIX 120 (10-5-06))
States two facts not in evidence. There was no testimony or evidence introduced that Blaise was in Las Vegas on July 7, 2001, or that her mom didn't know where she was on July 7.

"So the State submits to you, ""because of the fact that the defendant was down there partying since 7/6"", the night of 7/7, she says her attack occurred early morning hours, late evening – or late night hours, that it was sometime before sunup on July 8th that she killed Duran Bailey."
(9 App. 1723; Trans. XIX 121 (10-5-06))
States two facts not in evidence, and speculation. The prosecution did not introduce any evidence Blaise was in Las Vegas at any time on the July 6, 7, or 8, 2001. The state cannot submit anything during closing arguments or rebuttal.

"State submits to you, the reason there wasn't a lot in the urine sample is 'cause Blaise took off the day before, so she only completed part of the urine sample, when she was there the morning of the 6th or possibly in the afternoon of the 6th".
(9 App. 1723; Trans. XIX 120 (10-5-06))

States two facts not in evidence. There was no evidence introduced that Blaise "took off the day before" or that Blaise "only completed part of the urine sample". The state cannot submit anything during closing arguments or rebuttal.

"We know from the defense witness and Diane Parker that Duran Bailey had sold drugs before"
(9 App. 1723; Trans. XIX 121 (10-5-06))
States three facts not in evidence and was a false statement. No defense witness testified that Duran Bailey sold drugs. Diann Parker did not testify that Duran Bailey sold drugs.

"This murder was committed by the defendant."
(9 App. 1723; Trans. XIX 121 (10-5-06))
States facts not in evidence and usurps the jury's role as finders of fact. There was no evidence presented at trial to support this statement, and this statement usurps the jury's role as the finder of fact

"liked to do drugs and she wanted to do it over and over again. She never had to buy drugs,"
(9 App. 1724; Trans. XIX 122 (10-5-06))
Two misstatements of evidence and states facts not in evidence. She liked to do meth, not crack cocaine. There was no testimony presented the she "never had to buy drugs".

"But she even tells the detectives, in Las Vegas I know where to get drugs".
(9 App. 1724; Trans. XIX 122 (10-5-06))
States facts not in evidence and misstates the evidence. There was no testimony to where she bought methamphetamine. DiGiacomo misleadingly conflates Bailey's crack cocaine use and Blaise's methamphetamine use as the same under the umbrella of "drugs". There is no testimony that Blaise ever bought drugs from Duran Bailey. There is no evidence that Duran Bailey sold drugs.

"So she's down there and somehow she comes into contact with Duran Bailey. And somehow they end up back at his place, the trash dumpster where he would stay sometimes on the weekend".
(9 App. 1724; Trans. XIX 122 (10-5-06))
States four facts not in evidence. There was no testimony that Blaise ever came into contact with Duran Bailey. There is no evidence that he lived at that trash dumpster on the weekends or any other time.

"State submits to you that what happened was "somehow" the defendant hooked up with Duran Bailey for drugs,"
(9 App. 1724; Trans. XIX 122 (10-5-06))
States facts not in evidence. There was no testimony that Blaise ever came into contact with Duran Bailey. There is no evidence that Bailey ever sold any "drugs" and specifically methamphetamine. "Somehow" is impermissible because it is "pure speculation".

"She stops and "somehow" she goes back to her car and she gets a bat".
(9 App. 1724; Trans. XIX 123 (10-5-06))

States three facts not in evidence and speculation. There is no evidence or testimony presented that she stops. There is no evidence or testimony presented that she goes back to her car. There was no evidence or testimony presented that the baseball bat found in Blaise's car ever came into contact with Duran Bailey or anyone else. "Somehow" is impermissible because it is "pure speculation".

she went back to the car and she got a bat and she came back,
(9 App. 1724; Trans. XIX 123 (10-5-06))
Three speculations and States facts not in evidence. There was no evidence or testimony presented that she went back to the car. There was no evidence or testimony presented that she got a bat. There was no evidence or testimony presented that she came back. There was no evidence or testimony presented that the baseball bat found in Blaise's car ever came into contact with Duran Bailey or anyone else.

"We know that she can knock over a guy that's 6'6" from a punch in the mouth"
(9 App. 1724; Trans. XIX 123 (10-5-06))
Misstates the evidence. DiGiacomo said this and Blaise's counsel objected that it misstated testimony. The court sustained, but DiGiacomo said it again directly contrary to the court's ruling. Blaise's counsel did not object the second time she said it.

"He goes down. The skull fracture occurs when he falls. And Doc Simms told you that the head trauma itself, the blunt force trauma to the head is gonna render him unconscious"
(9 App. 1724; Trans. XIX 123-XIX124 (10-5-06))
Three misstatements of the evidence and speculation. ME Lary Simms testified that the head trauma occurred 2 hours prior to death, and the unconsciousness occurred due to the swelling.

"What did she do, stabs him a couple of times in the abdomen, makes sure he's dead"
(9 App. 1724; Trans. XIX 124 (10-5-06))
States three facts not in evidence and speculation. There is no witness statement, no corroborating eyewitness or medical evidence that whoever killed Bailey did this.

"was probably pulled by his right arm -- 'cause it's found like"
(9 App. 1724; Trans. XIX 125 (10-5-06))
States fact not in evidence. There is no testimony of this from anyone in the trial, or in any statement.

"She gets in her car and she high tails it out of there and she gets back to Panaca,"
(9 App. 1724; Trans. XIX 125 (10-5-06))
States fact not in evidence and speculation. There is no evidence or testimony presented of this from anyone in the trial, or in any statement.

"Defendant says that – to the police that I committed, I did this, but it was in a different area of town".
(9 App. 1724; Trans. XIX 125 (10-5-06))

Four Misstatements of the evidence. There is nothing in her statement or the police report that says she said she murdered Duran Bailey or committed this crime. There was no evidence or testimony presented that Blaise said this.

"If it did, why on July 18 are they - with Dixie are they checking the Internet then"?
(9 App. 1725; Trans. XIX 126 (10-5-06))
Two misstatements of the evidence. They didn't check the internet on July 18. That was the day Dixie talked to Laura Johnson, not the day Blaise was at Dixie's house.

"Why was she going to the Y to get a paper right after she talked to Laura if it wasn't recent? Why would she want that day's paper"?
(9 App. 1725; Trans. XIX 126 (10-5-06))
Two misstatements of the evidence. Dixie testified that she got the paper every day.

And think about too, Dixie made clear, as the one thing she definitely made clear when she was on the stand, when she talked to the defendant on July 18th
(9 App. 1725; Trans. XIX 127 (10-5-06))
Three misstatements of the evidence. Dixie did not testify that she talked to the Blaise on the 18th. The 18th is the day Dixie talked to Laura Johnson.

"She knew the area where this crime occurred",
(9 App. 1725; Trans. XIX 128 (10-5-06))
Misstates the evidence and speculation. There is no evidence or testimony presented regarding this. Steve Pzyskowski said his route included that zip code. He did not say that Blaise knew the area.

PG 001725 - XIX 128 Line 24
"She still has this anger 12 years later, 13 years later"
(9 App. 1725; Trans. XIX 128 (10-5-06))
States fact not in evidence and speculation. There was no expert psychological testimony presented that Blaise has anger against anyone.

"She has some deep seeded issues and anger, not only from this",
(9 App. 1725; Trans. XIX 129 (10-5-06))
States three facts not in evidence and speculation. There was no expert psychological testimony presented that Blaise has anger against anyone, or has deep seeded (seated) issues.

"It's very clear the defendant's someone who committed this murder".
(9 App. 1725; Trans. XIX 129 (10-5-06))
Speculation and states facts not in evidence. How is this clear? There was no evidence or testimony presented at trial that Blaise was even in Clark County, much less Las Vegas at any time on July 8, 2001.

"No proof of any prior attack".
(9 App. 1725; Trans. XIX 129 (10-5-06))

Improper argument and the State was trying to benefit from their objection to admittance of the evidence of a "prior attack". There was no evidence presented at trial because the State objected to Blaise's alibi witnesses who have evidence of the "prior attack" and Det. Thowsen perjured himself that he conducted an investigation at the Budget Suites on Boulder Highway, and of NRS 629.041 reports, hospital personnel and urologists for persons with a slashed or severed penis. The state wanted to have their cake and eat it too.

"She knew she killed her victim".
(9 App. 1725; Trans. XIX 129 (10-5-06))
States two facts not in evidence and speculation. This was not in Blaise's statement or the testimony of anyone she talked with.

"She's gonna have to minimize when she wants to get this off her chest"
(9 App. 1725; Trans. XIX 129 (10-5-06))
States two facts not in evidence and speculation. There is no expert testimony from any specially trained psychology expert that says Blaise minimized anything about the incident described in her statement, or that she wanted "to get this off her chest".

"So what is she gonna do to do that? She's gonna minimize. She's gonna make the listener have some sympathy for her".
(9 App. 1725; Trans. XIX 129 (10-5-06))
States three facts not in evidence and speculation. There is no testimony from any specially trained psychology expert that says Blaise minimized anything about the incident described in her statement. This testimony came from Det. Thowsen who is not qualified as an expert.

"In order for Blaise to talk about this and start to get it off her chest, like she did with even Michele Austria, she's gotta minimize her own actions".
(9 App. 1726; Trans. XIX 130 (10-5-06))
States three facts not in evidence. There is no expert testimony from any specially trained psychology expert that says Blaise minimized anything about the incident described in her statement. This testimony came from Det. Thowsen who is not qualified as an expert.

"And Detective Thowsen told you that's very common even when giving confessions".
(9 App. 1726; Trans. XIX 130 (10-5-06))
States facts not in evidence, Irrelevant. There is no expert testimony from any specially trained psychology expert that Blaise's statement WAS NOT a description of an attempted sexual assault "over a month ago" at the Budget Suites on Boulder Highway. Blaise did not give a confession.

"And she's leaving her car behind because she doesn't want it to be seen".
(9 App. 1726; Trans. XIX 131 (10-5-06))
States facts not in evidence and speculation. Trial testimony was Blaise's car was parked on the street in front of her parents' house in plain view continuously from July 2, 2001 until seized by the LVMPD on July 20, 2001.

"she's going to Doug's for the weekend",
(9 App. 1726; Trans. XIX 131 (10-5-06))
States facts not in evidence and speculation. There was no evidence or testimony to this at trial.

"Now on July 14th and 15th, that's probably when the defendant went four-wheeling with Michele and got the injuries to her abdomen".
(9 App. 1726; Trans. XIX 131 (10-5-06))
Misstates the evidence and speculation. There was no evidence or testimony to this at trial.

"So her conversation with Michele, even though she says it was before July 4th, it had to have been after the 13th".
(9 App. 1726; Trans. XIX 132 (10-5-06))
This misstates the evidence and speculation. Disparaging honesty of witness. Michele Austria testified that her conversation with Blaise took place prior to July 4th. The state cannot change the testimony of a witness.

"Now Dixie, keep in mind she wasn't a prosecution witness"
(9 App. 1726; Trans. XIX 133 (10-5-06))
Misstates the truth. Dixie was subpoenaed by the prosecution and testified as a prosecution witness.

"She goes to Dixie and she tells her that it was on a hotel street just west of I-15.
(9 App. 1726; Trans. XIX 133 (10-5-06))
Misstates the evidence. Dixie said Blaise told her a hotel street, but not east or west. I-15 is not mentioned at all.

"… defendant said, <u>smelled like old socks</u> that <u>hadn't been washed in two weeks</u>".
(9 App. 1726; Trans. XIX 133 (10-5-06))
Two misstatements of the evidence. These words are not in Blaise's statement or the police report. Those are Detective Thowsen's words used in his testimony. (PG XIII-75 line 20-21)

"But there are a few points that Dixie was trying to minimize".
(9 App. 1727; Trans. XIX 134 (10-5-06))
States facts not in evidence. There was no expert testimony that Dixie was minimizing.

"July 21", this is when Becky starts creating this alibi".
(9 App. 1727; Trans. XIX 136 (10-5-06))
States facts not in evidence and disparages honesty of witness. There is no testimony that Becky created an alibi. This directly disparaged Becky's honesty without any evidence presented that it was true.

"Keep in mind that the only people that really see Blaise between July 5th and July 8th are related to her".
(9 App. 1727; Trans. XIX 137 (10-5-06))
Misstates the evidence. Michele Austria testified that she saw Blaise on July 7th and Chris Carrington testified he saw Blaise on July 6th and 7th.

"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))
Improper argument. Denigrates the credibility of witnesses. The state could have subpoenaed them, but the state has never interviewed them. Ashley Lobato, Larry Lobato and John Kraft were not called to testify at the first trial. John Kraft was not interviewed prior to the first trial. A witness has no control over whether they are interviewed or called as a witness. The State was suggesting they were not truthful in their testimony during Blaise's second trial because they were not called as witnesses in her first trial.

"That car was moved".
(9 App. 1727; Trans. XIX 137 (10-5-06))
States facts not in evidence and contrary to evidence. All testimony presented at trial was that no one saw it moved.

"Now these are the two things that the State has to prove. We have to prove every material element of the offense as charged and what crime was committed, and we also have to tell you who committed it".
(9 App. 1727; Trans. XIX 137 (10-5-06))
Two misstatements of the law. The States burden of proof is that they must PROVE every material element "beyond a reasonable doubt" and PROVE who committed the crime, not tell the jury who committed the crime. It is up to the jury to determine if the defendant committed the crime, not for the prosecution to tell them. The state has to prove every material element beyond a reasonable doubt and one of those elements is that the defendant committed the crime.

"somebody fleeing the scene. That can be viewed, if you interpret it that was, as consciousness of guilt. Somebody who has just been attacked and reacting in self defense doesn't normally flee the scene".
(9 App. 1728; Trans. XIX 138 (10-5-06))
States facts not in evidence and improper opinion argument. There was no expert testimony about the actions of a person who has been sexually assaulted and is able to get away from their attacker.

"She told the detectives that she drove off because she didn't think anyone would care. It wasn't because she was afraid of her attacker, it was because she didn't think anyone would care."
(9 App. 1728; Trans. XIX 139 (10-5-06))
Misstates the evidence and improper opinion argument. In answering the question from the Detective: Did you use anything to cover him, Blaise said "No, 'cause I figured nobody would know, you know nobody was around, nobody cared so I figured nobody would care if I just drove off. I didn't think anybody would miss somebody like that. There was no expert psychology testimony that Blaise's motive or reason for leaving wasn't because she was afraid.

"She knew that there was no fear about her attacker seeing her because she knew that he was dead".

(9 App. 1728; Trans. XIX 139 (10-5-06))
Misstates the evidence and States facts not in evidence. She said he was alive and crying when she left the scene.

"She ditched the car, she got rid of the evidence, she got rid of the clothes she was wearing that she said had blood on them, she got rid of the knife that she used."
(9 App. 1728; Trans. XIX 139 (10-5-06))
Three misstatements of the evidence and two statements of facts not in evidence. Blaise didn't "ditch the car," she drove it to her ex-boyfriend Jeremy Davis' house and left it there for a few days before picking it up. Blaise does not say in her Statement that she ditched her clothes, that she had blood on her clothes, or that "she got rid of the knife." Steve Pyszkowski testified he saw her with her butterfly knife when she stayed at his house in June 2001. (PG 1086 VI – 17 Line 17-24 and PG 1087 VI – 18 Line 1-17)

"Why leaving a note for Jeremy that says that "I've gotta leave"
(9 App. 1728; Trans. XIX 139 (10-5-06))
Misstates the evidence. Jeremy Davis testified there was a note saying that she had to leave here car here and that she'd be back to get it. (Pg 1122 VI – 154 Line 11-12)

"That injury right there to the carotid artery, that was calculated".
(9 App. 1728; Trans. XIX 140 (10-5-06))
States facts not in evidence. Simms testified that it was a directed violent injury. There is no testimony that Blaise had any medical knowledge or training to make a "directed" wound to any person's carotid artery.

defines first degree murder, second degree murder etc… But says that the State only has to prove 3 things beyond a reasonable doubt,
(9 App. 1728; Trans. XIX 140 (10-5-06))
Misstates the law. Misstates the essential elements that the State has to prove, including that the State must prove the defendant did it beyond a reasonable doubt.

"She wounded him with the stab to the scrotum when she knocked him vulnerable".
(9 App. 1728; Trans. XIX 141 (10-5-06))
States facts not in evidence and contradictory theory of the crime. This conflicts with the prosecution's theory that the wound to the scrotum was the first wound, and there was no testimony that Bailey was "knocked vulnerable".

"It doesn't matter what the motive was or if it was sexually motivated, it doesn't. If you penetrate a sexual organ after the person's dead, however slight, you're guilty of the crime."
(9 App. 1729; Trans. XIX 143 (10-5-06))
Misstates the law. A defendant's intent to sexually penetrate a dead person's rectum is an element of the crime, but the motive is irrelevant. Legislative intent is the law was to criminalize anything that would be considered a sexual assault on a live body to also be against the law when perpetrated on a dead body. Slashing the rectum of an individual would never been considered a sexual assault.

"No, all it means is there was no evidence found at the scene that she left behind that's physically tied to her. Her DNA is not at the scene".
(9 App. 1729; Trans. XIX 143 (10-5-06))
Misstates the evidence. The only expert testimony at trial by Brent Turvey is it is principal of forensic science that all contact leaves evidence so it is not possible for Bailey's killer to leave no trace of evidence at the scene.

"It's very possible there were other people in and out of that dumpster and that they could've stepped in the blood that was wet in the back and left it".
(9 App. 1729; Trans. XIX 145 (10-5-06))
Three misstatements of the evidence. All of the pools of blood were covered. A person entering the trash enclosure after Bailey was murdered would have had to remove all the trash covering the blood, step in the blood, and then replace the trash. But there was no evidence at trial to prove or even suggest that happened. The only testimony was Richard Shott was in the trash enclosure before the police arrived.

"She told us she did",
(9 App. 1730; Trans. XIX 146 (10-5-06))
States facts not in evidence. She did not 'tell us she did it". Nowhere in Blaise's statement does she confess to the murder of Bailey or his post-mortem mutilation.

"it would just confirm yes, she was there".
(9 App. 1730; Trans. XIX 146 (10-5-06))
States facts not in evidence. There was no evidence introduced at trial Blaise was at the crime scene, so that was nothing to 'confirm".

PG 001730 - XIX 146 line 2-3
"It does not exclude her".
Misstates the evidence. All of the physical evidence tested in the case excludes Blaise as involved in Bailey's murder. Her fingerprints and DNA were not found at the crime scene and none of Bailey's DNA was found in her car or on any personal items of hers.

"It would've been nice to have her DNA there, but we don't need it because we know she was there because she told us she was there".
(9 App. 1730; Trans. XIX 146 (10-5-06))
Two statements of facts not in evidence. There was no evidence introduce at trial that Blaise "told us she was there". There was no evidence introduced at trial proving "she was there".

"It's impossible to snip the carotid artery without taking out half the neck".
(9 App. 1730; Trans. XIX 146 (10-5-06))
Misstates the evidence. Dr. Michael Laufer's expert medical testimony is that if the scissors were inserted partially open, it is possible (Pg 1441 XIV 98 line 9-12 and Pg 1441 XIV 99 line 6-22).

"You do have physical evidence that links the defendant to that crime scene. You have it with her car. The positive luminol test and the positive phenolphthalein test tell you there was blood

in that car. And it wasn't a false positive because you heard Dan Ford and you heard Louise Renhard testify that it causes a flashing, kind of like a sparkle when you get a false positive, not like what you got on this car door".
(9 App. 1730; Trans. XIX 147 (10-5-06))
Four statements of facts not in evidence and misstates the evidence. The confirmatory DNA tests scientifically prove that the luminol and phenolphthalein tests did not return positive results for blood, bur for one or more of the many natural and man-made substances that can cause a positive reaction. Presumptive tests can only suggest there might be blood present. Confirmatory tests are what prove that it is blood.

"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))
Two statements of facts not in evidence. The testimony was the confirmatory tests were all negative for blood, so there was no blood, and the non-existent blood did not constitute "physical evidence."

"She knew the street location, she knew the area where the crime was committed when she told Dixie".
(9 App. 1730; Trans. XIX 148 (10-5-06))
Misstates the evidence and States facts not evidence. Dixie testified Blaise described it as near as street with a hotel name. There was no testimony by Dixie that Blaise "knew the area where the crime was committed".

"She knew what major injury that this victim had"
(9 App. 1730; Trans. XIX 149 (10-5-06))
States facts not in evidence. Bailey's major injury and cause of death was associated with his head fracture. Bailey's other major injury contributing to his cause of death was his severed carotid artery. He also had an injury to his liver, and other injuries to his face and abdomen and his hands. Blaise never mentions any of these injuries in her statement or to any other person or to the police when describing the sexual assault she fought off.

"She knew that somebody had tried to move that body"
(9 App. 1730; Trans. XIX 149 (10-5-06))
States facts not in evidence. Blaise said her attacker was alive and "crying" when she left. Since he was alive there was no body for her to "move".

"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))
States two facts not in evidence. Blaise never said she knew what the dumpster enclosure looked like and she didn't say "it was just like this." She didn't describe the wire mesh "ceiling" directly above one's head, she didn't describe the block walls, she didn't describe the concrete curb around the base of the enclosure, she didn't describe the steel doors and she didn't describe the dumpster you have to go around to get into the back of the trash enclosure.

"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.
(9 App. 1731; Trans. XIX 150 (10-5-06))
Six statements of facts not in evidence. Misstates the facts in evidence. There is nothing in evidence that says that Blaise described any of these items. Additionally, the "how it looked" part misstates the evidence in the officer's report. The detective didn't say she said "looked like" - in the officer's report by LaRochelle it reads "While at CCDC, Lobato told Detective Thowsen and I that the incident occurred in a enclosed area similar to the jail cell, but smaller". Later added to the report were the words 'did not have covering" that excludes the Nevada State Bank's trash enclosure, because of it's most distinctive feature is the wire mesh "covering" directly above one's head when standing in it.

ADA William Kephart's improper closing arguments (130 total)

"They spent $12,000 on an expert to come in here and tell us what we already knew".
(9 App. 1740; Trans. XIX 186 (10-5-06))
Misstates the facts and improper argument. Brent Turvey testified that he was paid less than $7,500. Improper to disparage a witness for the defense. They are in effect telling the jury that the defense spent money on a witness for no good reason. That he was a hired gun for the defense.

"But we have her words, ladies and gentlemen, her words…. We're here because of her mouth, because of what she said. There's no one else, you heard no one else has said anything about cutting a man's penis off in the same vicinity and same time when—from her—other than her".
(9 App. 1740; Trans. XIX 186 (10-5-06))
Two statements of facts not in evidence and contrary to the evidence presented at trial. Blaise's statement specifically identifies she was assaulted at the Budget Suites on Boulder Highway – which is eight miles east of the Nevada State Bank, and she identifies it happened over a month prior to her July 20, 2001 statement.

"And didn't talk about Dixie at all, except for the fact, the one time when Dixie came in here and changed her story about what was said about how big this man was. It was never said before, never heard before until she comes in here after the defense had provided her with an autopsy report, and they had the audacity to ask her whether or not the State has rehearsed the statements with her".
(9 App. 1740; Trans. XIX 186 (10-5-06))
Misstates the evidence. Dixie testified she told the police detectives that interviewed her about the size of the person who attacked Blaise, but they did not tape that part of her statement.

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

in the same type of argument and throwing it against us and saying, you know what, possibility is not reasonable doubt -- or is reasonable doubt".
(9 App. 1740; Trans. XIX 187 (10-5-06))
States facts not in evidence and improper to make statements to the jury to elicit their sympathy. None of Blaise's hair was found at the crime scene.

"Well, ladies and gentlemen, you have to completely throw out all of the statements that the defendant made, let alone her own statement and what she told other people".
(9 App. 1740; Trans. XIX 187 (10-5-06))
Misstates the evidence and improper argument. Blaise's statement describes an assault that took place at a different location, weeks before Bailey's murder and involved a dramatically different event. Here statements to other people were consistent with her police statement on July 20, 2001.

"our experts were right out there, looked at it, took samples of the footprints, and says it was not blood"
(9 App. 1740; Trans. XIX 188 (10-5-06))
Misstates the evidence. Louise Renhard testified portions of the blood was still damp.

"…even though we had two tests, presumptive tests that said it's blood".
(9 App. 1740; Trans. XIX 188 (10-5-06))
Misstates the evidence. Testimony at trial was that presumptive tests can only identify there is a possibility a substance might be blood. The confirmatory DNA tests proved there was no blood in her car.

"You know why they found that man to say that, is because they want you to believe that a person used scissors to kill him and not a knife".
(9 App. 1740; Trans. XIX 188 (10-5-06))
Improper argument, attacks the honesty and credibility of a defense witness and misstates the evidence. Kephart not only disparaged the honesty and credibility of a defense witness but also the honesty of Blaise's counsel. Michael Laufer testified he didn't determine scissors until he examined the photos of Bailey's wounds. There was no testimony that Blaise's counsel requested Laufer do anything improper.

"-- told -- testified before that one times that she remembered seeing the defendant and testified about the day on the 8th, in the afternoon on the 8th, she went to work that day. She never said anything about seeing her before she went to work, getting up and seeing her laying on the floor or laying on the futon or whatever. She went to work, saw her in the afternoon".
(9 App. 1741; Trans. XIX 190 (10-5-06))
Improper argument, disparages a defense witness and states facts not in evidence. A witness only answers what they are asked and there was no testimony that Becky Lobato was previously asked if she saw Blaise on the morning of July 8th.

"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))
Improper argument, disparages a defense witness and misstates the evidence. Mr. Lobato was subpoenaed during the first trial but not called as a witness. It is improper to attack the credibility of a witness during closing arguments. Regarding John Kraft, they are impinging the integrity of the witness for not being previously interviewed and subpoenaed. Also it is improper to attack the credibility of a witness during closing arguments.

"We're talking about a methamphetamine addict that has problems with methamphetamine",
(9 App. 1741; Trans. XIX 191 (10-5-06))
States facts not in evidence. There was no testimony that Blaise was a methamphetamine addict.

"says she's out of control",
(9 App. 1741; Trans. XIX 191 (10-5-06))
Misstates the evidence. Blaise does not state that in her statement and no expert testimony at trial provides this information.

"She left, came back to Las Vegas, according to her statement, and spent three days on a binge".
(9 App. 1741; Trans. XIX 191 (10-5-06))
Three statements of facts not in evidence. Blaise did not say in her statement that she left Las Vegas, then came back to Las Vegas, and then spent three days on a binge.

"mom's calling work, mom's calling Doug, mom's calling the sheriff's department, for what she says in a previous statement -- previous testimony, looking for a truck".
(9 App. 1741; Trans. XIX 191 (10-5-06))
Misstates the evidence. Sheriff's Department reported there was no record of a call by the Lobatos'. (See exhibit OO, James Aleman Affidavit.)

"Who's talking about the dates of the 2nd? Who's rehearsing what"?
(9 App. 1742; Trans. XIX 194 (10-5-06))
Two statements of facts not in evidence and improper argument attacking the credibility of every defense witness who testified about seeing Blaise on July 2nd. There is no testimony regarding anyone rehearsing the date of "the 2nd"or any other testimony. Improper to attack the credibility of a witness during closing arguments.

"She went back to Las Vegas, ladies and gentlemen, and did exactly what she told the police, a three day binge. You have the 6th, 7th and 8th. And on the 8th day she killed Duran Bailey".
(9 App. 1742; Trans. XIX 194 (10-5-06))
Four statements of facts not in evidence. Blaise states in her statement that she was on a 14 day binge, and was up for 3 days preceding the attack, and there was no evidence Blaise was in Las Vegas on the 6th, 7th or 8th or tht she killed Duran Bailey.

"And he wants -- he knows she's going down to Las Vegas to do methamphetamine. He knows what the lifestyle is himself. She's going to Las Vegas to do that".

(9 App. 1742; Trans. XIX 195 (10-5-06))
Two statements of facts not in evidence. There is no testimony from Larry Lobato that he knows Blaise is going down to Las Vegas to do methamphetamine. In fact Doug Twining's testimony was he and Blaise did not do any meth from July 9 to 13. Larry Lobato testified that methamphetamine was available in Panaca from when his family moved there in the 1990s to the time of his testimony in October 2006.

"She's going to Las Vegas to do that".
(9 App. 1742; Trans. XIX 195 (10-5-06))
States facts not in evidence. There is no testimony from anyone that Blaise was going to Las Vegas to do methamphetamine. In fact Doug Twining's testimony was he and Blaise did not do any meth from July 9 to 13.

"She said I got the knife Christmas from my dad. This knife that she no longer has, that she just happened to get rid of this present from my dad."
(9 App. 1742; Trans. XIX 195 (10-5-06))
Misstates the evidence. Steve Pyszkowski testified he saw the knife in June 2001

"Ladies and gentlemen, she went there",
(9 App. 1742; Trans. XIX 196 (10-5-06))
States facts not in evidence. There is no testimony from anyone at trial that Blaise "went there".

"she knew where her connects were, she knew where to get dope. And I'm not even telling you that Duran Bailey was selling her dope. But he knew that he -- he was known to sell dope in the past"
(9 App. 1742; Trans. XIX 196 (10-5-06))
Misstates the evidence and states facts not in evidence. There is no testimony from anyone that Blaise did "dope". There is no testimony that Bailey was known to sell "dope". There is no testimony that Bailey was a methamphetamine connection for Blaise. There is no testimony that Bailey ever sold methamphetamine. The prosecution is misleading the jury by lumping in all kinds of drugs into one kind called 'dope".

"and she is on her three day binge and she's out looking"
(9 App. 1742; Trans. XIX 196 (10-5-06))
Misstates the evidence and speculation. There is no testimony that the Blaise was on a 3-day binge during the time frame that Bailey was murdered and it is speculation that "she's out looking." Blaise states in her statement to the police that for 7 days before and 7 days after her attack she was on methamphetamine, and she had been up for the three days preceding the attack.

"She finds him, believability that she had met him before."
(9 App. 1742; Trans. XIX 196 (10-5-06))
Two statements of facts not in evidence There is no testimony that Blaise "finds Bailey" or that she 'had met him before".